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ON THE

LAW OF TRIALS

IN ACTIONS

CIVIL AND CRIMINAL

By SEYMOUR D. THOMPSON, LL. D.

IN TWO VOLUMES

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THE LAW OF TRIALS.

VOLUME II.

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CHAPTER LI.

DESCRIPTION: QUALITY: CHARACTERIZATION.

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§ **1507. Questions of Fact.** — Matters of description, character or quality are closely allied to matters of *identity*. They are always questions of fact for a jury. Instances of these will be given in the present chapter; several others will be given in the chapter relating to crimes.[1]

§ **1508. Eminent Domain: Whether a Use is a Public Use.** — Under American constitutions, which provide that private property shall not be taken for public use without just compensation, where the question relates to the validity of a statute authorizing

[1] *Post*, §2157, 2159. *et seq.*

the condemnation of private property for a particular purpose, the question whether the use prescribed in the statute is a public use, is, as between the judicial and legislative branches of the government, a *judicial question*.[1] But, so far as the writer is aware, this question has never been held a question of fact for the jury; since, so to hold would present the anomaly of allowing juries to overrule acts of the legislature. Under the present constitution of Missouri,[2] the question whether the use for which private property is sought to be condemned is a public use, so as to authorize its condemnation, is a *question for the court*, any legislative declaration to the contrary notwithstanding.[3] Prior to this constitutional provision, it was held that the legislative declaration that the use was a public use, was conclusive;[4] and it is said that, if the legislature has declared the use or purpose to be a public one, its judgment will be respected by the courts, unless the use be palpably private.[5] The court will decide this question, under the Missouri constitution, without the aid of a jury.[6]

§ 1509. Eminent Domain: Whether an Appropriation by the State was for Permanent or Temporary Use. — In Pennsylvania the right of the State to take and appropriate lands required in the construction and operation of such public improvements as canals, is well settled; but there is a recognized distinction between appropriations which are required for permanent use and occupation, and those needed for temporary purposes only. As to the latter, the title of the owner is not divested, for his enjoyment is only temporarily interrupted; as to the former, the title acquired by the commonwealth is an absolute estate in perpetuity.[7] Where it becomes a question, in an

[1] Concord Railroad *v.* Greely, 17 N. H. 47.

[2] Const. Mo., art. II., § 20.

[3] Savannah *v.* Hancock, 91 Mo. 54.

[4] County Court *v.* Griswold, 58 Mo. 175; Dickey *v.* Tennison, 27 Mo. 373.

[5] Dill. Mun. Corp. (3rd ed.), § 600; Mills Em. Dom., § 10.

[6] Savannah *v.* Hancock, *supra*.

[7] Pennsylvania &c. R. Co. *v.* Billings. 94 Pa. St. 40, 44; Com. *v.* McAllister. 2 Watts (Pa.) 190; Haldeman *v.* Railroad Co., 50 Pa. St. 425; Craig *v.* Mayor of Allegheny, 53 Pa. St. 477; Robinson *v.* West Pa. R. Co., 72 Pa. St. 316.

action of *ejectment*, whether the commonwealth acquired title to property which is appropriated, for temporary purposes or for permanent use and occupancy, it is a question of fact exclusively *for the jury*.[1]

§ 1510. **Utility of a Public Highway.** — In what are called "highway cases," that is, proceedings to open a highway, the question whether the proposed highway is of public utility is a question of fact for the jury.[2]

§ 1511. **Whether a Place is a "Public Place," within the Meaning of a Statute.** — It has been held, under a statute providing for posting notices of sale for taxation of the lands of non-residents, which requires such notices to be posted in some "public place" in the town, that the question whether a particular place is to be considered a public place, within the meaning of such a statute, is a question *partly of fact and partly of law*. The nature and situation of the places and the cases to which they are applied are matters of fact, to be settled by a jury. But when these are settled, whether the place is to be considered a public place within the intent of the statute is purely a question of law:[3] and the like doctrine was applied in the case of a statute providing for the posting of notices of the sale of an equity of redemption in land, which required such notices to be posted up at "two of the most public places in the town in which the property is situated."[4]

§ 1512. **Whether a Person Undertaking to Transport Goods is a Common or Private Carrier.** — What constitutes a common carrier is said to be a question of law. Whether a party comes within that definition, is a *question of fact* for a jury.[5] It has been held proper, in a doubtful case, to leave it to the jury to decide, under proper definitions, what constitutes in law a

[1] Pennsylvania &c. R. Co. *v.* Billings, 94 Pa. St. 40.

[2] Kyle *v.* Miller, 108 Ind. 90.

[3] Tidd *v.* Smith, 3 N. H. 178.

[4] Russell *v.* Dyer, 40 N. H. 173, 187.

[5] Pennewill *v.* Cullen, 5 Harr. (Del.) 238, 241. Compare McHenry *v.* Railroad Co., 4 Harr. (Del.) 448.

common carrier, and what constitutes one who undertakes to carry goods for hire, a private carrier merely, — whether a defendant, sued for a loss of goods, was a common or a private carrier.[1]

§ 1513. Whether a Stream Navigable for Logs. — Whether a stream is navigable for logs has been held a *question for a jury*.[2]

§ 1514. The uses to which Demised Premises are put. — Where premises were demised upon a condition that no intoxicating liquors should be sold thereon, an unauthorized sale by a third person upon the premises, where the lessee is chargeable with no fault or negligence, will not work a forfeiture of the term, and the question of the lessee's *knowledge* of such sales, and of his *negligence or diligence* in relation thereto, is wholly one of *fact for the jury*.[3]

§ 1515. Whether a Particular Place of Business is a Bank. — Whether a place of business in a city called the Bank of the Metropolis, and having that name over the door, the same being a place where notes are discounted and accounts are kept with depositors, is a bank, is what is frequently termed a mixed question of law and fact. What is a bank is said to be a question of law, but the sufficiency of the evidence to prove that the particular place is a bank, is *for the jury*. It is therefore held error for the court to instruct them that it was a bank, for this included a decision upon the truth of the evidence.[4]

1516. Whether a Wharf in a City is a Public Wharf. — Whether a wharf in the city of Baltimore was a public wharf or not, has been held a *question of fact*, which the court cannot assume as established, although the testimony, if credited, might seem clearly to establish it.[5] It has been held in Connecticut, after an extended discussion of the subject, that the mere fact

[1] Haynie *v.* Baylor, 18 Tex. 498, 507.

[2] Haines *v.* Welch, 14 Ore. 319.

[3] Collins Man. Co. *v.* Marcy, 25 Conn. 242.

[4] Way *v.* Butterworth, 106 Mass. 75.

[5] Brown *v.* Ellicott, 2 Md. 75, 81.

that the owner of a landing in a highway has erected a wharf thereon, at a point of contact between the highway and navigable water, does not, *ipso facto*, make the wharf a public wharf, so as to exclude his proprietary interest: but that, "although a public landing at the *locus in quo* may have existed *prima facie*, at the time the plaintiff's ancestor erected the wharf, still, whether it was needed for the purpose, so that the wharf could not become the property of the plaintiff, would depend upon circumstances, and is a *question of fact* to be determined by the jury." More generally stated, the ruling was that, where a highway is laid out to navigable water and there terminates, the terminus may presumably be regarded as a public landing incidental to the highway. But where a highway, running from place to place, is laid along the shore of a navigable stream, and in immediate contact with it for a considerable distance, the reason for the presumption does not exist. The question in such a case depends on the circumstances, and is one of fact for the jury.[1]

§ 1517. **Whether "Flashboards" are part of a Mill-dam.** — In an action against the owner of a mill-dam for the flowage of the plaintiff's meadow, it has been held a *question for the jury*, whether "*flashboards*" upon the defendant's dam were or were not a part of the dam, or an *appurtenance* to it; and that the court ought to instruct the jury that, if they should find them to be a part of the dam, then the defendants could not be sued for maintaining them, in the condition in which they were when purchased, without previous notice that they had no right to use them. But if they found them to be no part of the dam, and only placed upon it for occasional use, as the state of the water might make them convenient or necessary, then the raising of the water by means of them to a greater height than the defendants had a lawful right to raise it, to the injury of the plaintiff, would render the defendants liable without any such notice, although they originally purchased the dam with flashboards upon it.[2]

[1] Burrows v. Gallup, 32 Conn. 493, 501.

[2] Noyes v. Stillman, 24 Conn. 15, 27.

§ **1518. What is an "Appurtenance" to a Steamboat.** — So, under a former statute of Missouri, known as the "Boat and Vessel Act," the question, what was and what was not an appurtenance of a steamboat, was regarded as a *question of fact*, to be established by evidence, and a fit subject of inquiry by a jury; since the statute nowhere defined what was meant by the term. It must therefore be referred to the intention of the defendant (the owner) and the general understanding of the community who are conversant with the business of steamboating.[1]

§ **1519. Whether a Dwelling House is "near" a Particular Place.** — A statute of New York[2] provides that "if any passenger shall refuse to pay his fare, it shall be lawful for the conductor * * * to put him and his baggage out of the cars, using no unnecessary force, at any usual stopping place, or near any dwelling house, as the conductor shall elect on stopping the train." In an action for damages for putting off a passenger in violation of this statute, the plaintiff testified that there was no house or crossing near the place where he was put off, and the conductor testified that there was a farm house 25 rods from the crossing and 30 rods from the train, which testimony was corroborated by other testimony. The court submitted the question to the jury upon proper instructions, whether there was a dwelling house near the place where the plaintiff was put off, within the meaning of the statute. This ruling was affirmed in General Term, — the court saying: "We can hardly say, as matter of law, that a dwelling house twenty-five or thirty rods distant, upon another highway, is, within the contemplation of the statute, a near dwelling house in a dark night, its vicinity being unknown to the passenger."[3]

§ **1520. What Fixtures are Removable.** — The question as to whether a given article is removable by a tenant, as a fixture, has been held a *question for the jury*, under proper instructions.[4]

[1] Amis *v.* Steamboat Louisa, 9 Mo. 629, 632.

[2] New York Laws 1850, chap. 140, § 35.

[3] Loomis *v.* Jewett, 35 Hun (N. Y.), 313.

[4] Ambs *v.* Hill, 13 Mo. App. 585.

The question whether the removal can be made so as to leave the freehold in as good a condition as before, is also a question for the jury.[1]

§ 1521. **Whether Particular Property is Partnership or Individual Property.** — The question whether, under proceedings in insolvency instituted by a surviving partner, money found upon the person of a deceased partner and mingled with other money which is admitted to be his own, is partnership property or private property, is a *question of fact*, which, if a dispute arises in reference to it, must be submitted to the jury.[2]

§ 1522. **Extent of Water Privilege set off in Partition.** — The report of commissioners in a proceeding for a partition contained the following clause, descriptive of a portion of the estate set off to one of the parties: "Also a water privilege now occupied by the saw-mill called Franklin." In an action by the proprietor of another mill, against the proprietor of the mill called Franklin, to recover damages for diversion of a portion of the water from the plaintiff's mill and obstructing his race, it was held that the extent of the water privilege granted by the words quoted was a question of fact for the jury.[3]

§ 1523. **Continuance in Business.** — Where a servant agrees to work for a master at an advanced rate for the second year if the master continues in business, the question whether he does continue in business is, in an action for the servant's wages, a *question for the jury*.[4]

§ 1524. **The Question of Sanity.** — "The question of sanity," said Mellen, C. J., "depends on a multitude of circumstances, various and minute, peculiar and contradictory, and where lights and shades are sometimes almost lost in each other. Besides, it

[1] Ambs *v.* Hill, 10 Mo. App. 108. See Tay. Land. & T., § 550; Ewell on Fixtures, *passim*.

[2] Dugin *v.* Coolidge, 3 Allen (Mass.), 555.

[3] Munroe *v.* Gates, 42 Me. 178, 181.

[4] Collett *v.* Smith, 143 Mass. 473.

is, perhaps, almost impossible for a judge to draw any certain divisional line, and present it beforehand for the regulation of the jury. The line of separation between the powers and provinces of court and jury, in the decision of such cases, we apprehend, it is also equally difficult to draw; and in those cases, cited by counsel for the appellant, from the celebrated speeches of Erskine, to show the various manners in which insanity displays itself and operates on the powers of the mind, it appears that the subjects of investigation were then before the jury for decision." The court accordingly held that the trial court committed no error, on the trial of an issue of *devisavit vel non*, in refusing to give the following instruction, requested by the objector: "That if an illusion was fixed upon the mind of the testator as a reality, for months before and up to the time of executing the will, and his conduct was at any time influenced by such illusion, he was not of sane mind. That if the testator was under the continued delusion for months previous to the time of the execution of the will, and during that time, that he believed an illusion of the imagination to be a reality, he was not of sane mind. That if he really, for months before and up to the time of executing the will, believed that he was repeatedly visited by a superhuman being, whom he saw, felt, heard and conversed with, as some of the testimony tended to show, then he was not of sane mind." But, instead of giving this, the judge instructed the jury that the law, upon the facts assumed by the counsel for the objector, had laid down no certain rules, and prescribed no deductions necessary to be made from them; but that these facts, if proved, together with the testimony in the case, must be left to their sound discretion, as a matter of evidence, from which to determine the issue before them." It was held by the whole court that in these rulings there was no error. The court summed up its conclusions in the language of Starkie:[1] "The question of sanity is so peculiarly a question of fact for the decision of a jury, that a will of real estate cannot be set aside in equity, without being first tried at law on an issue of

[1] 3 Stark. Ev. 1707.

devisavit vel non."[1] In Kentucky there is a decision which seems to be quite out of line with authority. It was an appeal to the circuit court, from a decision of the probate court rejecting a will. A trial by jury had taken place in the circuit court, resulting in a finding in favor of the will, on which finding a judgment had been rendered, from which the heirs had appealed. In the opinion of the Court of Appeals the following language was used by Stites, J.: "In all cases involving the capacity of a person to make a will, the inquiry is, was such person, at the time of making and publishing the paper offered as his will, of sound and disposing mind? The degree of capacity necessary to make a valid will must be determined by the courts of the country; and, in ascertaining whether such capacity exists, they are to be governed, necessarily, by rules of evidence applicable to such cases, and deemed authoritative, because founded upon reason and experience, and so recognized by enlightened jurists." This conclusion seems to be founded upon the following provision of a Kentucky statute, applicable to such cases: "The Circuit Court and Court of Appeals shall try both law and fact, but the Court of Appeals shall not hear or adjudge any matter of fact pertaining thereto, other than such as may be certified from the circuit court." The court therefore proceeded to examine the facts, and, being of opinion thereon that the verdict of the jury was right, affirmed the judgment without considering the correctness of the instructions.[2] The reporter cites in a footnote a manuscript opinion in the matter of Hooten's will, delivered by the same court in 1857, where the court decided such a contest upon the merits, irrespective of the verdict of the jury and the instructions of the circuit court.

§ 1525. **Whether a Particular Game is a Game of Chance.** — It seems to be a question of fact for a jury whether a particular game, — as for instance, the game called *rondeau*, is a game of chance, within the meaning of a criminal statute against gaming.[3]

[1] Ware *v.* Ware, 8 Me. 42, 46, 60.

[2] Overton *v.* Overton, 18 B. Mon. 61.

[3] Glascock *v.* State, 10 Mo. 508.

§ **1526. Name — Idem Sonans.** — Where there is a question whether two names differently spelled, or two different spellings of the same name, are *idem sonans*, it is said to be governed by the following rule: If two names, spelled differently, necessarily sound alike, the court may, as matter of law, pronounce them to be *idem sonans;* but if they do not necessarily sound alike, the question whether they are *idem sonans* is a *question of fact* for the jury.[1] Thus, it has been said that, as a matter of law, Darius and Trius are *idem sonans*, Coleridge, J., saying: "If the question had been left to the jury, there can be no doubt that a Dorsetshire jury would have found that Darius and Trius were the same name."[2] On the other hand, in a criminal case, where a witness testified that his name was spelled Malay or Maley and that he was called Maley, but never Mealy, — the court left it to the jury to say whether the name proved was *idem sonans* with the one in the indictment, and it was held that this ruling was right.[3] In another case the court submitted to the jury the question whether the name Celestia and Celeste were usually and ordinarily pronounced alike, and it was held proper.[4]

[1] Com. *v.* Warren, 143 Mass. 568; Reg. *v.* Davis, 4 New Sess. Cas. 611; *s. c.* 5 Cox C. C. 237; 2 Den. C. C. 233.

[2] Reg. *v.* Davis, *supra.*

[3] Com. *v.* Donovan, 13 Allen (Mass.), 571.

[4] Com. *v.* Warren, 143 Mass. 568. See also Com. *v.* Jennings, 121 Mass. 47.

CHAPTER LII.

REASONABLENESS.

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ARTICLE I. — REASONABLE TIME.

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§ **1530. General Observations.** — In one jurisdiction it is said: "Where the facts are clearly established, or are undisputed, or admitted, reasonable time is a question of law. But where, what is a reasonable time depends upon certain other controverted points, or where the motives of the parties enter into the question, the whole is necessarily to be submitted to a jury, before any judgment can be formed whether the time was or was not reasonable."[1] In another jurisdiction the question has been thus discussed: "It is a familiar rule, that all questions of law are to be determined by the court, and that questions of fact are within the exclusive province of the jury. Ordinarily, there is but little difficulty in ascertaining what questions are for the court, and what for the jury; but there are cases in which it is somewhat difficult to determine whether the conclusion is one of fact or of law. This difficulty frequently arises when the inquiry is as to questions of reasonable time, reasonable cause, due diligence, probable cause, and others of like character. Abstractly, these are questions of law, just as the terms larceny, robbery, and assault and battery are; for 'it is a question of legal judgment and discretion, to pronounce whether the facts, as found by a jury, do or do not satisfy the legal expression.' But the latter terms, and others of the same class, are absolutely defined

[1] Hill *v.* Hobart, 16 Me. 164, 168, opinion by Shepley, J.

and determined in the law by general rules applicable to all cases: so that, upon the finding by the jury of the specific facts in each particular case, the law draws the conclusion that they do or do not constitute the particular offense charged. In all such cases, therefore, it is for the court to determine as a question of law, the sufficiency or insufficiency of the facts to constitute the offense; so, in some cases, the law determines what shall or shall not be reasonable time or cause, and the like. As, in the case of a bill of exchange, where the law requires notice of dishonor to be given within a reasonable time, if it appears on the facts proved in evidence, that the case is one falling within a rule by which the law itself prescribes, and defines what shall be considered to be reasonable time, the question is a mere question of law: for the law itself, from the mere *res gestæ*, makes the inference that the time was reasonable. But in other instances questions of this character depend on such an infinite variety of circumstances that, by reason of the impracticability of prescribing any general rule applicable to the facts of each particular case, the inference in law follows the inference in fact; and in such cases the time will be reasonable, or the cause probable in point of law, according as the one or the other is reasonable or probable in point of fact. 'Hence it follows that the test for deciding whether such general inference as to reasonable time, probable cause, etc., be one of law or fact, is this: if the court in the particular case can draw the conclusion by the application of any legal rules or principles, the conclusion is a legal one. But if, on the other hand, the circumstances be so numerous and complicated as to exclude the application of any general principle or definite rule of law, the further inference is necessarily one of mere fact, to be made by the jury. In other words, the rules of ordinary practice and convenience, become the legal measure and standard of right.'" [1] "The law," says Mr. Starkie, "cannot prescribe in general what shall be reasonable time by any defined combination of facts, so much does the question depend upon the situation of the parties and the minute and

[1] Cochran *v.* Toher, 14 Minn. 385, 389, opinion by McMillan, J.; citing 1 Stark. Ev. 514, 516, 517.

peculiar circumstances incident to each case. If a man has a right, by contract or otherwise, to cut and take crops from the land of another, the law, it is obvious, can lay down no rule as to the precise time when they shall be cut and removed; all that can be done is to direct or imply that this shall be done in a reasonable and convenient time; and this must obviously depend upon the state of the weather, and other circumstances which cannot, from their nature, form the basis of any legal rule or definition." [1] "The term reasonable time," said Currey, C. J., "is a technical and legal expression which, in the abstract, involves matter of law as well as matter of fact. Whenever any rule or principle of law applies to the special facts proved in evidence and determines their legal quality, its application is matter of law. But whenever the special facts and circumstances are such that the court cannot, by the aid of any legal rule or principle, decide upon the legal quality of the facts, it is necessary that the jury should draw the inference in fact, with reference to the ordinary course and practice of dealing and the general principles of morality and utility. Where the law itself prescribes what shall be considered to be reasonable time in respect to a given subject, the subject is one of law, and the duty of the jury is confined to finding the simple facts. Where, on the other hand, the law does not, by the operation of any principle or established rule, decide upon the legal quality of the simple facts or *res gestæ*, it is for the jury to draw the general inference of reasonable or unreasonable [time] in point of fact. In such cases the legal conclusion follows the inference of facts; in other words, the question as to reasonable time, etc., is one of fact; and the time is reasonable or unreasonable in point of law, according to the finding of the jury in point of fact." [2]

§ 1531. Meaning of the Words "Reasonable Time." — The words reasonable time would seem to be so easily understood as not to be capable of being made plainer by attempts at definition. The same may be said of the words "*reasonable doubt;*"

[1] Stark. Ev. (9th Am. ed.) 769.

[2] Luckhart *v.* Ogden, 30 Cal. 548, 558.

and yet, as hereafter seen,[1] there are hundreds of cases, many of them conflicting and some of them fantastic in their absurdity, which undertake to prescribe in what manner the judge shall, in charging the jury in a criminal trial, define the words reasonable doubt. If it is proper to attempt any definition of the words reasonable time, that given by Chief Baron Pollock may be suggested, namely, that "a reasonable time means, as soon as circumstances will permit."[2]

§ 1532. **As a Question of Interpretation —Meaning of Words which imply Immediate Action.** — This question frequently arises in interpreting the meaning of words in written instruments which ordinarily imply immediate action. Thus, in an old case it was ruled by Lord Hardwick that the word "*immediately*" is not to be interpreted in a sense which excludes all intermediate time and action.[3] In another old case it was said: "Though the word immediately, in strictness, excludes all mesne time, yet to make good the deeds and evidence of parties, it shall be construed such convenient time as is reasonably requisite for doing the thing."[4] Where, in another case, the governing statute required the judge before whom a cause should be tried to give the plaintiff a certificate "*immediately afterwards*," where the action was brought to try a right,[5] it was held that "immediately afterwards" did not mean the very instant afterwards, but that it meant within such reasonable time as would exclude the danger of intervening facts operating upon the mind of the judge, so as to disturb the impression made upon it by the evidence in the cause.[6] In a case involving the interpretation of a coroner's inquest on a dead body, which, after reciting the accident, proceeded to state, "of which shock," etc., "the deceased *instantly* died," — it was said by Lord Denman, C. J., in giving the opinion of the Court of Queen's Bench, that the word

[1] *Post*, § 2463, *et seq.*

[2] Goodwyn *v.* Cheveley, 4 Hurl. & N. 631, 633.

[3] Rex *v.* Francis, Cases Temp. Hardw. (Lee) 111.

[4] Pybus *v.* Mitford, 2 Leon. 77.

[5] Stat. 3 & 4 Vict., chap. 24.

[6] Thompson *v.* Gibson, 8 Mees. & W. 281.

instantly was not equivalent to "then." "'Then,' 'adtunc,'" said the learned judge, "means the very time at which the other event happened; it therefore involves the same day: and such is the known sense of the term in pleading. But of 'instantly' the more natural and usual sense is, instantly *after;* we do not know what the pleader may mean by that allegation; possibly five minutes or an hour, some time on the succeeding day, or even a longer time. By the course of precedents such words as *instanter* and *incontinenter* do not dispense with a direct allegation of time: we repeatedly find them associated with it."[1] In a statute giving two justices of the peace power to hear and determine causes of common assault, and providing that, when they should dismiss the complaint, they should "*forthwith* make out a certificate under their hands, stating the fact of such dismissal," and "deliver such certificate to the party against whom the complaint was preferred," and providing that the person receiving such certificate should not be prosecuted again for the same offense, civilly or criminally, — the meaning of the word "forthwith" has been held to be, so soon that the facts connected with the question are still fresh in the minds of the justices; and that a certificate granted several months after the dismissal is not granted "forthwith," so as to bar a subsequent common-law prosecution.[2] Where a statute requires a thing to be done "*forthwith*," it is the duty of the judge to expound to the jury the meaning of the word forthwith; but it has been held that he may leave it to them to say, whether, under the circumstances, the thing had or had not been done within a reasonable time, and therefore according to a reasonable construction of the word "forthwith."[3] It has been held that a contract by a manufacturer to furnish certain specified goods "*as soon as possible*," means within a reasonable time, regard being had to the manufacturer's ability to produce them, and to orders which he may have on hand; and that it does not mean as soon as the goods

[1] Reg. *v.* Brownlow, 11 Ad. & El. 119, 127.

[2] Reg. *v.* Robinson, 12 Ad & El. 672. See for the meaning of this word in a clause in a policy of insurance respecting notice of loss, *ante*, § 1296.

[3] Tennant *v.* Bell, 9 Ad. & El. (N. S.) 684.

can be furnished by any possibility, laying aside all other orders which the promissor might have.[1] Where a contract — as for instance to deliver goods — is by its terms to be performed "*on or about*" a date named, it is interpreted to mean that it must be performed within a reasonable time after such date; and what is a reasonable time in such a case, is a *question of fact* for the jury under all the circumstances.[2]

§ 1533. **Reasonable Time for Performing a Contract: The General Rule Stated.** — Where no time is specified in the contract, within which it is to be performed, as, in the case of a sale of goods, within which delivery is to be made, — the law annexes to it the condition that it is to be performed within a reasonable time, and what will be a reasonable time is a *question for the jury*, regard being had to all the circumstances of the case,[3] though it is conceded in some cases that the question may be ruled as a *question of law*.[4] Where the parties have, by correspondence, extended the time within which an existing contract is to be performed, without mentioning the time, it has been held that the law will annex to the agreement the implication that it is to be performed within a reasonable time, and that what is a reasonable time will be, under the circumstances, a *question of law* for the court.[5]

§ 1534. **For Delivery of Goods by a Common Carrier.** — Thus, a common carrier who receives goods and begins the transit is, in the absence of a special agreement, bound to deliver them within a reasonable time. What is a reasonable time is or-

[1] Atwood *v.* Emery, 1 Com. Bench (N. S.), 110.

[2] Kipp *v.* Wiles, 3 Sandf. (S. C.) (N. Y.) 585, 588. Compare Ellis *v.* Thompson, 3 Mees. & W. 445.

[3] Cocker *v.* Franklin &c. Co., 3 Summ. (U. S.) 530; Ellis *v.* Thompson, 3 Mees. & W. 445; Evans *v.* Hardeman, 15 Tex. 480; Green *v.* Haines, 1 Hilt. (N. Y.) 254; Hays *v.* Hays, 10 Rich. L. (S. C.) 419; Muilman *v.* D'Eguino, 2 H. Bl. 565; Wilder *v.* Sprague, 50 Me. 354; Murrell *v.* Whiting, 32 Ala. 55, 65; Steagall *v.* McKellar, 20 Tex. 265.

[4] Hill *v.* Hobart, 16 Me. 168. See also Atwood *v.* Clark, 2 Me. 249; Kingsley *v.* Wallis, 14 Me. 57; Howe *v.* Huntington, 15 Me. 350.

[5] Luckhart *v.* Ogden, 30 Cal. 548, 559.

dinarily a *question of fact* for the jury; and the usual course of delivery is, in most cases, *prima facie* evidence of what is a reasonable time.[1]

§ **1535. Other Illustrations.** — It has been so held where work is done under a contract, the specifications of which are departed from by direction of the party for whom the work is done. Such departure excuses performance within the time limited by the contract, and the obligation thereafter is to complete the work within a reasonable time.[2] It is so ruled where the question is whether an action for the breach of a contract which fixes no time of performance, is barred by limitation; since, until the lapse of the reasonable time which the law implies for performance in such a case, there is no breach of the contract such as will entitle the obligee to maintain an action thereon, and such as will put the statute of limitations in motion.[3] It was so held where the time related to the *delivery* of certain corn, which the defendant had sold to the plaintiff, and the evidence was that the plaintiff was to call and get the corn within two or three weeks after the contract, although no particular time was specified.[4] In another case the plaintiff sold to the defendant three thousand bushels of wheat, to be delivered at the defendant's mill. It was understood by the parties that the wheat had to be transported by a team a distance of twelve miles. It was held that the plaintiff was not required to deliver or offer to deliver the whole amount in one lot at one time, — such mode

[1] Schwab *v.* Union Line, 13 Mo. App. 159, 132. As to what obstructions will excuse delay, and consequently constitute circumstances to be considered by the jury upon the question of reasonable time, see Railroad Co. *v.* Taylor, 35 L. J (C. P.) 210; Railroad Co. *v.* Burrows, 55 Mich. 6; Railroad Co. *v.* Burns, 60 Ill. 284. That the carrier cannot set up an extraordinary influx of business beyond its carrying capacity as an excuse for a delay beyond the usual time, see Tucker *v.* Pacific R. Co., 50 Mo. 385; Faulkner *v.* South Pacific Railroad, 51 Mo. 311. That the sudden and wrongful refusal of its employés to work will not excuse a railway company in failing to deliver in the usual time, see Read *v.* St. Louis &c. R. Co., 60 Mo. 199.

[2] Green *v.* Haines, 1 Hilt. (N. Y.) 254.

[3] Evans *v.* Hardeman, 15 Tex. 480.

[4] Steagall *v.* McKellar, 20 Tex. 265.

of delivery not having been in the minds of the parties, and not being reasonably practicable, in view of the character and situation of the property; and, the vendee having brought an action for a breach of the contract, it was held that, whether a reasonable time for a delivery had elapsed was a *question for the jury*.[1] It has been so held in the case of a *sale*, where the contract is silent as to the time of *payment;* in which case the law annexes to it the condition that payment is to be made within a reasonable time.[2] So, where a contract is to be performed upon the happening of an event which the obligor undertakes to bring about, the rule seems to be that he must bring the event about within a reasonable time or he will be liable for non-performance, and that what is a reasonable time is a question for a jury. Thus, a party accepted an order for the payment of a sum of money "when he sold certain wharf logs." Three years after this acceptance, an action was brought upon it, and the acceptor was permitted to show his inability to effect a sale of the logs, notwithstanding he had used all the common and ordinary means of so doing. It was held that, whether there had been an unreasonable delay in effecting the sale was properly submitted to the jury.[3] So, where a charter party provided for two voyages from Mobile, one to Toulouse and the other to some Atlantic port in France, secured to the owners of the vessel the right to send her, after the termination of the first voyage, "to any other port in Europe to load for any port of the United States, proceeding from such port to Mobile to commence the second voyage," — it was held a question for the jury whether an *offer to perform* the second voyage was made within a reasonable time after the termination of the first, and this, notwitstanding the written evidence in the case, consisting of the correspondence

[1] Roberts *v.* Mazeppa Mill Co., 30 Minn. 413; Cocker *v.* Franklin &c. Man. Co., 3 Sumner (U. S.), 530; Coates *v.* Sangston, 5 Md. 121. See also Cochran *v.* Toher, 11 Minn. 385, Derosia *v.* Winona &c. R. Co., 18 Minn. 133; Pinney *v.* First Division &c. R. Co., 19 Minn. 251. Upon the question of reasonable time generally, see Ellis *v.* Thompson, 3 Mees. & W. 445.

[2] Hays *v.* Hays, 10 Rich. Law (S. C.), 419.

[3] Wilder *v.* Sprague, 50 Me. 354. Compare Doe *v.* Ulph, 66 Eng. C. L. 208; *s. c.* 13 Q. B. 204.

had between the parties showing the dates at which the vessel touched at her several ports.[1]

§ **1536. For making Payment.** — The question what is a reasonable time within which to pay a debt, under an agreement allowing a reasonable time, is a *question for the court*.[2]

§ **1537. "Unreasonable and Vexatious Delay of Payment."** — A statute of Illinois provides that certain demands shall bear interest where there has been, "an unreasonable and vexatious delay of payment." It is held that something more than mere delay of payment is necessary to bring a case within the operation of this statute,[3] and that whether the delay has been unreasonable and vexatious is a *question of fact* for the jury under the circumstances.[4]

§ **1538. Parol Evidence admissible on the Question.** — In determining this question, parol evidence of the conversations of the parties may be admitted, since this evidence may tend to show what the parties themselves thought would be a reasonable time for performing it.[5] In cases of *bailment*, where the contract is indefinite as to the time of its continuance, the bailee has not the arbitrary and exclusive right to determine at what time it shall terminate. If the bailment is for any expressly declared purpose, it terminates whenever that purpose is accomplished. If the time be not fixed by agreement, or by the nature of the object to be accomplished, then the bailee must return the property whenever called upon, after a reasonable time; and what time is reasonable must be determined by the circumstances of each particular case.[6] Accordingly, it is held that if the written contract does not, in its terms, specify the time of its con-

[1] Murrell *v.* Whiting, 32 Ala. 55, 65.

[2] Bottum *v.* Moore, 13 Daly (N. Y.), 464; *ante*, § 1220, 1221.

[3] Samis *v.* Clark, 13 Ill. 454; Hitt *v.* Allen, *Id.* 592; Clement *v.* McConnell, 14 Ill. 154; McCormick *v.* Elston, 16 Ill. 205; Aldrich *v.* Dunham, *Id.* 404.

[4] Kennedy *v.* Gibbs, 15 Ill. 406; Davis *v.* Kenaga, 51 Ill. 170.

[5] Cocker *v.* Franklin &c. Co., 2 Sumn. (U. S.) 530.

[6] See 2 Pars. Contr. 128, 129.

tinuance, parol evidence becomes necessary, in order to enable the jury to determine what length of time is reasonable under the circumstances.[1]

§ 1539. **For making a Tender: A Question of Law.** — Contrary to the preceding holdings, the rule is that what is a reasonable time within which to make a tender is also a question of law.[2] "It is not," said Parke, B., "to be left to a jury, to be determined as a question of practical convenience or reasonableness in each case; but the law appears to have fixed the rule, and it is this: that a party, who is, by contract, to pay money, or to do a thing transitory, to another, anywhere, on a certain day, has the whole of the day, and if on one of several days, the whole of the days, for the performance of his part of the contract; and until the whole day, or the whole of the last day, has expired, no action will lie against him for the breach of such contract. In such a case, the party bound must find the other, at his peril,[3] and within the time limited, if the other be within the four seas; and he must do all that, without the concurrence of the other, he can do, to make the payment, or perform the act, and that at a convenient time before midnight, such time varying according to the *quantum* of the payment, or nature of the act to be done. Therefore, if he is to pay a sum of money, he must tender it a sufficient time before midnight for the party to whom the tender is made, to receive and count; or if he is to deliver goods, he must tender them so as to allow a sufficient time for examination and receipt. This done, he has, so far as he could, paid or delivered within the time; and it is by the fault of the other only, that the payment or delivery is not complete."[4]

[1] Cobb *v.* Wallace, 5 Coldw. (Tenn.) 539, 545.

[2] Startup *v.* MacDonald, 6 Man. & G. 593, where it was ruled in the Exchequer Chamber (reversing the court of common pleas), that a tender of goods by a vendor made at half past eight o'clock in the evening was made within a reasonable time, although the jury had, by a special verdict, found that the time was unreasonable. Lord Denman, C. J., dissented.

[3] Kidwelly *v.* Brand, Plowd. 71.

[4] Startup *v.* MacDonald, 6 Man. & G. 593, 624.

§ 1540. Rule where the Tender is to be made at a Certain Place. — "But," continued Baron Parke, "where the thing to be done is to be performed *at a certain place*, on or before a certain day, to another party to a contract, there the tender must be to the other party *at that place;* and, as the attendance of the other is necessary at that place to complete the act, there the law, though it requires that other to be present, is not so unreasonable as to require him to be present for the whole day, where the thing is to be done on one day, or for the whole series of days, where it is to be done on or before a day certain; and, therefore, it fixes a particular part of the day for his presence; and it is enough if he be at the place at such a convenient time before sunset on the last day, as that the act may be completed by daylight; and if the party bound tender to the party there, if present, or, if absent, be ready at the place to perform the act within a convenient time before the sunset for its completion, it is sufficient; and if the tender be made *to the other party* at the place at any time of the day, the contract is performed; and though the law gives the uttermost convenient time on the last day, yet this is solely for the convenience of both parties, that neither may give longer attendance than is necessary; and if it happen that both parties meet at the place at any other time of the last day, or on any other day within the time limited, and a tender is made, the tender is good.[1] This is the distinction which prevails in all the cases: where a thing is to be done *anywhere*, a tender a convenient time before midnight is sufficient; where the thing is to be done *at a particular place*, and where the law implies a duty on the party to whom the thing is to be done to attend, that attendance is to be by daylight, and a convenient time before sunset."[2] Mr. Baron Alderson in the same case

[1] Citing Bac. Abr. tit. Tender D. a; Co. Litt. 202 a.

[2] Startup *v.* MacDonald, 6 Man. & G. 593, 624. "This," continued Baron Parke, "is the meaning of the distinction in Withers *v.* Drew, Cro. Eliz. 676, referred to in Vin. Abr. tit. *Night* (citing Co. Litt. 202, 211; 5 Co. Rep. 114; Cro. Eliz. 14), and cited on the argument, — that things done in the night where personal attendance of another is not necessary are good; as an award made in the night before twelve was held to be valid. The case of a reservation of rent with a covenant to pay it, affords a clear illustration of

said: "The general rule, I conceive, is, that wherever, in cases not governed by particular customs of trade, the parties oblige themselves to the performance of duties within a certain number of days, they have until the last minute of the last day, to perform their obligation. The only qualification that I am aware of to this rule is, that in acts requiring time in order that they may be completely performed, the party must, at all events, tender to do the act, at such a period before the end of the last day, as, if the tender be accepted, will leave him sufficient time to complete his performance before the end of that day. In the case of a mercantile contract, however, the opposite party is not bound to wait for such tender of performance beyond the usual hours of mercantile business, or at any other than the usual place at which the contract ought to be performed. The party, therefore, who does not make his tender at that usual place, or during those usual hours, runs a great risk of not being able to make it at all. In this case the plaintiffs have had the good fortune to meet with the defendant, and to make a tender to him in sufficient time. And I think, under these circumstances, that the defendant was bound to accept the goods, and is liable in damages for not accepting them." [1]

§ 1541. For the Rescission or Disaffirmance of a Contract obtained by Fraud. — It is well settled that where a party has been

the principle above laid down. The tenant has until the last moment of the day to pay rent; and if he tender it to the lessor personally on the land, if he can find him, a convenient time before midnight, he is not liable to an action, (Keating *v.* Irish, 1 Lutw. 227); or to a distress, if he tender any time before it takes place. But as the rent issues out of the land, it is competent for the tenant to protect himself by being ready on the land at the door of the mansion house, or the place most notorious, a convenient time, before sunset, for the rent to be counted over and received, and remaining there during that time, though the lessor be not there to receive it. Tinckler *v.* Prentice, 4 Taunt. 549; Bro. Abr. tit. Tender, pl. 41; Hill *v.* Grange, Plowd. 173. And, on the other hand, if the lessor wishes to enforce a clause of re-entry for non-payment of rent, he must be on the land at the time and place before mentioned, and there demand it. But if the parties meet at any time whatever on the last day, on or off the land (Cropp *v.* Hambleton, Cro. Eliz. 48), and the tender is made, the forfeiture is saved."

[1] *Ibid.* 622.

induced by fraud to enter into a contract, if he would rescind it, he must offer to do so within a reasonable time after discovering the fraud.[1] In an action at law, what will be a reasonable time has been said to be a mixed question of law and fact, proper to be submitted to the jury.[2] Where no facts are presented, except the simple one of the length of time which has elapsed between the making of the contract and the offer to rescind, the court must say, as matter of law, whether the time was reasonable. But where there are disputed facts involving questions of excuse, of the discovery of the fraud, etc.; whether the time was reasonable is a question of fact for the jury under all the circumstances.[3]

§ 1542. For the Rescission of a Contract of Sale for a Breach of Warranty. — It has been held that, where there has been a breach of warranty, the vendee of a chattel may return it to the vendor and rescind the contract within a reasonable time.[4] It is also held that, upon a tender of the property to the vendor within a reasonable time, the vendee may sue for and recover the purchase-money which he has paid for it.[5] It has been laid down that the time within which the vendee may choose to retain the article before tendering it back, in the absence of any circumstances tending to excuse the delay, may be so short that the court may declare it to be a reasonable time, or so long that the court may declare it to be an unreasonable time, as matter of law; and it was intimated that two months and a half, in the absence of explanation or excuse, would be, as matter of law, an unreasonable time.[6]

§ 1543. For the Disaffirmance after coming of Age of Contracts made during Infancy. — The well known rule is that con-

[1] Gatling *v.* Newell, 9 Ind. 572, 577; Cain *v.* Guthrie, 8 Blackf. (Ind.) 409; Tilton Safe Co. *v.* Tisdale, 48 Vt. 83.

[2] Chamberlain *v.* Fuller, 59 Vt. 247, 252.

[3] Gatling *v.* Newell, 9 Ind. 572, 577.

[4] Branson *v.* Turner, 77 Mo. 489; Johnson *v.* Whitman Agr. Co., 20 Mo. App. 100; overruling Walls *v.* Gates, 4 Mo. App. 1, 6.

[5] Johnson *v.* Whitman Agr. Co., *supra*.

[6] Johnson *v.* Whitman Agr. Co., *supra*.

tracts of infants are not absolutely void, but voidable at their election after arriving at their majority. Such a contract is confirmed if, after arriving at majority, the infant do no other act but fail to disaffirm it within a reasonable time. What is a reasonable time for such disaffirmance is held to be a *question of fact*, as it necessarily depends upon the circumstances of each particular case.[1] It is therefore error to instruct the jury that, if, immediately on reaching full age, the infant had knowledge that he was not bound by the deed, but did not disaffirm for a period of ten months, the time was unreasonable.[2] But where a minor executes a deed of conveyance of land, and, after attaining his majority, conveys the same land to a third person, the *second deed* is, as matter of law, a disaffirmance of the first;[3] and it is error to submit to the jury whether, from the terms of the second deed, a disaffirmance was intended.[4]

§ 1544. For the Disaffirmance of the Unauthorized Acts of an Agent. — Where an agent does an act which is unauthorized by the instructions of his principal, the latter has a reasonable time after knowledge of the acts done to disaffirm the same as between himself and his agent, and what will be such reasonable time will generally be a *question of fact* for a jury, under all the circumstances.[5] Thus, where goods are consigned to a *factor*

[1] Scott *v.* Buchanan, 11 Humph. (Tenn.) 468, 476; Wiley *v.* Wilson, 77 Ind. 596.

[2] Wiley *v.* Wilson, *supra*. In Scranton *v.* Stewart, 52 Ind. 68, it was held that, in the case of the conveyance of real estate by an infant, a disaffirmance within three and a half years after coming of age was within reasonable time. In Miles *v.* Lingerman, 24 Ind. 385, it was held that a married woman could maintain an action ten years after she came of age for lands conveyed while she was a minor, although they had passed into the hands of an innocent purchaser. In Law *v.* Long, 41 Ind. 586, 599, it was said: "The authorities all agree that the contract must be disaffirmed within 'a reasonable time' after the infant arrives of age, but there is great diversity of opinion as to what is 'reasonable time.'"

[3] Peterson *v.* Laik, 24 Mo. 541; Youse *v.* Norcoms, 12 Mo. 549; Norcum *v.* Gaty, 19 Mo. 65; Tucker *v.* Moreland, 10 Pet. (U. S.) 72; Jackson *v.* Carpenter, 11 Johns. (N. Y.) 539; Jackson *v.* Burchin, 14 Johns. (N. Y.) 124.

[4] Peterson *v.* Laik, 24 Mo. 541.

[5] Minor *v.* Mechanics' Bank, 1 Pet. (U. S.) 46; Richmond Mfg. Co. *v.* Starks, 4 Mason (U. S.), 296; Bevan

for sale, and the latter sells them in disregard of the instructions of the consignor, it is well settled that the consignor has a reasonable time within which to disaffirm the act of the factor, and that, what will be a reasonable time, is a question of fact for the jury.[1]

§ 1545. For the Return of Money Received Under Rescinded Contract. — Where a party has been induced by fraudulent representations to sell goods to another, partly for cash and partly on credit, and, upon discovering the fraud, elects to rescind the contract and claim the goods, he is not bound to tender back the money so received before bringing trover for the goods; other-

v. Cullen, 7 Pa. St. 281; Owings *v.* Hull, 9 Pet. (U. S.) 608; Minnesota Linseed Oil Co. *v.* Montague, 59 Iowa, 448, 452. See also Kramph *v.* Hatz, 52 Pa. St. 525; O'Brien *v.* Phœnix Ins. Co., 76 N. Y. 459; Parkhill *v.* Imlay, 15 Wend. (N. Y.) 431; Porter *v.* Patterson, 15 Pa. St. 229; Wilder *v.* Sprague, 50 Me. 354; Magee *v.* Carmack, 13 Ill. 289; Davis *v.* Kenaga, 51 Ill. 170.

[1] Porter *v.* Patterson, 15 Pa. St. 229, 235; Loraine *v.* Cartwright, 3 Wash. C. C. (U. S.) 151; Cairnes *v.* Bleecker, 12 Johns. (N. Y.) 300; Fowle *v.* Stevenson, 1 Johns. Cas. 110; Parkhill *v.* Imlay, 15 Wend. (N. Y.) 431; Lanfear *v.* Sumner, 17 Mass. 109; Bainbridge *v.* Wilcox, 1 Baldw. (U. S.) 536; Thompson *v.* Fisher, 13 Pa. St. 310; Bevan *v.* Cullen, 7 Pa. St. 281; Prince *v.* Clarke, 8 Eng. C. L. 54. In one case it was said by Gibson, C. J., that the principal is bound to disavow it the first moment the fact comes to his knowledge. Breading *v.* Dubarry, 14 Serg. & R. 27. But it was pointed out by Rogers, J., in a subsequent case in the same court, that the case in which this remark was made was a case between the principal and a stranger, which, of course, called for a more stringent rule than where the contest is between the principal and his agent; and Rogers, J., said: "In the latter certainly he is not bound to act until he obtains the information necessary to enable him to act understandingly. Nor, although strong expressions are used, which, be it remarked, the case did not call for, would a principal even as to a stranger be bound to disavow the act until he had an opportunity of informing himself of all the facts and circumstances. Besides, whether he acted promptly would be a fact for the jury. But, however this may be as between principal and stranger, no such rule exists between a consignor and his factor or agent. For if there be any point settled it is that, between them, the principal is entitled to a reasonable time; he is not bound to answer until he has obtained sufficient information as to the state of the accounts between them. The ratification, to bind, must be made with a full knowledge of all the facts and circumstances." Porter *v.* Patterson, 15 Pa. St. 229, 235; citing Story Contr., § 311; Story Ag., § 239; Owings *v.* Hull, 9 Pet. (U. S.) 608.

wise the knave might accept the money and keep the goods, and thus place the defrauded vendor in a worse situation than he was in before. His obligation to restore what he has received from the vendee is based upon the obligation of the vendee to restore at the same time what he has received under the contract to sell; and where the vendee has, by disposing of all his property and absconding, or otherwise, put it out of his power to make such restoration, it may be ruled as a *matter of law* that the vendor is not bound, in order to maintain trover, to restore the money which he has received under the contract.[1] In such a case it was well said that the defrauded party has, "so entangled himself in the meshes of his knavish plot, that the party defrauded could not unloose him; and the fault was his own."[2]

§ 1546. For the Return of Counterfeit Money, Forged Paper, etc. — Where a party receives in payment a worthless[3] or spurious[4] bank-note, he must return it to the party from whom he received it, within a reasonable time, or he will loose his recourse upon the latter.[5] "It would be a matter of regret," said Kent, C. J., "if the law obliged us to regard a payment in counterfeit, instead of genuine bank bills, as a valid payment of a debt, merely because the creditor did not perceive and detect the false bills at the time of payment. The reasonable doctrine, and one which undoubtedly agrees with the common sense of mankind, is laid down by Paulus in the Digest, and has been incorporated in the French law. He says that, if a creditor receive by mistake anything in payment, different from what was due, and upon a supposition that it was the thing actually due, — as if he receive brass instead of gold, — the debtor is not discharged, and the creditor upon offering to return that which he received, may demand that which is due by the con-

[1] Ladd *v.* Moore, 3 Sandf. (S. C.) (N. Y.) 589.

[2] Masson *v.* Bovet, 1 Denio (N. Y.), 69.

[3] Magee *v.* Carmack, 13 Ill. 289.

[4] Simms *v.* Clarke, 11 Ill. 137; Union Nat. Bank *v.* Baldenwick, 45 Ill. 375.

[5] Markle *v.* Hatfield, 2 Johns. (N. Y.) 458; Boyd *v.* Mexico Southern Bank, 67 Mo. 537, 539; Simms *v.* Clarke, *supra;* Union National Bank *v.* Baldenwick, *supra.*

tract."[1] But this right to return must be exercised within a reasonable time after discovering the spurious character of the bank-note or coin received; and what will be a reasonable time is a *question of fact*, depending upon the circumstances of the case.[2] It was so held where the party receiving the bill failed to bring it back until the lapse of thirteen or fourteen days.[3]

§ **1547. For objecting to an Account Rendered.** — Unless a current account, striking a balance due, which is rendered by a creditor to his debtor, is objected to by the latter within a reasonable time after receiving it, it becomes an *account stated*, and, in the view of some courts, cannot be impeached except for fraud or mistake, while others hold that it is merely *prima facie* evidence that the balance is due as claimed. What is a reasonable time for objecting to it has been variously held a question of law for the court,[4] and also a *question of fact* for the jury.[5]

§ **1548. For the Acceptance of an Office, Trust or Agency.** — It is assumed to be the law that one who is appointed to an office, trust or agency has a reasonable time within which to accept or decline the appointment. It has been held that the omission of a *factor* to acknowledge the receipt of an order and to signify his acceptance of the commission, will not discharge the principal, where the order is complied with, and advice thereof

[1] Markle *v.* Hatfield, 2 Johns. (N. Y.) 458, quoted with approval in Boyd *v.* Mexico Southern Bank, 67 Mo. 537, 539, criticised in Atwood *v.* Cornwall, 28 Mich. 336, 342.

[2] Magee *v.* Carmack, 13 Ill. 289; Simms *v.* Clark, 11 Ill. 137; Union National Bank *v.* Baldenwick, 45 Ill. 375; Boyd *v.* Mexico Southern Bank, 67 Mo. 537, 541. In one case it was held that the duty of returning forged paper must begin from the time that the holder has had what the jury shall believe to be satisfactory evidence of its spuriousness, and that the question of negligence or reasonable time in such cases is for the jury. Burrill *v.* Watertown Bank, 51 Barb. (N. Y.) 105.

[3] Union Nat. Bank *v.* Baldenwick, *supra*.

[4] Oil Co. *v.* Van Etton, 107 U. S. 325, 333. See also Perkins *v.* Hart, 11 Wheat. (U. S.) 237, Toland *v.* Sprague, 12 Pet. (U. S.) 300; Wiggins *v.* Burkhem, 10 Wall. (U. S.) 129; Lockwood *v.* Thorne, 11 N. Y. 170.

[5] Peter *v.* Thickstun, 51 Mich. 592

given, within a reasonable time. What will be a reasonable time for the acceptance of such a commission and the giving of advice thereof, is said to depend upon the course of the particular trade and the peculiar circumstances of the case. It is, therefore, not a *question of law*, but of *fact* to be submitted to the jury.[1]

§ 1549. **For the Acceptance of Shares of Unpaid Stock by a Bankrupt's Assignee.** — Shares of stock in a corporation, or joint stock company, which are fully paid up, are property depending in value upon the assets and prospects of the company. If they are partly paid up, they may be also possessed of value, notwithstanding the liability to pay what remains unpaid in respect of them. But where a small fraction only of such shares is paid and the rest unpaid, or where the assets or prospects of the company are very low, such shares may be a burden instead of a blessing, they may incur a liability, without producing any benefit to the holder. In such a case it would seem that an assignee in bankruptcy of the holder of shares would have a right of election whether to accept the shares or not. This election he would be bound to exercise within a reasonable time; and it has been held that what would be a reasonable time is a *question of fact* for a jury under the circumstances of the case; and moreover, that a reasonable time for such an acceptance does not begin to run until some party interested in the shares, other than the assignee, has taken some steps respecting them.[2]

§ 1550. **Reasonable Notice to quit a Yearly Tenancy.** — This is stated with confidence to be everywhere a *question of law*. It was such in England under the principles of the common law, and is now such by statute in that country, and it is presumed that the same rule obtains everywhere in this country, either in conformity with the rule of the common law, or more generally by statute. Prior to the Agricultural Holdings Act, 1883

[1] Parkhill *v.* Imlay, 15 Wend. (N. Y.) 131.

[2] Graham *v.* VanDieman's Land Co. 11 Ex. 101; *s. c.* 30 Eng. L. & Eq. 574.

(England),[1] the law in England, established for centuries, had been that a reasonable notice to quit a yearly tenancy was a notice of six calendar months, the same to terminate at the expiration of the current year.[2] "The rule of law," said Lord Ellenborough, C. J., "originally was that *reasonable* notice to quit should be given, where notice was necessary between landlord and tenant. What notice shall be deemed reasonable has received a construction so long ago as the reign of Henry VIII. in a case in the Year Books,[3] that it shall be half a year's notice." [4] And when the tenant held different portions of the premises from different days, it was further decided that the notice referred to the day of entry on the substantial subject of the holding.[5] It seems also to be the law in England, that if the hiring be from month to month, a month's notice will be necessary and if it be by the quarter, a quarter's notice will be necessary.[6]

§ 1551. Reasonable Notice of Discontinuance of Contract of Service. — This, in like manner, is a *question of law.* It is

[1] Stat. 46 and 47 Vict., c. 61, § 54. Under this statute if the holding be either agricultural or pastoral, or both, or be wholly or in part cultivated as a market garden, a year's notice, "expiring with a year of tenancy," is necessary in every contract, whether made before or after the commencement of the statute, unless the landlord and tenant shall have agreed *in writing* that this enactment shall not apply, in which case a six months' notice shall continue to be sufficient. *Ibid.*, § 33. See also Stat. 39 and 40 Vict., c. 63, as to a corresponding law of Ireland.

[2] Right *v.* Darby, 1 T. R. 159. This subject, it is presumed, is now regulated by statute in most American jurisdictions.

[3] 13 Hen. VIII., 15 b. 16.

[4] Doe *v.* Spence, 6 East, 120, 123. So held in Doe *v.* Snowdon, 2 W. Bl. 1224; Doe *v.* Rhodes, 11 Mees. & W. 600.

[5] Doe *v.* Snowdon, *supra;* Doe *v.* Watkins, 7 East, 551; Doe *v.* Spence, *supra;* Doe *v.* Rhodes, *supra.* It is said by Judge Taylor to be still an open question in the superior courts in England, whether, in the absence of evidence of a contract or usage, a week's notice to quit is necessary to determine a weekly tenancy, in support of which statement he asks the reader to compare Jones *v.* Mills. 10 Com. Bench (N. S.) 788; *s. c.* 31 L. J. C. P. 66; Huffell *v.* Armitstead, 7 Car. & P. 56, per Parke, B.; and Towne *v.* Campbell, 3 Com. Bench 921. But Judge Taylor, who was a county judge, also states that in the county courts this question has been settled in the affirmative for the last thirty years.

[6] Towne *v.* Campbell, 3 Com. Bench, 921, per Coltman, J.; Kemp *v.* Derrett, 3 Camp. 510.

a settled rule of English law that, in the case of menial or domestic servants, a hiring for a year is subject to the condition that either party may put an end to the relation upon giving the other a month's notice or a month's wages.[1] The reason of the rule, as stated by Erle, C. J., is that "there are some contracts for services which bring parties into such close proximity and frequency of intercourse, — valuable if mutually agreeable, but intolerably annoying should it be otherwise, — that it is highly desirable that either party should be at liberty to put an end to them if so minded. Where the service is of such a domestic nature as to require the servant to be frequently about his master's person, or, as in the case of a gardener, about his grounds, if any ill feeling should arise between them, the constant presence of the servant would be a source of infinite irritation and annoyance to the master. The law and the reason of the law are mutual. The servant may have an exacting and dissatisfied master, constantly finding or imagining faults or shortcomings; in such a case, the sooner the servant can free himself from his disagreeable position, the better for his comfort and happiness. It is therefore for the benefit of both that the contract which binds two incompatible tempers together should be easily determinable." [2] This rule is held to include head-gardeners [3] and huntsmen; [4] but it does not apply to farm servants,[5] nor to governesses,[6] nor to housekeepers in large hotels,[7] and other like employés.[8] In respect of all servants hired generally, without any stipulation as to time, according to the English rule, the law presumes the hiring to have been for a year, unless there are circumstances tending to rebut the presumption; [9] as, for in-

[1] Erle, C. J., in Nicoll *v.* Greaves, 17 Com. Bench (N. S.), 27, 33; *s. c.* 33 L. J. (C. P.) 259.

[2] *Ibid.*, 17 Com. Bench (N. S.), 34.

[3] Nowlan *v.* Ablett, 2 Cromp. Mees. & R. 54; *s. c.* 5 Tyrwh. 709; Johnson *v.* Blenkensopp, 5 Jur. 870.

[4] Nicoll *v.* Greaves, *supra*.

[5] Lilley *v.* Elwin, 11 Ad. & El. (N. S.) 742.

[6] Todd *v.* Kerrich, 8 Exch. 151.

[7] Lawler *v.* Linden, L. R. 10 C. L. 188.

[8] Fawcett *v.* Cash, 5 Barn & Adolph. 904.

[9] Lilley *v.* Elwin, 11 Ad. & El. (N. S.) 742, 754; 1 Tayl. Ev. (8th Eng. ed.), § 177.

stance, the existence of an agreement to pay weekly or monthly wages, coupled with the absence of any other stipulation showing an intention that the service should continue a longer period than a week or a month.[1] This rule applies to domestic, as well as to farm servants, but with the exception already stated in respect of a month's notice or month's wages in the case of a domestic or menial servant.[2]

§ 1552. For Applying for Letters of Administration. — A person who is entitled to precedence under a statute in having letters of administration upon the estate of a deceased person granted to him, loses his right of preference, — not by delay merely, — but by an *unreasonable delay*.[3] What will be an unreasonable delay has been held a *question of law*.[4]

§ 1553. For removing Goods by Executor from Mansion of Testator. — In like manner, the question whether an executor has had reasonable time to remove goods from the testator's mansion is a *question of law* for the court.[5]

§ 1554. For removing Trespassing Cattle. — In England, the owner of land on the one hand is not bound to fence it; the owner of cattle, on the other hand, is not a trespasser until he re-

[1] 1 Tayl. Ev. (8th Eng. ed.), § 177; Rex *v.* Worfield, 5 T. R. 508; Rex *v.* St. Andrew, 8 Barn. & Cres. 679; Reg *v.* Pilkington, 5 Ad. & El. (N. S.) 662; Baxter *v.* Nurse, 6 Man. & G. 939.

[2] Beeston *v.* Collyer, 4 Bing. 309, 313; Turner *v.* Mason, 14 Mees & W. 116. It is also said by Taylor: "In the case of clerks, warehousemen, travelers, editors, reporters, actors, ushers, governesses, and the like, the law raises no inflexible presumption of an indefeasible yearly hiring, from the mere fact of a hiring for an indefinite period; but in all such cases the jury must determine the question for themselves, after weighing all the circumstances proved, and ascertaining, if possible, what usage prevails in the particular business or employment to which the hiring relates." 1 Tayl. Ev. (8th Eng. ed.), § 177, citing Baxter *v.* Nurse, 6 Man. & G. 935; *s. c.* 1 Car. & K. 10; Holcroft *v.* Barber, 1 Car. & K. 4; Todd *v.* Kerrick, 8 Exch. 151; Parker *v.* Ibbetson, 4 Com. Bench (N. S.) 348; Fairman *v.* Oakford, 5 Hurl. & N. 635.

[3] Stoker *v.* Kendall, Busb. L. (S. C.) 242; Wallis *v.* Wallis, Winst. L. (N. C.) 78.

[4] Hughes *v.* Pipkin, Phill. L. (N. C.) 4.

[5] Co. Litt. 56 b.

fuses to remove his cattle which have strayed upon another's land, within a reasonable time after notice of the fact.[1] This rule would probably have an application in those American jurisdictions which follow the English rule of exonerating the land-owner from liability to fence and requiring the cattle-owner to restrain his cattle; but it would have no application in those States where cattle are allowed to run at large upon any unenclosed lands, and where the land-owners, in order to exclude trespassing cattle, are required to fence. Under the English rule it has been held[2] that, whether the owner of the trespassing cattle remove them within a reasonable time after notice, is a question not to be determined by the judge, but is a *question for the jury*, to be determined with reference to all the surrounding circumstances.[3]

§ 1555. **Consideration: Reasonable Time of Forbearance to bring Suit.** — The question what is a reasonable time of forbearance, where there has been an agreement by a creditor to forbear bringing suit on his demand without stating the time of such forbearance, has arisen in connection with the question whether such an agreement is a good consideration to support the promise of a third party to pay the debt. It is said that an agreement to forbear, either absolutely or for a certain time, to institute or prosecute legal or equitable proceedings to enforce a legal or equitable demand, is a sufficient consideration to support the promise of a third person, as well as that of the person liable to suit.[4] In order to furnish the consideration of a contract of forbearance, the delay must be either for a certain time or for a reasonable time. A forbearance for a very brief length of time, as for an hour or a day, would not, it seems, furnish a good consideration.[5] An agreement for an indefinite forbearance has been held good,[6] on the ground, it would seem from other

[1] Goodwyn *v.* Cheveley, 4 Hurl. & N. 631, 634.

[2] Per Pollock, C. B., Martin, B., and Channell, B.; Bramwell, B., dissenting.

[3] Goodwyn *v.* Cheveley, 4 Hurl. & N. 631.

[4] 1 Chit. Con. 35, 36; Glasscock *v.* Glasscock, 66 Mo. 627, 630.

[5] Metc. Contr. 174.

[6] Philips *v.* Sackford, Cro. Eliz. 455.

cases,[1] that it is an agreement for a total forbearance. But where the circumstances are such as to preclude the conclusion that the agreement was for a total forbearance, and it is nevertheless an agreement for a forbearance for a length of time not stated, it will be intended that it was an agreement to forbear for a reasonable length of time; and what is a reasonable length of time, will, it is said, be a *question of law* for the court.[2]

§ 1556. Priorities among Creditors; Delay in Exposing Property to Judicial Sale. — There is a principle, sanctioned by judicial decisions, that, where personal property is levied upon under an execution, and the sheriff thereafter delays, with the consent of the plaintiff, for an unreasonable length of time, to sell the property, such delay will have the effect of releasing the lien of the execution and letting in the lien of a junior execution, held by another creditor of the same debtor.[3] In Ohio, the principle, applicable to the practice in that State, is said to be: "If there has been an *unreasonable delay* in completing the execution by a sale, at the instance and by the authority of the plaintiff, such unreasonable delay may have the effect of postponing his, in a certain sense, dormant process, to that of a more vigilant, though junior execution creditor. Mere delay, if not unreasonably protracted, will not have such effect; but where the delay is unreasonable, in view of the rights of other creditors, the character and condition of the property levied on, and the uses to which it is in the meantime applied, it is just and proper that a limit should be placed upon the indulgence of the creditor holding such prior lien. The question whether such delay was reasonable or unreasonable in a given case, depends upon its peculiar circumstances, and is, therefore, peculiarly a question for the jury under the instructions of the court. It is manifest that a delay which is unreasonable in one case, by reason of the condi-

[1] Thorne *v.* Fuller, Cro. Jac. 397; Cowlin *v.* Cook, Latch, 151; Lonsdale *v.* Brown, 4 Wash. C. C. (U. S.) 151; Hamaker *v.* Eberly, 2 Binn. (Pa.) 506; Clark *v.* Russel, 3 Watts (Pa.), 213.

[2] Glasscock *v.* Glasscock, 66 Mo. 627, 631.

[3] Russell *v.* Gibbs, 5 Cow. (N.Y.) 39.

tion of the parties or the subject-matter of the levy, would, under other circumstances, be altogether reasonable and proper." And the court held that where, in such a case, there is evidence fairly tending to prove such unreasonable delay, it is error for the court to foreclose inquiry, and withdraw the question from the jury, by instructing them that such prior levy was valid and subsisting at the time when the lien of the junior execution attached.[1]

§ **1557. Time during which Member of Parliament privileged from Arrest.** — Although it may possibly have anciently been the rule that a member of Parliament was privileged from arrest on civil process, only for a convenient time before the assembling and after the prorogation or dissolution of Parliament, — yet, on a review of the precedents, it has been found to be the undoubted law of England for two hundred years, that this privilege exists for *forty days* before and forty days after the meeting of Parliament, and that the rule is the same in the case of a dissolution as in the case of a prorogation.[2]

§ **1558. Whether a Settler on Public Land has followed up his Location with Reasonable Diligence.** — In Nevada there are two methods of acquiring title, sufficient to maintain ejectment in respect of public land not surveyed or brought into market by the general government: 1. By a compliance with the requirements of a statute of that State entitled "An Act Prescribing the Mode of Maintaining and Defending Possessory Actions for Public Lands in this State."[3] 2. By actual possession or occupation of such lands. In respect of the second question, it is laid down that, "the person first locating a tract of public lands should have a reasonable time after the location to enclose it, or to make such improvements as may be necessary to its enjoyment; and, during that time, he must be protected precisely the same as if he had perfected his possessions by enclosure

[1] Acton *v.* Knowles, 11 Ohio St. 18, 28, 30.

[2] Goudy *v.* Duncombe, 1 Exch. 430; Re Anglo-French Co-operative Society, 14 Ch. Div. 533.

[3] Nev. Laws of 1864–65, p. 343.

or otherwise. But if ousted after the lapse of such reasonable time, he can only recover by showing the actual, notorious prior possession.[1] The question whether a settler on public lands has proceeded with reasonable diligence to follow up his location with the necessary improvements, so as to recover in ejectment against a subsequent possessor, is a *question of fact* for a jury.[2]

§ 1559. In Matters arising in the Course of Judicial Administration. — In matters arising in the course of judicial administration, the judge, from his greater experience, would be better qualified to decide what is a reasonable time for the doing of an act, than would a jury. But even here no uniform rule can be stated, especially in view of the fact, already seen, that the question of *negligence in an attorney* or solicitor is generally regarded as a *question of fact* for a jury.[3] So, where under a peculiar agreement the question was whether *costs* had been taxed within a reasonable time after the making of the agreement that they should be taxed, it was held that it was a *question for the jury* and not for the judge.[4] So, whether an *award* is made within a reasonable time, within the intention of the parties making the submission, has been a *question for the jury*, in an action upon the award.[5] But where a plaintiff sued out a writ of *capias ad respondendum*, and caused his debtor to be arrested and committed to prison or held to bail, upon the payment of the debt, it became his duty to countermand the order of arrest within a reasonable time, and what was a reasonable time was for the *decision of the judge*, and was not to be submitted to the jury, in an action for false imprisonment.[6] So, under the old law, which made a sheriff liable for an *escape*, where he failed to take to

[1] Stainінger *v.* Andrews, 4 Nev. 59, 67. Compare Plume *v.* Seward, 4 Cal. 94; Coryell *v.* Cain, 16 Cal. 567; Lawrence *v.* Fulton, 19 Cal. 690; Hutton *v.* Schumaker, 21 Cal. 453; Polack *v.* McGrath, 32 Cal. 15.

[2] Stainінger *v.* Andrews, 4 Nev. 59, 70.

[3] *Post*, § 1700.

[4] Burton *v.* Griffiths, 11 Mees. & W. 817, 824.

[5] Haywood *v.* Harmon, 17 Ill. 477, 480.

[6] Scheibel *v.* Fairbain, 1 Bos. & Pul. 388.

prison a person whose body had been taken in execution under a *capias ad satisfaciendum*, within a *convenient time*, it was held that what was a *convenient time* was a question *for the determination of the judge*, who would admit of all reasonable delay; "but if that be made use of by the officer, as a means of giving more liberty than he ought, he will be liable for an escape."[1]

§ 1560. Reasonable Time for holding Prisoner for Re-examination. — This question is liable to arise in actions for false imprisonment. It is now, according to Taylor, regulated by statute in England and in Ireland — with a single exception recognized in England.[2] It is presumed to be so regulated in most American jurisdictions. Where it is so regulated, of course the question, when it arises, must be *pronounced by the court* upon an interpretation of the statute, and cannot be submitted to a jury. Where there is no governing statute, or where the statute is flexible, leaving a latitude of discretion as to what is a reasonable time, then, it is supposed that what is a reasonable time will be a mixed question of law and fact, similar to the question of reasonable cause in actions for malicious prosecution.[3] In two cases in England,[4] and one in Ireland,[5] which where actions against the committing magistrate, this question was *submitted to the jury;* but the propriety of these rulings may be questioned. It seems to be a reversal of judicial conceptions to have the propriety of the discretionary action of a judicial officer passed upon by a jury, in an action for damages against the officer.

§ 1561. For Passenger to call for and receive his baggage after transit ended. — It has been said: "The carrier is bound to deliver safely to a passenger his baggage at the place of its destination, in a reasonable time and manner; and when it is thus

[1] Benton *v.* Sutton, 1 Bos. & P. 24, 28, per Heath, J.

[2] Tayl. Ev. (8th Eng. ed.), § 35, and cases cited.

[3] See Davis *v.* Capper, 10 Barn. & Cr. 28; *s. c.* 5 Man. & Ry 53; *s. c.*, 4 Car. & P. 134.

[4] Davis *v.* Capper, *supra;* Cave *v.* Mountain, 1 Man. & G. 260; *s. c.* 1 Scott (N. R.), 132.

[5] Gillman *v.* Connor, 2 Jebb & Symes, 210.

delivered, or offered to be delivered, the passenger is bound to receive it and remove it in a reasonable time. If he refuses or neglects to do so, and the carrier thereafter retains it unclaimed by the owner, his liability is changed from that of an insurer to the responsibility of an ordinary bailee, liable only for losses occasioned by his own fault." [1] What is a reasonable time for the passenger to take away his baggage has been regarded as a *mixed question* of fact and law. Where the testimony is conflicting and the facts are unsettled, the jury are to decide it, under the instructions of the court as to the law. But where there is no dispute as to the facts, the question is purely one of law, and the court should decide it; [2] and in such case it is error to submit the question to a jury.[3]

§ 1562. Reasonable Time for selling after Distress. — Under English statutes,[4] it has been held that a landlord may remain upon the premises for more than five days after a distress for the purpose of selling the goods distrained, since, by the statute, he could not sell until five days have expired; and, that it is a *question for the jury* to say what is a reasonable time after five days within which to sell the goods.[5]

§ 1563. Delay in making the Voyage Insured. — An unreasonable delay in performing the voyage insured will discharge a policy of *marine insurance*.[6] What is an unreasonable delay will be a question for a jury. In one case it was *submitted to a jury* with the evidence to find a special verdict and they found as a conclusion that there was "unreasonable and unjustifiable delay between the making of the said policy of insurance and the com-

[1] Roth *v.* Buffalo &c. R. Co., 34 N. Y. 548, 558, opinion by Smith, J.

[2] Roth *v.* Buffalo &c. R. Co. 34 N. Y. 548 (where, under the circumstances, the court held that the delay was unreasonable); Hedges *v.* Hudson River &c. R. Co., 49 N. Y. 223.

[3] Hodges *v.* Hudson River &c. R. Co., *supra; post*, § 1881.

[4] Stat. 2 Wm. & M. Sess. 1, c. 5, § 2: 11 Geo. 2, c. 19, § 10.

[5] Pitt *v.* Shew, 4 Barn. & Ald. 206, 208.

[6] Chitty *v.* Selwyn, 2 Atk. 359; Palmer *v.* Marshall, 8 Bing. 161; Ougier *v.* Jennings, 1 Camp. 505; Smith *v.* Surridge, 4 Esp. 25; Hull *v.* Cooper, 14 East. 479; Mount *v.* Larkins, 8 Bing. 122; Park Ins. 71, 72; *ante*, § 1320.

mencement of the risk intended to be insured against," and judgment was entered thereon for the defendant.[1]

§ 1564. **Time for returning Goods sold by Sample.** — So, it is proper to *submit it to the jury*, whether goods sold by sample have been rejected and returned within a reasonable time.[2]

§ 1565. **Time for transmitting Inland Bill of Exchange.** — So, it has been held that the holder of an inland bill, payable after sight, is not bound instantly to transmit it for acceptance. He may put it into circulation, or, though he do not circulate it, he may take a reasonable time to present it for acceptance; and what is a reasonable time is a *question for the jury*.[3] In determining this question, it has been held that the jury should be instructed to take into consideration the interests, not only of the drawer, but of the holder also.[4] The question of reasonable time does not arise in the case of a *blank acceptance*, when the bill is in the hands of a *bona fide* indorsee for value without notice.[5]

§ 1566. **Other Cases where Reasonable Time has been held a Question for a Jury.** — It has been held, in an action on the case for not carrying away tithes, that, whether the whole crop

[1] Mount *v.* Larkins, 8 Bing. 108; *s. c.* 1 Moore & S. 165. In Phillips *v.* Irving, 7 Man. & G. 325, 328, 329, the question was left to the decision of the court by consent, and Tindal, C. J., ruled "that no certain or fixed time could be said to be a reasonable time for seeking a cargo in a foreign port; but that the time allowed must vary with the varying circumstances, which may render it more or less difficult to obtain such a cargo."

[2] Parker *v.* Palmer, 4 Barn. & Ald. 387.

[3] Fry *v.* Hill, 7 Taunt. 397; *ante*, § 1222 *et seq.*

[4] Mullick *v.* Radakissen, 9 Moore P. C. 46, 53; Mellish *v.* Rawdon, 9 Bing. 416. See also Chartered & Mercantile Bank of India *v.* Dickson, L. R. 3 P. C. 574, where the Privy Council, reviewing the evidence in a case which seems to have been tried without a jury, determined that the lapse of time from the 16th of February to the 14th of December of the same year, in the case of a demand note, was not, under the circumstances, an unreasonable time for presenting it. See further Van Diemen's Land Bank *v.* Victoria Bank, 40 L. J. (C. P.) 28.

[5] Montague *v.* Perkins, 22 L. J. (C. P.) 187.

has been left on the ground for a reasonable time after the tithe has been set out, in order that the tithe-owner may compare the tenth part with the other ninth, is a *question for the jury* and not for the court, where the question depends on a variety of circumstances, such as the residence of the respective parties, the time when notice was given that the corn should be tithed, the state of the weather, and other things most proper for the consideration of a jury.[1] Nevertheless, it seems that such a question may sometimes be a *question for the judge*, the facts having been first ascertained by the jury.[2] The question what are "*seasonable times*" for doing an act, — which means the same thing as reasonable times, — has been held in substance to be a question of fact. Thus, in an action of trespass *q. c.*, where the defendant justified by reason of the custom that the inhabitants of the town, time out of mind in every year, had, at all seasonable times in the year, the easement of passing over the land in question, it was held to be a mixed question of law and fact what times were to be deemed seasonable, and therefore this might be shown upon a plea setting up such a defense.[3]

Article II. — Reasonable Things.

Section

1567. Regulations of Railway Companies.
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[1] Facey *v.* Hurdom, 3 Barn. & Cres. 213.

[2] Littledale, J., in Facey *v.* Hurdam, 3 Barn. & Cres. 213, 217.

[3] Bell *v.* Wardell, Willes, 202.

SECTION
1577. Stipulation in Insurance Policy as to Time of Giving Notice of Loss.
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§ **1567. Regulations of Railway Companies.** — Whether a regulation established by a railway company, or other public carrier, is a *reasonable* one, is a question for the judge;[1] but whether a certain regulation of a railway company is *sufficient* for the prevention of collisions, is a question for the jury.[2] Thus, it has been held that the reasonableness of the rules adopted by a common carrier, requiring passengers to surrender their tickets to the conductor when called for,—is a *question of law* for the court, and that it is error to submit such a question to the jury; since if it were left to the varying discretion of juries there would be one rule to-day and another to-morrow, and neither passengers nor railway companies would know their rights and obligations.[3] Contrary to the preceding, it has been held in New Jersey that the reasonableness of a regulation of a railway company which affects its customers, as contradistinguished from a by-law which affects its own members, as, for instance, a regulation requiring a receipt for all the goods which have been deliv-

[1] *Ante*, § 1057.

[2] Chicago &c. R. Co. *v.* McLallen, 81 Ill. 109, 116.

[3] Ill. Cent. R. Co. *v.* Whittemore, 43 Ill. 420, 423; Vedder *v.* Fellows, 20 N. Y. 126. At the same time it is held proper to admit testimony in regard to the necessity of such a rule. Illinois Central R. Co. *v.* Whittemore, *supra*.

ered to the company as a carrier before its agent is permitted to deliver any part of them,— is a *question of fact* for a jury.[1] So, it has been held that the reasonableness of rules prescribed by a railway company to its engineers for the running of their trains, would present a *question for the* decision of the *jury*.[2]

§ **1568. By-laws of Corporations.** — It has always been held that the reasonableness of the by-laws of corporations is a question of law, and that such by-laws may be set aside when, in the opinion of the court, they are unreasonable.[3] It will be seen that this rule involves nothing more than the substitution of the opinion of the judge for that of the governing body of the corporation, in determining whether a corporate by-law is to stand or fall. This rule applies to the by-laws, more usually called *ordinances*, of municipal corporations which impose penalties for prescribed offenses. Whether such a by-law is reasonable is a *question of law* for the court. If one party offer such an issue to the court, the other party may demur; but it has been held, if he joins issue thereon, he cannot afterwards submit the question to the court; it must, it seems, go to the jury.[4]

§ **1569. Rules of Boards of Trade.** — The reasonableness of a rule of a board of trade touching the inspection of provisions in case of cash sales is, it seems, a *question of law* for the court.[5]

§ **1570. Whether Fines, Customs or Services are reasonable.** — These questions are likewise to be decided by the judges.[6] While the existence of a *custom of trade* is generally a question of fact for a jury, yet the reasonableness of such a custom is a *question of law* for the court; and hence the court will not leave it to the jury to find the existence of a custom which, if found,

[1] Morris &c. R. Co. *v.* Ayres, 29 N. J. L. 393. See also State *v.* Overton, 24 N. J. L. 435, 441.

[2] Quimby *v.* Vermont Central R. Co., 23 Vt. 387, 395.

[3] *Ante*, § 1057.

[4] Common Council of Alexandria *v.* Brockett, 2 Cranch C. C. (U. S.) 13.

[5] Chicago Packing &c. Co. *v.* Tilton, 87 Ill. 548; *ante*, § 1057.

[6] Co. Litt. 56 b, 59 b; Wilson *v.* Hoare, 10 Ad. & El. 236; Bell *v.* Wardell, Willes, 202, 204.

would be unreasonable, and which the court would, therefore, not allow to be applied in the government of the rights of the parties.[1]

§ 1571. **Reasonableness of the Charges of Boom Companies for driving Logs of other Owners mingled with theirs, and Circumstances which justify the same.** — Under a rule of law which the Supreme Court of Michigan were, prior to an adequate statutory enactment,[2] obliged to declare to meet the very peculiar and difficult case of logs of an individual owner becoming mingled in driving them down a river with those of the boom company created for the purpose of log driving under the statutes of that State, — where the logs of an individual owner became mingled with those in the charge of a boom company without the owner's consent, and without the fault of the company, the company acquires a lien for their services in driving them, which they do not waive by refusing to deliver them to the owner on demand unless he tenders, not only a reasonable compensation for the service, but enough to cover the cost of separating his logs from the rest. The court further held that, in an action involving the existence of a lien for such service, a full showing should be had as to the items which go to the making up of the claim, and that a full cross-examination should be permitted; and further, that the reasonableness of the claim is *for the jury*, and that they cannot be instructed a sto their conclusions thereon.[3] In an action by a boom company for running certain logs which have thus become mingled with those in their charge, it has been further held that it is *for the jury* to decide whether any of the various items of the account properly enter into it, and whether the charges of the company are reasonable: whether it was proper for the company to interfere to take care of the defendant's logs or to detain them temporarily to prevent loss to their owners; and whether an artificial channel, provided

[1] Bourke *v.* James, 4 Mich. 336; *ante*, § 1057.

[2] Such a statute was afterwards enacted. Pub. Laws of Michigan 1883, p. 72.

[3] Hall *v.* Tittabawassee Boom Co., 51 Mich. 377, 409.

by the company, was useful for clearing the river and securing the safe delivery of the logs.[1]

§ 1572. Reasonableness of Contracts: General Observations. — Whether a contract is void as being an unreasonable restraint of trade may, it seems, under circumstances, be a question for the jury, though in general it is a *question of law*.[2] It is believed that it is generally, if not universally, decided as a question of law; and the writer may add that he has met with no cases in American jurisdictions which submit to juries the question of the reasonableness of stipulations in contracts. The current of decisions runs entirely the other way.

§ 1573. Contracts limiting the Common-Law Liability of Carriers. — This is seen in the manner in which the law deals with stipulations in contracts between carriers and shippers, by which the carrier undertakes to discharge himself of the liability imposed upon him by the common law as an insurer of the goods against all loss or damage happening from other causes than the act of God or the public enemy. The law holds such stipulations void and discharges them, in so far as they attempt to exonerate the carrier from liability for loss or damage happening in consequence of the negligence, fraud, or other fault of himself, his agents or servants.[3]

§ 1574. Stipulation with a Common Carrier as to Time of bringing Suit for Loss. — Among the stipulations which common carriers make for the purpose of evading the liability cast upon them by the common law, is one that, in case of loss or damage to the goods received by them for carriage, suit shall be brought within a specified time. It is held that such contracts do not contravene the policy of the law, provided the time limited is not so short as to be unreasonable; and it will be a

[1] Sturgeon River Boom Co. *v.* Nester, 55 Mich. 113.

[2] Tallis *v.* Tallis, 1 El. & Bl. 391; *s. c.* 22 L. J. Q. B. 185; 18 Eng. L. & Eq. 151; *Ante* §§ 1096, 1097.

[3] *Post*, § 1851 *et seq.*

question of law for the court whether it is reasonable or unreasonable.[1]

§ 1575. Stipulations as to Notice of Loss in Case of the Carriage of Live stock. — It has been held that a contract between a carrier of live stock and a shipper by which it is provided that no claim for loss or damage shall be allowed or sued for, unless written notice, verified by affidavit, shall be given to the carrier's general agent, at a designated place, within five days after the removal of the stock from its cars, is reasonable and valid,[2] thus deciding it as a *question of law*.

§ 1576. Stipulations by Telegraph Company as to Time of giving Notice of Claims for Damages for Erroneous Transmission of Messages. — It is held that it is competent for a telegraph company to make a reasonable stipulation with its customers that claims for damages shall be made within a reasonable time. It is said that, "when a definite term is fixed, the question of its reasonableness is to be determined by the court;" but that, "where the only limitation is that a thing shall be done within a reasonable time, it is proper *for the jury* to say what is a reasonable time, in view of the circumstances of the case."[3] Applying this principle, it has been held that *thirty*,[4] and even *twenty days*[5] is not an unreasonable time, as matter of law.[6]

§ 1577. Stipulation in Insurance Policy as to time of giving Notice of Loss. — Stipulations in policies of fire insurance requiring the policy-holder to give notice of the loss within *thirty days* thereafter are upheld, though the courts are liberal in interpreting various acts of the company as a waiver of such a stipulation.[7]

[1] Thompson *v.* Chicago &c. R. Co., 22 Mo. App. 321, 326.

[2] Dawson *v.* St. Louis &c. R. Co., 76 Mo. 514; Brown *v.* Wabash &c. R. Co., 18 Mo. App. 568, 577.

[3] Massengale *v.* Western Union Tel. Co., 17 Mo. App. 257, 260.

[4] *Ibid.*

[5] Heimann *v.* Western Union Tel. Co., 57 Wis. 562.

[6] Compare Wolf *v.* Telegraph Co., 62 Pa. St. 83.

[7] Russell *v.* State Ins. Co., 55 Mo. 585; *ante*, § 1296.

§ 1578. What Sum of Money carried in a Passenger's Trunk is a Reasonable Sum. — It is held that the baggage which a passenger has entrusted to a carrier with whom the owner has taken passage, is under the same protection as goods which are entrusted to a common carrier; that a proper sum of money for traveling expenses, contained in the trunk of a passenger, is to be considered as a part of his personal baggage, and, in case of its loss, the passenger may recover the value of the same; that this amount must be measured, not alone by the requirements of the transit over a particular part of the entire route to which the line of one class of carriers extends, but must embrace the whole of the contemplated journey; and that it includes such an allowance for expenses or sickness, and for sojourning by the way, as a reasonably prudent man would consider it necessary to make.[1] Beyond a small amount sufficient for traveling expenses merely, it is held that money, whether in bank-notes or in specie, is not properly baggage.[2] While it has been held in some instances that even small amounts of money, taken along by a traveler to defray his traveling expenses, are not properly packed in his baggage,[3] yet the weight of authority is to the contrary.[4] Sev-

[1] Merrill *v.* Grinnell, 30 N. Y. 594.

[2] Phelps *v.* London &c. R. Co., 19 C. B. (N. S.) 321; *s. c.* 11 Jur. (N. S.) 652; 34 L. J. (C. P.) 259; 13 Week. Rep. 782; 12 L. T. (N. S.) 496; Butcher *v.* London &c. R. Co., 16 C. B. 13; 1 Jur. (N. S.) 427; 24 L. J. (C. P.) 137; Grant *v.* Newton, 1 E. D. Smith, 95; Whitmore *v.* Str. Caroline, 20 Mo. 513; Merrill *v.* Grinnell, 30 N. Y. 594; Bomar *v.* Maxwell, 9 Humph. (Tenn.) 621; Doyle *v.* Kiser, 6 Ind. 242; Jordan *v.* Fall River R. Co., 5 Cush. (Mass.) 69; Dunlap *v.* International Steamboat Co., 98 Mass. 371; Dibble *v.* Brown, 12 Ga. 217; Hellman *v.* Holladay, Woolw. 365; Hutchings *v.* Western R. Co., 25 Ga. 61; Hickox *v.* Naugatuck R. Co., 31 Conn. 281; The Ionic, 5 Blatch. 538; Senecal *v.* Richelieu Co., 15 Lower Canada Jur. 1; Orange Co. Bank *v.* Brown, 9 Wend. (N. Y.) 85; Davis *v.* Michigan &c. R. Co., 22 Ill. 278.

[3] Grant *v.* Newton, 1 E. D. Smith (N. Y.), 95; Davis *v.* Michigan &c. R. Co., 22 Ill. 278.

[4] Bomar *v.* Maxwell, 9 Humph. (Tenn.) 621; Merrill *v.* Grinnell, 30 N. Y. 594; Johnson *v.* Stone, 11 Humph. (Tenn) 419; Doyle *v.* Kiser, 6 Ind. 242; Jordan *v.* Fall River Co., 5 Cush. (Mass.) 69; Duffy *v.* Thompson, 4 E. D. Smith, 178; Weed *v.* Saratoga &c. R. Co., 19 Wend. (N. Y.) 534; Cincinnati &c. R. Co. *v.* Marcus, 38 Ill. 219; Torpey *v.* Williams, 3 Daly (N. Y.), 162; Hickox *v.* Naugatuck &c. R. Co., 31 Conn. 281; Illinois &c. R. Co. *v.* Copeland, 24 Ill. 332; Cadwallader *v.* Grand Trunk Co., 9 Lower Canada Rep. 169; Orange Co. Bank *v.* Brown, 9 Wend. (N. Y.) 85.

eral authorities also concur in holding that, what is a reasonable amount of money which a passenger may thus take with him in his trunk, so as to charge the carrier with liability therefor as an insurer, is a *question of fact* for a jury, to be determined upon the evidence touching the circumstances of the traveler and of the journey.[1]

§ 1579. What amount of Baggage for a Passenger is Excessive. — The same principles apply in respect of the quantity of baggage which a traveler is entitled to take as such.[2] It has been laid down, in a case in the Supreme Court of the United States, that the liability of a carrier for the loss of passengers' baggage does not extend beyond ordinary baggage, or such baggage as a traveler usually carries with him for his personal convenience; that the contract of carriage "only implies an undertaking to transport such a limited quantity of articles as are ordinarily taken by travelers for their personal use and convenience, — such quantity depending, of course, upon the situation of the party, the object and length of his journey, and many other considerations."[3] An English case has thus expressed the rule: "Whatever the passenger takes with him for his personal use or convenience, according to the habits or wants of the particular class to which he belongs, either with reference to the immediate necessities or to the ultimate purpose of the journey, must be considered as personal baggage."[4] And whether the amount of baggage which a passenger takes along with him on a particular journey is reasonable or excessive, within the foregoing rule, is a *question of fact* for the jury. It was so held where a Russian countess, of great wealth and high

[1] Merrill *v.* Grinnell, *supra*; Johnson *v.* Stone, 11 Humph. (Tenn.) 419; Jordan *v.* Fall River Co., 5 Cush. (Mass.) 69; Duffy *v.* Thompson, 4 E. D. Smith (N. Y.), 178; Weed *v.* Saratoga &c. R. Co., 19 Wend. (N. Y.) 534; Grant *v.* Newton, 1 E. D. Smith (N. Y.), 95.

[2] See Angell on Carriers, § 115.

[3] Hannibal &c. R. Co. *v.* Swift, 12 Wall. (U. S.) 262; New York &c. R. Co. *v.* Fraloff, 100 U. S. 24; *s. c.* 9 Cent. L. J. 432; 8 Rep. 801; 20 Alb. L. J. 409; Thomp. Carr. Pass. 502.

[4] Macrow *v.* Great Western R. Co., L. R. 6 Q. B. 612, per Lord Cockburn, C. J.

social position, traveling in America as she had traveled in many countries, put on board a railway six ordinary travel-worn trunks, one of which contained a large quantity of wearing apparel, including many elegant and costly dresses and also rare and valuable laces, which she had been accustomed to wear upon different occasions when on visits or frequenting theaters or attending dinners, balls or receptions, — a portion of which lace had been made by her ancestors upon their estates in Russia. One of these trunks was broken open and rifled in the hands of the railway carrier, and two hundred yards of valuable lace stolen. She brought an action against the carrier for the value of the same, and recovered a verdict of $10,000. A judgment on this verdict was affirmed by the Supreme Court of the United States. The court, speaking through Mr. Justice Harlan, said: "To the extent, therefore, that the articles carried by the passenger for his personal use exceed in quantity and value such as are ordinarily or usually carried by passengers of like stations and pursuing like journeys, they are not baggage for which the carrier, by general law, is responsible as insurer. In cases of abuse by the passenger of the privilege which the law gives him, the carrier secures such exemption from responsibility, not however, because the passenger, uninquired of, failed to disclose the character and value of the articles carried, but because the articles, being in excess of the amount usually or ordinarily carried under like circumstances, would not constitute baggage within the true meaning of the law. The laces in question confessedly constituted a part of the wearing apparel of the defendant in error. They were adapted to, and exclusively designed for personal use, according to her convenience, comfort, or tastes, during the extended journey upon which she had entered. They were not merchandise, nor is there any evidence that they were intended for sale, or for purposes of business. Whether they were such articles, in quantity and value, as passengers of like station, and under such circumstances ordinarily or usually carry for their personal use, and to subserve their convenience, gratification, or comfort while traveling, was not a pure question of law for the sole and final determination of the court, but a

question of fact for the jury, under the proper guidance from the court as to the law governing such cases. It was for the jury to say to what extent, if any, the baggage of defendant in error exceeded in quantity and value that which was usually carried without extra compensation, and to disallow any claim for such excess." [1]

§ 1580. **What is Baggage a Mixed Question of Law and Fact.** — It is frequently said that what is baggage is a *mixed question* of law and fact, to be determined by the jury under proper instructions from the court.[2] It cannot be decided as a question of law merely, upon any given state of facts, because no general rule of law can be formulated as to what is or what is not a reasonable amount of baggage to be carried by a passenger in a particular case. It is rather a question to be determined upon the aggregate experience of twelve men in the jury box, than by a single judge on the bench. The adjudications seem to justify the statement that anything may be carried as personal baggage which travelers usually carry for their *personal use*, comfort, instruction or amusement, having regard to the circumstances of each particular case.[3] No doubt there are cases where the evidence, not being conflicting or doubtful, the question may be decided as a matter of law. Thus, it has been held, in a multitude of cases, that a passenger cannot carry *merchandise* in his personal

[1] New York &c. R. Co. *v.* Fraloff, 100 U. S. 24, 29; *s. c.* 9 Cent. L. J. 432; 8 Rep. 801; 20 Alb. L. J. 409; Thomp. Carr. Pass. 502, 507.

[2] Brock *v.* Gale, 14 Fla. 523; Dibble *v.* Brown, 12 Ga. 217; Parmalee *v.* Fischer, 22 Ill. 212.

[3] Parmalee *v.* Fischer, 22 Ill. 212; Dibble *v.* Brown, 12 Ga. 217; American Contract Corp. *v.* Cross, 8 Bush, (Ky.) 472; Cincinnati &c. R. Co. *v.* Marcus, 38 Ill. 219; Dexter *v.* Syracuse &c. R. Co., 42 N. Y. 326; Gleason *v.* Goodrich Transp. Co., 32 Wis. 85; Del Valle *v.* Str. Richmond, 27 La. Ann. 90; Hutchings *v.* Western &c. R. Co., 25 Ga. 61; Macrow *v.* Great Western R. Co., L. R. 6 Q. B. 612; *s. c.* 40 L. J. (C. P.) 300; 24 L. T. (N. S.) 618; 19 Week. Rep. 873; Mississippi &c. R. Co. *v.* Kennedy, 41 Miss. 671; Toledo &c. R. Co. *v.* Hammond, 33 Ind. 379; Wilson *v.* Grand Trunk R. Co., 56 Me. 60; Walsh *v.* Str. H. M. Wright, 1 Newb. Adm. 494; Cadwallader *v.* Grand Trunk R. Co., 9 Lower Can. 169; New Orleans &c. R. Co. *v.* Moore, 40 Miss. 39; Pardee *v.* Drew, 25 Wend. (N. Y.) 459.

baggage to avoid payment of freight upon it, and in case of its loss, hold the carrier to his liability as an insurer.[1]

§ 1581. The same Rule applicable to Baggage of a Guest Lost at a Public Inn. — The liability of an innkeeper for the goods of his guest is analogous to that of a common carrier.[2] Both had their origin in what was termed the *custom of the realm*. At common law, the liability of an innkeeper seems to be larger than that of a common carrier, because it extended to the goods of the guest which the innkeeper received, without reference to whether they were properly denominated baggage. Thus, it is said in an ancient and leading case in England: "Therefore, if one brings a bag or chest, etc., of evidence into an inn, or *obligations*, *deeds* or other *specialties*, and by default of the innkeeper they are taken away, the innkeeper shall answer for them, and the writ shall be *bona et catalla* generally, and the declaration shall be special. These words, *bona et catalla*, restrain the latter words to extend only to movables, * * * and these words aforesaid, *absque subtractione seu amissione*, extend to all movable goods." [3] There seems to have been a disposition in recent times to limit the liability to what is termed *ordinary baggage*, though, where the subject is not governed by statute, as it now is in most of the States, the common-law rule

[1] Cahill *v.* London &c. R. Co., 10 C. B. (N. S.) 154; *s. c.* 7 Jur. (N. S.) 1164; 30 L. J. (C. P.) 289; 3 Week. Rep. 653; 4 L. T. (N. S.) 246; affirmed on appeal 13 C. B. (N. S.) 818; 8 Jur. (N. S.) 1063; 31 L. J. (C. P.) 271; 10 Week. Rep. 391; Belfast &c. R. Co. *v.* Keys, 9 H. L. Cas. 556; *s. c.* 8 Jur. (N. S.) 367; 9 Week. Rep. 793; 4 L. T. (N. S.) 841; Great Northern R. Co. *v.* Shepherd, 8 Exch. 30; *s. c.* 7 Eng. Ry. Cas. 310; 21 L. J. (Exch.) 286; Mississippi &c. R. Co. *v.* Kennedy 41 Miss. 671; Collins *v.* Boston &c. R. Co., 10 Cush. (Mass.) 506; Dibble *v.* Brown, 12 Ga. 217; Smith *v.* Boston &c. R. Co., 44 N. H. 325; Bell *v.* Newton, 4 E. D. Smith, 59; Pardee *v.* Drew, 25 Wend. (N. Y.) 459; Hutchings *v.* Western &c. R. Co., 25 Ga. 61; Mich. &c. R. Co. *v.* Oehm, 56 Ill. 293; Mich. &c. R. Co. *v.* Carrow, 73 Ill. 348; Richards *v.* Westcott, 2 Bosw. (N. Y.) 589; Ross *v.* Missouri &c. R. Co., 4 Mo. App. 583; Lee *v.* Grand Trunk R. Co., 36 Upper Can. (Q. B.) 350; Beckman *v.* Shouse, 5 Rawle (Pa.), 179; Blumantle *v.* Fitchburg R. Co., 127 Mass. 322; *s. c.* 20 Alb. L. J. 354.

[2] *Post*, § 1843.

[3] Calye's Case, 8 Coke Rep. 63. See note to this case in 1 Smith Lead. Cas. 131.

no doubt still generally prevails. It has been supposed that, under the rule which would limit the liability to what is termed ordinarily baggage, that is to such articles of necessity or personal convenience as are usually carried by travelers for their personal use, it would be a *question for a jury* to determine what is baggage under the circumstances of each particular case.[1]

§ 1582. **Whether "Cash Letters" belong to the Class of Goods which the Owners of a Steamboat Undertook to Carry for Hire.** — It has been held, under circumstances, not improper for the court to *submit to the jury* the question whether cash letters belonged to that class or character of goods which the owners of a steamboat, — sued for the loss of bank bills inclosed in sealed letters, — undertook to carry for hire.[2]

§ 1583. **Difference of Risk in the Carriage of Collected Parcels.** — It has been held a question for the jury whether there was a difference of risk to a carrier in carrying what was known as packed parcels, containing a number of parcels belonging to different individuals, collected by a person who followed the trade of collecting parcels and transmitting them to his agent, in the country for distribution to their various owners, and other small parcels called "inclosures," — the *question* being one *of fact*, and not of law.[3]

§ 1584. **Reasonableness of a Qualified Refusal by a Common Carrier to Deliver Goods.** — In case of goods in the hands of a common carrier, if delivery is demanded by the person entitled to receive them, and the refusal of the carrier to deliver them is absolute and unqualified, this is sufficient evidence of a *conversion;* but if the refusal is qualified, the question then is, whether the qualification is reasonable, for if reasonable and made in good faith, it is no evidence of a conversion.[4] In other

[1] Sasseen *v.* Clark, 31 Ga. 242.

[2] Knox *v.* Rives, 14 Ala. 249.

[3] Crouch *v.* Great Northern R. Co., 11 Ex. 742; *s. c.* 34 Eng. L. & Eq. 573.

[4] McEntee *v.* New Jersey Steamboat Co., 45 N. Y. 34, 37; Alexander *v.* Southey, 5 Barn. & Ald. 247; Holbrook *v.* Wight, 24 Wend. (N. Y.) 169; Rogers *v.* Weir, 34 N. Y. 463; Mount *v.* Derick, 5 Hill (N. Y.), 455.

words, if at the time of the demand, a reasonable excuse is made in good faith for the non-delivery, the goods being evidently kept with a view to deliver them to the true owner, there is no conversion.[1] The reason of this rule is that carriers are under an obligation to deliver the goods to the rightful owner; they must see to it that the goods are delivered to the right person, for if the goods are delivered to the wrong person, either by an innocent mistake or through fraud of third persons, as upon a forged order, the carrier will be responsible, and the wrongful delivery will be treated as a conversion.[2] They will, therefore, be protected in refusing to deliver, until reasonable evidence is furnished them that the party claiming is the party entitled, so long as they act in good faith and solely with a view to a proper delivery; and it has been held, under circumstances, that whether their excuse for refusing delivery, grounded upon the insufficient identification of the claimant, was reasonable, is a *question of fact* for a jury,[3] and this would seem to be the rule in most cases.

§ 1585. Necessaries Furnished to Infants and Married Women.—It seems that, whether goods purchased by a *minor* are necessaries, is a *question of law*, and if necessaries, that their quantity, quality and reasonable value are *matters of fact*.[4] It has been reasoned, in a suit of chancery against a *married woman* to charge a note, signed by herself and her husband, upon her separate realty, that it is a *mixed question* of law and fact, for a master to find, whether the articles for which the note was given were necessaries.[5]

§ 1586. Easement: Reasonable Use of Right of Way.—Where premises are demised or conveyed, "with right of way

[1] McEntee *v.* New Jersey Steamboat Co., *supra*.

[2] *Id.*; Hawkins *v.* Hoffman, 6 Hill (N. Y.), 586; Powell *v.* Myers, 26 Wend. (N. Y.) 591; Devereux *v.* Barclay, 2 Barn. & Ald. 702; Guillaume *v.* Hamburgh &c. Packet Co., 42 N. Y. 212; Duff *v.* Budd, 3 Brod. & Bing. 177; *post*, §§ 1836, 1875.

[3] McEntee *v.* New Jersey Steamboat Co., 45 N. Y. 34.

[4] Garr *v.* Haskett, 86 Ind. 373; Henderson *v.* Fox, 5 Ind. 489.

[5] Winship *v.* Waterman, 56 Vt. 181.

thereto," it will be a question for a jury what is a reasonable use of such right of way. Thus, where a right of way was expressed to be "through the gate-way" of the plaintiff (which gate-way led to other premises of the plaintiff), and at the time of the lease, carts could come in to load and unload, and turn around and go out again, but, through alterations of the premises, could not do so now without slightly trenching upon the plaintiff's premises, — it was held that, in the reasonable use of the right of way, the defendants had a right to do this, and that, what was a reasonable use was a *question for the jury*.[1]

§ 1587. **Contest as to whether a Deed passes a Right of Way as an Easement: Whether a New Way can be made without Unreasonable Labor and Expense** — In an action to recover damages for the obstruction of a way by erecting a fence across it, the plaintiff claiming the way as an easement, being appurtenant to land conveyed to her by a deed, it will be a question for the jury on all the evidence, whether a new way could be made without *unreasonable labor and expense*. In such a case the applicatory rule of law has been held to be that a way over other land of a grantor in a deed may pass as appurtenant to the land granted, although there are no insuperable physical obstacles to prevent access by another way, if such other way cannot be made without unreasonable labor and expense; and, in determining this question, *a jury may consider* the comparative value of the land and the probable cost of such a way.[2]

§ 1588. How Jury Instructed in such a Case. — "The jury are instructed that the deed under which the plaintiff claimed, conveyed whatever was necessary to the beneficial enjoyment of the estate granted, and in the power of the grantor to convey; that it was not enough for the plaintiff to prove that the way claimed would be convenient and beneficial, but she must also prove that no other way could be

[1] Hawkins *v.* Carbines, 3 Hurl. & N. 911.

Pettingill *v.* Porter, 8 Allen (Mass.), 1. Compare Ewart *v.* Cochrane, 7 Jur. (N. s.) 925; Leonard *v.* Leonard, 2 Allen (Mass.), 543; Carbrey *v.* Willis, 7 Allen (Mass.), 264

conveniently made from the highway to her intestate's house, without unreasonable labor and expense; that unreasonable labor and expense means excessive and disproportionate to the value of the property purchased; and that it was a question for the jury, on all the evidence, whether such new way could be made without such unreasonable labor and expense." [1]

[1] Pettingill *v.* Porter, 8 Allen (Mass.) 1, 6.

CHAPTER LIII.

MALICIOUS PROSECUTION.

ARTICLE I. — WHAT QUESTIONS FOR THE JUDGE AND WHAT FOR THE JURY.
ARTICLE II. — JURY HOW INSTRUCTED IN SUCH ACTIONS.

ARTICLE I. — WHAT QUESTIONS FOR THE JUDGE AND WHAT FOR THE JURY.

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1622. Effect of the Rule upon Pleading.

1623. When Error of Submitting Question of Probable Cause to Jury no Cause of Reversal.

§ 1593. Essential Grounds of the Action. — In order to sustain a civil action to recover damages for the malicious prosecution of a prior criminal action, two things must concur: malice and the want of probable cause.[1] In other words, the plaintiff must show that the prosecution originated in the malice of the prosecutor and without probable cause.[2] Neither of these ingredients is sufficient without the other. It is not sufficient to prove express malice, unless the want of a probable cause is also shown.[3] The malice here spoken of is *express malice*, that is to say, *malice in fact*, as distinguished from malice in law. "Actions of slander," it is said, "are sometimes maintainable without proof of actual malice, — *constructive* malice being sufficient. The reason for the distinction is this: Slander is always against public policy, and very rarely, if ever, springs from other than malicious motives; but the prosecution of alleged criminals is not against public policy, and it is only occasionally that such a prosecution is commenced without probable cause. Hence, in actions of slander, the falsity of the charge being shown, *malice* is established by a legal presumption, and proof of *actual* malice is not required; but, in actions for malicious prosecution, the law allows of no such presumption, and requires proof of actual malice to sustain them.[4] In other words, the plaintiff must show that the defendant acted from a *malicious motive* in prosecuting him, and that he had no *sufficient reason* to believe him guilty.

[1] Johnstone *v.* Sutton, 1 T. R. 544; Wade *v.* Walden, 23 Ill. 425; Israel *v.* Brooks, 23 Ill. 575; Potter *v.* Seale, 8 Cal. 217; Stone *v.* Crocker, 24 Pick. (Mass.) 81, 83; Jones *v.* Gwynn, 10 Mod. 214; Farmer *v.* Darling, 4 Burr. 1971, 1974; Golding *v.* Crowle, Sayer, 1; Lyon *v.* Fox, 2 Brown (Pa.), Apx. 69; Munns *v.* Dupont, 3 Wash. C. C. 31; Kelton *v.* Bevins, Cooke (Tenn.), 90; Marshall *v.* Bussard, Gilm. (Va.) 9; Bell *v.* Graham, 1 Nott & McC. (S. C.) 278; Vanduzor *v.* Linderman, 10 Johns. (N. Y.) 106; White *v.* Dingley, 4 Mass. 435; Lindsay *v.* Larned, 17 Mass. 190.

[2] Center *v.* Spring, 2 Ia. 393, 406.

[3] *Ibid.*

[4] Humphreys *v.* Parker, 52 Me. 502, 506.

A man may, from pure malice, prosecute another who is really guilty, or whom he may, upon sufficient grounds, believe to be guilty, and though the accused be in fact innocent, no action will lie against the prosecutor.[1]

§ 1596. **Distinction between Actions for Malicious Prosecution and Actions for Trespass or False Imprisonment.** — "There is," said Lord Mansfield, "no similitude or analogy between an action of trespass, and this kind of action. An action of trespass is for the defendant's having done that which, upon the stating of it, is manifestly illegal. This kind of action is for a prosecution which, upon the stating of it, is manifestly legal." [2]

1597. Definition of Express Malice. — Express malice or malice in fact is not necessarily envy, hatred or ill-will; but in its legal sense it is that state of mind which prompts the doing of an act without just or legal provocation or excuse. "In a legal sense, malice has a meaning different from its popular signification. Acts willfully and designedly done, which are unlawful, are malicious in respect to those to whom they are injurious. One may prosecute a laudable purpose with an honest intention, but in such a manner, and in such disregard of the rights of others, as to render his acts unlawful. Prosecutions may be instituted and pursued with pure motives, to suppress crimes, but so regardless of established forms of law, and of judicial proceedings, as to render the transactions illegal and malicious. The general motive may be upright and commendable, while the particular acts, in reference to others, may be malicious in the legal acceptation of the term; so that an act may be malicious in a legal sense, which is not prompted or characterized by malevolence or corrupt design." [3]

§ 1598. A Precedent of an Instruction on this Question. — It was accordingly held that the following instruction, in an action of trespass on the case for a conspiracy in commencing a prosecution, and an abuse

[1] Stone *v.* Crocker, 24 Pick. (Mass.) 81, 83.

[2] Johnstone *v.* Sutton, 1 T. R. 544.

[3] Page *v.* Cushing, 38 Me. 523, 526. opinion by Howard, J.

of legal process, was correct: "It is not necessary, to maintain the action, that the defendants should have had any corrupt design, or that there should have been any moral turpitude in the act complained of. That defendants might have acted from good motives, and probably did; but if they intended to take liquors from the boat which they knew were there merely on freight, and combined and confederated for that purpose, they were not justified; and if, by such combination for such unlawful purpose, and the acts done by them in effecting such purpose, they occasioned damage to the plaintiffs, they would be liable to pay such damage." [1]

§ 1599. Definition of Probable Cause: Importance of understanding this Subject. — The importance of having a clear idea of the meaning of the term probable cause is seen in the fact that the want of probable cause, rather than the presence of malice, is the essential ground of the action, and, as hereafter seen, usually furnishes the evidence from which the malice is implied. "The essential ground of this action," said Lord Mansfield, "is that a legal prosecution was carried on without a probable cause. We say this is emphatically the essential ground, because every other allegation may be implied from this; but this must be substantively and expressly proved, and cannot be implied. From the want of probable cause malice may be, and most commonly is, implied. The knowledge of the defendant is also implied." [2]

§ 1600. How defined. — Probable cause has been variously defined as follows: "A suspicion, founded on circumstances sufficiently strong to warrant a reasonable man in the belief that the charge is true." [3] "A reasonable ground of suspicion, supported by circumstances, sufficiently strong in themselves to warrant a cautious man in the belief that the person accused is guilty of the offense with which he is charged." [4] "Such facts and circumstances as would induce an ingenuous and unprejudiced man, of common capacity, in the defendant's situation, to

[1] Page *v.* Cushing, 38 Me. 523, 524.
[2] Johnstone *v.* Sutton, 1 T. R. 544.
[3] Potter *v.* Seale, 8 Cal. 217, 221.
[4] Munns *v.* Dupont, 3 Wash. C. C. 31; Center *v.* Spring, 2 Ia. 393, 407; Ash *v.* Marlow, 20 Oh. 119, 129; Cole *v.* Curtis, 16 Minn. 182, 195; Bacon *v.* Towne, 4 Cush. (Mass.) 217; Foshay *v.* Ferguson, 2 Denio (N. Y.), 617; Richey *v.* McBean, 17 Ill. 63.

believe the plaintiff to be guilty, would justify a criminal prosecution against him." [1] "That apparent state of facts, found to exist upon reasonable inquiry, — that is, such as the given case rendered convenient and proper, — which would induce a reasonable, intelligent and prudent man to believe that the accused person had committed, in a criminal case, the crime charged; or in a civil case, that a cause of action existed." [2]

§ 1601. The Defendant's Knowledge, how far an Ingredient. — Among the facts which bear upon the question of probable cause are the defendant's *knowledge* of the alleged ground of the accusation at the time when he prosecuted, and his belief, at that time, that the conduct forming such ground of accusation amounted to the offense charged. If the defendant did not so believe, the want of probable cause is established, though the imputed offense appeared *prima facie* to have been committed by the plaintiff, and the fact to have been known to the defendant, before the charge was made. The absence of belief must be proved by the plaintiff; and, if it be not proved, the defect is not supplied, for the purpose of showing want of probable cause, by evidence that the defendant made use of the charge as a means of obtaining an unfair advantage over the plaintiff.[3] Accordingly, if, in such an action, the evidence bearing upon this question is conflicting, the jury, according to the English practice, may be asked by the judge whether or not the defendant, at the time when he prosecuted the prior action, *knew* of the existence of those circumstances which tend to show probable cause, or *believed* that they amounted to the offense which he charged against the plaintiff; and if the verdict of the jury negatives either of these facts, the judge will decide, as a point of law, that the defendant had no probable cause for instituting the prosecution.[4] Thus, in an action for maliciously, and without

[1] Stone *v.* Crocker, 24 Pick. (Mass.) 81, 86.

[2] Lacy *v.* Mitchell, 23 Ind. 67.

[3] Turner *v.* Ambler, 10 Ad. & El. (N. S.) 252.

[4] *Ibid.* See also Haddrick *v.* Heslop, 12 Ad. & El. (N. S.) 267, 274, 277; Broad *v.* Ham, 5 Bing. (N. C.) 722.

reasonable or probable cause, prosecuting the plaintiff for perjury, it appeared that the statements alleged to be perjured had been made by the plaintiff when testifying as a witness in an action against the defendant, respecting facts known to the defendant only by the relation of others. There was evidence that the defendant had been told that the plaintiff's evidence was willfully false; but there was also evidence that the defendant had said that he had indicted the plaintiff merely to stop his mouth as a witness in another proceeding. The judge directed the jury that "if the plaintiff had, in fact, sworn falsely; or if the defendant, at the time he preferred and prosecuted the indictment, acting upon the information he had received, believed and had reasonable grounds for believing, that the plaintiff had sworn falsely, then there was reasonable and probable cause for preferring and prosecuting the indictment; but if the defendant, at the time he preferred and prosecuted the indictment, did not believe the information he had received to be true, but in his own mind believed, and had reasonable grounds to believe, that the plaintiff had not sworn falsely, or, still more, if he believed that the plaintiff had spoken the truth, then there was no reasonable or probable cause for preferring and prosecuting the indictment." It was held by the Court of Exchequer Chamber, that this direction was correct.[1]

§ **1602. May depend upon Reasonable Grounds of Belief.** — This is illustrated by an English case, where the criminal prosecution had been for sheep-stealing, and it appeared, at the trial of the action for malicious prosecution, that the plaintiff was possessed of a sheep, which the defendant claimed belonged to a lot of sheep which had been stolen from him; that the plaintiff had given an account of the way he became possessed of it, which, if it belonged to the defendant, must have been willfully false; that the defendant took away the sheep from the plaintiff, whereupon plaintiff sued him for so doing, in the county court; that, to stop this action in the county court, the defendant pro-

[1] Heslop *v.* Chapman, 23 L. J. (Q. B.) 49.

cured the plaintiff to be indicted for larceny, of which charge he was afterwards acquitted. In summing up to the jury, Baron Bramwell, assuming these facts to be true, asked them whether the defendant had reasonable grounds for his belief that the plaintiff had stolen the sheep. On their finding that he had, the learned judge ruled that there was reasonable and probable cause for the prosecution. On review, it was held by Coleridge and Crompton, JJ., that, under these circumstances, the finding of the jury on that one point, in addition to the facts which were beyond dispute, made out a complete case of reasonable and probable cause, and that the direction of the trial judge was therefore right.[1]

§ 1603. **How Jury instructed as to its Meaning.** — This subject depends upon the facts of each particular case, and therefore escapes definition. But it has been held in one case, where the prior criminal prosecution was for an *assault*, that the judge rightly directed the jury that if the defendant preferred the indictment with the *consciousness that he was in the wrong* in the transaction which led to the assault upon him, there was no reasonable or probable cause for the indictment.[2] An action for malicious prosecution for *perjury* was founded on the following circumstances: — The plaintiff's father had been tenant of a house to the defendant, and was sued in the County Court for rent in arrear. The defense was surrender before any rent due, and the plaintiff, as a witness, swore that he, at the defendant's request, gave him up the key on a particular day. Upon this evidence perjury was assigned, and the plaintiff was indicted, tried and acquitted. He then brought an action for malicious prosecution. In this action the judge directed the jury: 1. If they believed that the plaintiff did give up the key, and the defendant, knowing that he had done so, indicted him for perjury, they should find for the plaintiff. 2. If they did not believe the plaintiff, they should find for the defendant. 3. If they were in doubt as to which party was speaking the truth, they should find for the de-

[1] Douglas *v.* Corbett, 6 El. & Bl. 511. Erle, J., dissented.

[2] Hinton *v.* Heather, 14 Mees & W. 131.

fendant, as the plaintiff would not have made out his case. 4. Alternatively, if they thought that the plaintiff did give up the key, but that the defendant, having forgotten the fact, prosecuted him under an honest impression that he had corruptly sworn that he had done what he had not done, they would not be justified in finding that the defendant had maliciously and without reasonable and probable cause prosecuted the plaintiff, but might find for the defendant. It was held that this was a right direction.[1]

§ 1604. Judge not to submit each Particular Fact to Jury. — The difficulty of applying this doctrine, under the English system, was thus stated by Lord Denman, C. J., after regretting that the case of *Panton* v. *Williams*,[2] had not been brought to the House of Lords: "That case, however, does not lay down, as a rule, that the judge is to submit each particular fact to the jury, but only that he is to look at all together, ask the jury which is proved, and decide, according to the result, whether probable cause is shown or not. As to single facts, what law can he resort to in directing the jury? How can he lay down, as a general proposition of law, what particular fact shows probable cause, under the circumstances of an individual case? The fact which is probable cause in one case is not in another. What general rule can there be? There is, on any view, a difficulty; but the Court of Exchequer Chamber having decided as they did, I have always endeavored to follow their ruling."[3]

§ 1605. Evidence of Malice: Inferred from Want of Probable Cause. — It is universally conceded that the want of probable cause, for instituting the prosecution is a circumstance from which the jury may infer that it was instituted from malicious motives.[4] In other words, the want of probable cause is *evi-*

[1] Hicks *v.* Faulkner, 51 L. J. (Q. B.) 268.

[2] 2 Ad. & El. (N. S.) 169.

[3] Rowlands *v.* Samuel, 11 Ad. & El. (N. S.) 40, note.

[4] Savil *v.* Roberts, 1 Salk. 14; *s. c.* 1 Ld. Raym. 374; Johnstone *v.* Sutton, 1 T. R. 545; Purcell *v.* MacNamara, 9 East, 361; Incledon *v.* Berry, 1 Camp. 203, note; Kerr *v.* Workman, Add. (Pa.) 270; Stewart *v.* Sonneborn, 98 U. S. 187; Center *v.* Spring, 2 Ia. 393, 407; Israel *v.* Brooks, 23 Ill. 575; Grant *v.* Moore, 29 Cal. 644, 648; Pot-

dence of malice. It is competent evidence, and it may, in the opinion of the jury, be very strong evidence; but it is not conclusive evidence.[1] It is *prima facie* evidence of malice, or, in other words, evidence tending to show malice; but it does not necessarily establish the existence of malice. That is to say, malice is not an inference of law from the want of probable cause. But it is an inference of fact, to be drawn by the jury or not, as to them seems right, under all the circumstances of the case. The rule means no more than this: that malice need not be proved by direct and positive testimony, since this, in many cases, would be impossible; but it may be inferred from the facts which go to establish a want of probable cause.[2] "Actual malice may be inferred by the jury from the want of probable cause, or be proved by other circumstantial evidence, like any other fact; but it is a fact to be found by the jury, and not a fact to be established by a legal presumption."[3] The jury are *at liberty*, but are *not bound* to infer the existence of malice from the want of probable cause; and consequently, where a state of facts arises upon indisputable evidence, which, if true, shows that there was no probable cause, the judge is not authorized to tell the jury that the only question for them is the question of damages; since it still remains for them to determine whether the prosecution, although without probable cause, was malicious.[4] On the other hand, the rule being that malice may be inferred from the want of probable cause, it follows that no other evidence of malice is necessary than to show a want of probable cause for bringing the criminal action.[5] It follows also that while, as hereafter seen, want of probable cause is a question of law, yet, "*as evidence of malice*, it is a question wholly for the jury, who, even if they should think there was want of probable

ter *v.* Seale, 8 Cal. 220; Pangburn *v.* Bull, 1 Wend. (N. Y.) 345, 352; Stockley *v.* Hornidge, 8 Car. & P. 11, 18; Hicks *v.* Faulkner, 51 L. J. (Q. B.) 268, 273, per Hawkins, J.

[1] Stone *v.* Crocker, 24 Pick. (Mass.) 87.

[2] Sharpe *v.* Johnston, 76 Mo. 660; Sharpe *v.* Johnston, 59 Mo. 557; Vansickle *v.* Brown, 68 Mo. 629.

[3] Humphries *v.* Parker, 52 Me. 502, 506.

[4] Mitchell *v.* Jenkins, 5 Barn. & Ad. 588.

[5] Halliday *v.* Sterling, 62 Mo. 321.

cause, might nevertheless think that the defendant acted honestly and without ill will, or any other motive or desire than to do what he *bona fide* believed to be right in the interests of justice; in which case they ought not to find the existence of malice."[1]

§ 1606. Conclusively inferred from Criminal Prosecutions to effect some Collateral Purpose. — Criminal prosecutions, without a legal cause, instituted for the purpose of obtaining the payment of a debt, or the restitution of property, are in legal contemplation malicious.[2] Such conduct has been characterized as evidence of a "heart regardless of social duty, and fatally bent upon mischief;" and it has been said: "That evil quality of the heart which prompts a man to make a false charge against another, for the purpose of private gain or advantage, is legal malice."[3] Accordingly, where one was arrested on criminal process, in which he was falsely charged with fraud, for the purpose of coercing him to surrender to the prosecutor certain promissory notes, of which each of them was a part owner, — the prosecution was held to be without probable cause and, in legal contemplation, malicious, and a verdict for the defendant was set aside.[4]

§ 1607. Evidence to Negative Malice: Acting under Advice of Counsel. — The fact that the defendant, in instituting the criminal prosecution, acted under advice of counsel may be shown in evidence for the purpose of disproving malice; but the fact that he so acted does not conclusively disprove malice. It has accordingly been held error to instruct the jury that, "if defendant acted under the advice of counsel, malice cannot be inferred from the want of probable cause." "He may," said Wright, C. J., "have misrepresented the facts; he may not have acted *bona fide* under the counsel given, or he may himself have known or believed that there was no cause for the prosecution; and if so, he would not be protected; and malice

[1] Hicks *v.* Faulkner, 51 L. J. (Q. B.) 268, 273, per Hawkins, J.

[2] Brooks *v.* Warwick, 2 Stark. 393; McDonald *v.* Rooke, 2 Bing. (N. C.) 219.

[3] Kimball *v.* Bates, 50 Me. 308, 309.

[4] *Ibid.*

might be inferred from the want of probable cause, though he did act under the advice of counsel." [1]

§ 1608. **Evidence of want of Probable Cause: Probable Cause not inferable from Malice.** — While, as already seen, malice may be inferred from the want of probable cause, yet the converse of the rule is not true; but the rule is that the want of probable cause cannot be inferred from the most express malice.[2] "A man," said Lord Mansfield, "from a malicious motive, may take up a prosecution for real guilt, or he may, from circumstances which he really believes, proceed upon apparent guilt; in neither case is he liable to this kind of action." [3] The obvious reason is that a man is not to be held liable in damages for doing a lawful act from an evil motive. [4]

§ 1609. **Evidence of Probable Cause: Binding over by a Magistrate.** — The fact that the plaintiff was, in a criminal prosecution, committed or held to bail by a magistrate is, in one view, conclusive evidence of probable cause for commencing the proceedings, [5] while in another view it is *prima facie* evidence only. According to the latter view the judge goes far enough when he instructs the jury that, after the exhibition of the affidavit, warrant and transcript of the justice's docket, showing that the accused was bound over to court, it is incumbent on the plaintiff to show affirmatively that there was no reasonable or probable cause for the prosecution. [6]

§ 1610. **When Conviction Conclusive Evidence of Probable Cause.** — A conviction, even by a justice of the peace, if the case were within his jurisdiction, is sufficient evidence of probable cause to defeat an action for malicious prosecution, as mat-

[1] Center *v.* Spring, 2 Ia. 393, 405, 406.

[2] Johnstone *v.* Sutton, 1 T. R. 544; Wade *v.* Walden, 23 Ill. 425; Center *v.* Spring, 2 Ia. 393, 407; Israel *v.* Brooks, 23 Ill. 575; Grant *v.* Moore, 29 Cal. 644, 648; Potter *v.* Seale, 8 Cal. 220; Pangburn *v.* Bull, 1 Wend. (N. Y.) 345, 352; Stockly *v.* Hornidge, 8 Car. & P. 18.

[3] Johnstone *v.* Sutton, 1 T. R. 544.

[4] Sharpe *v.* Johnston, 76 Mo. 660.

[5] Ritchey *v.* Davis, 11 Ia. 124; 2 Greenl. Ev., § 457, and authorities cited.

[6] Ash *v.* Marlow, 20 Oh. 119, 129.

ter of law. On this subject Chief Justice Shaw said: "When the plaintiff had been convicted by a tribunal, constituted by law, with authority to render a judgment which, if not appealed from, would have been conclusive of his guilt, and such judgment is not impeached on the ground of fraud, conspiracy or subordination in its procurement, although afterwards reversed on another trial, it constitutes sufficient proof that the prosecution was not groundless, and to defeat an action for malicious prosecution." [1]

§ 1611. Malice a Question of Fact for the Jury. — In such actions the question of malice is always a question of fact for the jury.[2] This is merely an illustration of the broader rule that express malice, like express fraud, its congener, is a fact, to be proved as such, and as such to be established, if at all, by the finding of a jury. Except in a limited class of cases, which fall within the rule concerning what is called in the books *implied malice*, — cases in which the law conclusively presumes the existence of malice from the existence of some other established or admitted fact, — the existence of malice is always a question of fact for the jury; [3] and, as we have seen,[4] the malice which is essential to support this action is express, and not implied malice. Such being the law, it is error to instruct the jury that, when probable cause is not proved, the law implies malice, and that unless the jury are satisfied from the evidence that there was probable cause, they should find for the plaintiff.[5]

§ 1612. Burden of Proof. — In general the burden of proof is *on the plaintiff*, to exhibit a state of facts which show a concur-

[1] Cloon *v.* Gerry, 13 Gray (Mass.), 201. To the same point is Whitney *v.* Peckham, 15 Mass. 243. See also Cotton *v.* James, 1 Barn. & Adl. 128; Pierce *v.* Thompson, 6 Pick. (Mass.) 193.

[2] Mitchell *v.* Jenkins, 5 Barn. & Adl. 588; Anderson *v.* Kellar, 67 Ga. 58; Center *v.* Spring, 2 Ia. 393, 407; Newell *v.* Downs, 8 Blackf. (Ind.) 523; Potter *v.* Seale, 8 Cal. 217; Page *v.* Cushing, 38 Me. 523, 526; Ritchey *v.* Davis, 11 Ia. 124; Von Latham *v.* Libby, 38 Barb. (N. Y.) 339, 343; Humphries *v.* Parker, 52 Me. 502, 506; Moody *v.* Deulsch, 85 Mo. 237, 243; Halliday *v.* Sterling, 62 Mo. 321.

[3] Schofield *v.* Ferrers, 47 Pa. St. 194; United States *v.* Alden, Sprague (U. S.), 95; State *v.* Allen, 22 Mo. 318.

[4] *Ante*, § 1595.

[5] Ritchey *v.* Davis, 11 Ia. 124, 127; Schofield *v.* Ferrers, 47 Pa. St. 194.

rence of the two grounds of recovery, a prosecution set on foot out of malice and without probable cause.[1] It devolves upon him to show affirmatively, by circumstances or otherwise, that the defendant had no grounds for the prosecution — no such reasonable grounds of suspicion, sufficiently strong in itself, as to warrant a cautious man in believing that the person arrested was guilty of the offense with which he was charged.[2] Where the defendant pleads singly the truth of the facts involved in the prosecution, this, it has been held, is an assumption of the burden of proving such facts by him, in which case the plaintiff need not, in the first instance, show the want of a probable cause.[3] As was well said by Morton, J.: "The want of probable cause is the essential ground of this action. Other things may be inferred from this. But this cannot be inferred from anything else. It must be established by positive and express proof. It is not enough to show that the plaintiff was acquitted of the charge preferred against him, or that the defendant abandoned the prosecution. But the *onus probandi* is upon the plaintiff to show affirmatively, by circumstances or otherwise, as he may be able, that the defendant had no ground for commencing the prosecution." [4]

§ **1613. Probable Cause a Question of Law.** — No rule is better settled both in England[5] and in America,[6] than that in

[1] Pangburn *v.* Bull, 1 Wend. (N. Y.) 345, 352.

[2] Israel *v.* Brooks, 23 Ill. 575. See also Jacks *v.* Stimpson, 13 Ill. 701; Richey *v.* McBean, 17 Ill. 65; Hurd *v.* Shaw, 20 Ill. 356.

[3] Morris *v.* Corson, 7 Cow. (N. Y.) 281.

[4] Stone *v.* Crocker, 24 Pick. (Mass.) 81, 84; citing Purcell *v.* McNamara, 1 Camp. 199; *s. c.* 9 East, 361; Sykes *v.* Dunbar, 1 Camp. 202, note; Incledon *v.* Berry, 1 Camp. 203, note; Wallis *v.* Alpine, 1 Camp. 204, note; Shock *v.* McChesney, 4 Yeates (Pa.), 507.

[5] Sutton *v.* Johnstone, 1 T. R. 493, 510, 544, 547; *s. c.* aff'd in House of Lords, *Id.* 784; Panton *v.* Williams, 2 Ad. & El. (N. S.) 169; *s. c.* 1 Gale & Dav. 504; Michell *v.* Williams, 11 Mees. & W. 205; Hailes *v.* Marks, 30 L. J. Exch. 389; *s. c.* 7 Hurl. & N. 56; Hinton *v.* Heather, 14 Mees. & W. 131, 134; West *v.* Baxendale, 9 Com. Bench, 141; Turner *v.* Ambler, 10 Ad. & El. (N. S.) 252; Douglas *v.* Corbett, 6 El. & Bl. 511; Hill *v.* Yates, 8 Taunt. 182; *s. c.* 2 Moore, 80; Blachford *v.* Dod, 2 Barn. & Adl. 179; Lister *v.* Perryman, L. R. 4 H. L. 521; *s. c.* 39 L. J. Exch. 177.

[6] Lacy *v.* Mitchell, 23 Ind. 67, *semble*; Cloon *v.* Garry, 13 Gray (Mass.), 201; Masten *v.* Dayo, 2 Wend. (N. Y.)

civil actions for damages for the malicious prosecution of a criminal action, the question of probable cause is a question of law, which the judge must decide, upon established or conceded facts, and which it is error for him to submit to the jury.[1]

§ 1614. No Matter how Numerous or Complicated the Facts may be. — Said Tindal, C. J., in giving the opinion of the Court of Exchequer Chamber in the leading English case: "Such being the rule of law where the facts are few and the case simple, we cannot hold it to be otherwise where the facts are more numerous and complicated. It is undoubtedly attended with greater difficulty in the latter case, to bring before the jury all the combinations of which numerous facts are susceptible, and to place in a distinct point of view the application of the rule of law, according as all or some only of the facts, and inferences from facts, are made out to their satisfaction. But it is equally certain that the task is not impracticable; and it rarely happens but that there are some leading facts in each case which presents a broad distinction to their view, without having recourse to the less important circumstances that have been brought before them."[2] On the contrary, it has been held in this country that, where the circumstances which may have induced the belief in the defendant that the plaintiff had committed the crime for which he was charged, were numerous and complicated, the question whether the defendant had probable cause for believing that the crime had been committed and that the plaintiff had committed it, is a question of fact for the jury. The reason for this conclusion has been stated thus: "The law does not and could not prescribe a definite rule as to what particular facts shall constitute this reasonable ground of belief; the only rule which it can, or does prescribe is, that the facts in each particular

424; Beason *v.* Southard, 10 N. Y. 236, 240; Waldheim *v.* Sichel, 1 Hilton (N. Y.), 45; Von Latham *v.* Libbe, 38 Barb. (N. Y.) 339, 343; Gordon *v.* Upham, 4 E. D. Smith (N. Y.), 9, 10; Wade *v.* Walden, 23 Ill. 425; Page *v.* Cushing, 38 Me. 523, 526.

[1] Hill *v.* Yates, 8 Taunt. 182; Pangburn *v.* Bull, 1 Wend. (N. Y.) 345, 352.

[2] Panton *v.* Williams, 2 Ad. & El. (N. S.) 169, 194; *s. c.* 1 Gale & Dav. 504.

case must be such as would reasonably produce such belief in the minds of ordinary men; but in such case it is for the jury to say, not only what specific facts are established, but to determine their effect as a fact within the rule mentioned; and only upon such finding does the law pronounce its conclusion." [1] There is other and high authority for the conclusion that, where the facts are doubtful, the question of probable cause must be submitted to the jury. Thus, in an action for malicious prosecution in the English Common Pleas, it appeared that the defendant, a constable, being told by A, that the plaintiff had robbed her, and this information being supported by a letter which was shown him, supposed to be intercepted, apprehended the plaintiff, a respectable inhabitant of Cheltenham, at her lodgings, and took her from her bed at night to prison. The charge proved unfounded, and she, having sued the constable for the false imprisonment, Gaselee, J., in charging the jury said that "if the constable had a complaint made to him under such circumstances as to induce him to believe it true, he had a right to take into custody the party complained against, provided the facts were such as to warrant an apprehension; and he desired the jury to consider whether the statement they had heard satisfied them, looking at the letter and the other facts, that the constable had reasonable ground to suppose the plaintiff implicated in the felony with which she had been charged; and whether, standing in his place, they would have acted as he had done." It was held that this direction was right in substance, and afforded no ground for a new trial; but a majority of the judges were careful to state that the question of probable cause in such actions is a question of law for the court. Thus, Best, C. J., said: "The question of probable cause is, no doubt, a question for the judge; but the jury must first find the facts which are supposed to constitute the probable cause; and it is sometimes difficult to draw the line between the law and the fact. * * * On these facts the judge could not properly have directed a nonsuit. It was necessary to leave to the jury whether, admitting the facts, the

[1] Cochran v. Toher, 14 Minn. 385, 391, opinion by McMillan, J.

defendant acted honestly. * * * But the learned judge tells them, 'If you believe the fact, and thence infer that the defendant was acting honestly, you must find for him.' This was saying in substance that, in his opinion, the facts, if believed, furnished a probable cause for the defendant's conduct. But if the direction to the jury were, on the whole, substantially right, a mere inaccuracy of expression will not render it necessary to have recourse to a new trial. This direction was substantially right. It was for the jury to say whether they believed the facts; and, if they believed them, whether the defendant were acting honestly; in other words, whether the jury under the same circumstances, would have done as he did." Park, J., also said: "I do not impeach any of the cases that have been decided on this subject, nor had I ever a doubt that it is the province of the judge on such occasions to determine the point of law; but, as that must be compounded of the facts, and as the jury must decide on them, my practice has been to say, 'You are to tell me whether you believe the facts stated on the part of the defendant, and if you do, I am of opinion that they amount to a reasonable and probable cause for the step he has taken.' I do not direct a nonsuit, because the fact is so closely connected with the law. The direction of the learned judge in this case is conformable to that mode of proceeding." Gaselee, J., who gave the charge in question, also said: "I never meant to leave to them the question of legal probable cause; for I had the case of Beckwith *v.* Philby[1] before me, and I was requested to nonsuit the plaintiff. I could not do so upon the plaintiff's case, though, in similar causes, I have occasionally done so, after hearing the defendant's case; but when there is any doubt as to the facts, they must be found by the jury. By leaving them to the jury in this case, and also whether the defendant acted *bona fide*, I intended, in effect, that, if they were satisfied on that head, the defendant stood excused."[2]

[1] 6 Barn. & Cres. 637.

[2] Davis *v.* Russell, 5 Bing. 354, 356, 363. 365, 367. In Beckwith *v.* Philby, 6 Barn & Cres. 635, Lord Tenterden. C. J., submitted the question squarely to a jury, but this decision was plainly erroneous.

§ **1615. Origin of the Rule.** — This rule seems to have had its origin from the circumstance that, in the early history of these actions, it was customary to set forth the facts in the defendant's plea, and for the court, upon a *demurrer* to such plea, to determine, as a mere question of law, whether probable cause was exhibited or not.[1]

§ **1616. Doubts as to the Rule.** — The rule has not stood in England without the expression of grave doubts as to its propriety. Mr. Justice Coleridge in one case said: "The Court of Exchequer Chamber, in *Panton* v. *Williams*,[2] laid down a rule which, in theory, is perfect; but I believe no judge has sat long without finding himself embarrassed in its application to the special cases before him.[3] More recently the wisdom of the rule was doubted in the House of Lords, and its existence regretted by three judges as eminent as Lord Hatherley, Lord Westbury and Lord Colonsay.[4] In one American jurisdiction it has been held that it is a question, at least under some circumstances, to be submitted to the jury.[5] The doubts thus expressed in England as to the wisdom of the rule find an amusing offset in an opinion of the Supreme Court of Pennsylvania. "It is always the duty of the court," said Lowrie, J., "to pronounce the law arising on a given state of facts. And this again is only an exemplification of the principle of good sense that prevents us from applying to a schoolmaster or a preacher to instruct us in the arts of tanning or glass-blowing, or to work at these trades for us."[6]

§ **1617. No Definite Rule of Decision.** — Although the wisdom of the rule was thus doubted and the existence of the rule regretted in the English House of Lords, yet it was agreed that it

[1] Tindal, C. J., in Panton *v.* Williams, 2 Ad. & El. (N. S.) 192.

[2] 2 Ad. & El. (N. S.) 169.

[3] Douglass *v.* Corbett, 6 El. & Bl. 511, 514.

[4] Lister *v.* Perryman, L. R. 4 H. L. 521; *s. c.* 39 L. J. Exch. 177.

[5] Anderson *v.* Keller, 67 Ga. 58. See also the reasoning of Overton, J., in Kelton *v.* Bevins, Cooke (Tenn.), 90, 107.

[6] Laughlin *v.* Clawson, 27 Pa. St. 328, 330.

was the settled law of England that the jury must find the facts on which the question of reasonable and probable cause depends, and that the judge must then determine whether the facts found do constitute reasonable and probable cause; and, as the facts will vary with each particular case, it is conceded that no rule can be laid down for the exercise of judgment by the judge.[1] "No definite rule," said Lord Chelmsford, "can be laid down for the exercise of the judge's judgment. Each case must depend upon its own circumstances, and the result is a conclusion drawn by each judge for himself, whether the facts found by the jury, in his opinion, constitute a defense to the action. The verdict in cases of this description, therefore, is only nominally the verdict of a jury."[2] In the same case Lord Colonsay said: "Finding that I had to deal with this as a matter of inference in law, I was desirous to ascertain what were the rules or principles of law by which the court ought to be guided in drawing that inference. I did not find that there were any. Neither in the very able argument we heard from the bar, nor in the judgments set out in these papers, nor in the cases that have been referred to, are any such rules or principles enunciated. I think it is laid down by the learned Lord Chief Baron that it is a mere question of opinion, depending entirely on the view which the judge may happen to take of the circumstances of each particular case. And, upon a careful consideration of the decisions, it seems to me impossible to deduce any fixed and definite principle to guide and assist the judge in any case that may come before him. Chief Justice Tindal's rule seems almost the only one that can be resorted to, namely, that there must have existed a state of circumstances upon which a reasonable and discreet person would have acted. Now, in the system to which I have already alluded,[3] it is thought that twelve reasonable and discreet men (as jurors are supposed to be), can judge of that matter for themselves, and that lawyers are not the only class of persons

[1] Lister *v.* Perryman, L. R. 4 H. L. 521; *s. c.* 39 L. J. Exch. 177. From the opinion of Lord Colonsay in this case it would seem that, by the law of Scotland, it is a question of fact for the jury.

[2] *Ibid.* 535.

[3] The Scotch law.

competent to determine whether the information was such as a reasonable and discreet man would have acted upon. For what is it that the judge would have to determine? He would have to determine whether the circumstances warranted a reasonable and discreet man to deal with the matter, that is to say, not what impression the circumstances would have made upon his own mind, he being a lawyer, but what impression they ought to have made on the mind of another person, probably not a lawyer."[1]

§ 1618. **Sense in which it is a Question of Law.** — The sense in which this question is a question of law is simply this: That upon any given state of facts, no matter how numerous and complicated, conceded or established, the judge must say whether there was or was not reasonable or probable cause for instituting the criminal prosecution. Where the system of special verdicts is in effect, the jury will find the ultimate facts, and the judge will pronounce the law upon those facts, as in other cases. Where the practice of the jurisdiction allows the submission of special interrogatories to the jury, the necessary facts for the conclusion may be thus drawn out, and the conclusion then pronounced by the judge in rendering the judgment of the court, either in conformity with, or in disregard of, the general verdict, according to principles explained in another portion of this work.[2] In other cases, the judge pronounces the conclusion of law, by instructions to the jury, based upon hypothetical states of fact which the evidence tends to prove, leaving it to them to say whether the evidence does or does not prove such facts, — their verdict being, of course, subject to be set aside by the judge on a motion for a new trial, if it is plainly in conflict with the evidence, or contrary to the law as thus expounded by him. The sense in which it is a question of law was thus stated by Chief Baron Pollock: "If the jury find certain facts to be true, and the necessary consequence is that any person acquainted with those facts would believe that the plaintiff had committed felony, I do not think it necessary to ask the jury whether the defendant was *bona fide* acting under that belief. If a man

[1] *Ibid.* 539, 540.

[2] *Post*, § 2667, *et seq.*

found his own property in the possession of another, it would be absurd to ask the jury whether he *bona fide* believed it to be his property, and acted on that belief when he gave the other into custody." And he gave as a reason for holding that this is a question for the judge, and not for the jury, that "if it were not so, the administration of justice would be uncertain; for the experience of most judges must have afforded them opportunities of observing that evidence which, in a criminal court, would be sufficient for a conviction, when the party complains of a wrong, may have a different effect with a jury, when the same person seeks to vindicate a right." [1] In the Court of Appeals of New York it has been said: "If the facts which are adduced as proof of a want of probable cause are not controverted, if conflicting testimony is to be weighed, or if the credibility of witnesses is to be passed upon, the question of probable cause should go to the jury, with proper instructions as to the law. But where there is no dispute about the facts, it is the duty of the court, on the trial, to apply the law to them." [2] The same principle is expressed in many other cases with little variation. It is often said that if the facts are not disputed, the court must decide, as matter of law, whether they constitute probable cause; but where the facts are disputed, the court must hypothetically state the material facts which there is evidence fairly tending to prove, and positively direct the jury as to the law thereon, leaving them to determine whether or not the facts exist.[3] In another case it is said: "It is often said in the books that, in actions for malicious prosecution, the question whether there was probable cause for instituting the prosecution is a question of law for the court. This proposition does not mean that it is the province of the court to decide, upon conflicting evidence, whether there was or was not such probable cause, but that, where the evidence is not conflicting, or where the facts are conceded, it is the province of the court to tell the jury whether the facts do or do not afford

[1] Hailes *v.* Marks, 7 Hurl. & N. 55, 63, 64.

[2] Besson *v.* Southard, 10 N. Y. 236, 240, opinion by Jewett, J.

[3] Pennsylvania Co. *v.* Weddle, 100 Ind. 139; Brown *v.* Connelly, 5 Blackf. (Ind.) 390.

such probable cause. Where, as in this case, the evidence as to the facts is conflicting, it is the duty of the court to tell the jury whether the hypothetical state of facts which the evidence of each party tends to prove, does or does not, if found by them to exist, afford such probable cause. As a general rule, it is error for the court, in instructing the jury, to submit a question of law to them for determination; and hence, in an action for malicious prosecution, it is error for the court to submit to the jury generally the question whether there was or was not probable cause for the prosecution."[1] The Supreme Court of Vermont, speaking through Wheeler, J., say: "In practice a true application of the rule seems to require that, if none of the facts are in dispute, the question of probable cause arising upon them should be decided by the court as a question of law, without the intervention of a jury at all; that, if some of the facts are undisputed, and others are in controversy, and the question of probable cause cannot be determined upon the undisputed facts without determining the existence of those in dispute, then the case should be presented to the jury, by stating which of the disputed facts are to be passed upon and how; so that, by determining the mere existence or non-existence of them, the question of probable cause, or the want of it, will be determined, according to the view of them in law taken by the court."[2] Indeed, the judicial opinions abound in disquisitions upon this question;[3] but they all amount to this: that where the facts are doubtful or disputed, the judge must submit the question to the jury to find the facts, instructing them as to the law, and that he does this by informing them that certain states of fact, if found to exist, do or do not constitute probable cause.[4]

[1] Meysenberg *v.* Engelke, 18 Mo. App. 346, 351. See also Hill *v.* Palm, 38 Mo. 22; Sharpe *v.* Johnson, 76 Mo. 660; 2 Greenl. Ev., § 454; Brennan *v.* Tracy, 2 Mo. App. 540.

[2] Driggs *v.* Burton, 44 Vt. 124, 147.

[3] See the observations of Lord Tenterden, C. J., in Blachford *v.* Dod, 2 Barn. & Ad. 179, 182, 184, and of Littledale, J., in the same case. *Ibid.* 186. See also Bulkeley *v.* Keteltas, 6 N. Y. 387; Grant *v.* Moore, 29 Cal. 644, 651.

[4] See Stone *v.* Crocker, 24 Pick. (Mass.) 81, 85, and the observations of Morton, J.; Cloon *v.* Gerry, 13 Gray (Mass.), 201; Hinton *v.* Heather, 14 Mees. & W. 131, 134; Kidder *v.* Park-

§ 1619. Mixed Questions of Law and Fact. — It is in precisely this sense that the courts use the term when they say that probable cause presents a mixed question of law and fact.[1] They use the expression precisely as Lord Mansfield used it when he said: "The question of probable cause is a mixed proposition of law and fact. Whether the circumstances alleged to show it probable or not probable, are true and existed, is a matter of fact; but whether, supposing them to be true, they amount to a probable cause, is a question of law."[2] "It, therefore," according to Mr. Broom, "falls within the legitimate province of the jury to investigate the truth of the facts offered in evidence, and the justice of the inferences to be drawn from such facts; whilst at the same time they receive the law from the judge, that, according as they find the facts proved or not proved, and the inferences warranted or not, there was reasonable and probable ground for the prosecution, or the reverse; and this rule holds, however complicated and numerous the facts may be."[3] They mean that, where the facts are not disputed, it is for the court, in instructing the jury, to declare their legal effect; and that, where they are disputed, it is for the jury to determine the

hurst, 3 Allen (Mass.), 393, 395; Reynolds *v.* Kennedy, 1 Wils. 232; Hill *v.* Yeates, 2 J. B. Moore, 80; Isaacs *v.* Brand, 2 Stark. 167; Brooks *v.* Warwick, 2 Stark. 389; Reed *v.* Taylor, 4 Taunt. 616; Leggett *v.* Blount, Taylor (N. C.), 123; Munns *v.* Dupont, 2 Browne (Pa.), Apx. 42; *s. c.* 3 Wash. C. C. 31; Crabtree *v.* Horton, 4 Munf. (Va.) 59; Kelton *v.* Bevins, Cooke (Tenn.), 90; Ulmer *v.* Leland, 1 Me. 135.

[1] As to the meaning of this expression, see *ante*, § 1031.

[2] Johnstone *v.* Sutton, 1 T. R. 545. He said that upon this principle proceeded the case of Reynolds *v.* Kennedy, 1 Wils. 232. See in confirmation of the text Pangburn *v.* Bull, 1 Wend. (N. Y.) 345, 352; Center *v.* Spring, 2 Ia. 393, 407; Munns *v.* Dupont, 3 Wash. C. C. 31; Potter *v.* Seale, 8 Cal. 217; Ash *v.* Marlow, 20 Oh. 119, 129; Masten *v.* Deyo, 2 Wend. (N. Y.) 424, 427; M'Cormick *v.* Sisson, 7 Cow. (N. Y.) 715; Bulkeley *v.* Smith, 2 Duer (N. Y.), 271; Humphries *v.* Parker, 52 Me. 502, 504.

[3] Broom's Leg. Max., p. 105. The learned author cites: Johnstone *v.* Sutton, 1 T. R. 544; Blachford *v.* Dod, 2 Barn. & Ad. 179; Reynolds *v.* Kennedy, 1 Wils. 232; James *v.* Phelps 11 Ad. & El. 483; Panton *v.* Williams, 2 Q. B. 169, 194; Peck *v.* Boyes, 7 Scott N. R. 441; Michell *v.* Williams, 11 Mees. & W. 205; Bushell's Case, Vaughan, 147.

question whether there was probable cause, under proper hypothetical instructions from the court.[1]

§ **1620. Nonsuits, when granted in these Cases.** — "It may happen," said Morton, J., "that this and other mixed questions need not and cannot properly be sent to the jury. When the facts are undisputed, or when all the facts which the plaintiff's evidence conduces to prove, do not show a want of probable cause, it becomes a mere question of law which the court must decide, and it would be useless and improper to take the opinion of a jury upon it; for if they found for the plaintiff, the court would set aside the verdict, not so much because it was against evidence as because it was against law."[2] Perhaps the rule is more clearly stated, if it is said that, it being then the office of the judge to say whether a state of facts, if true, do or do not constitute probable cause: and, the burden being upon the plaintiff to show a want of probable cause, if the plaintiff in his action exhibits a state of facts upon which the legal conclusion is that there was no probable cause, the court should grant a nonsuit or direct a verdict for he defendant, according to the practice in the particular jurisdiction.[3] More difficulty will arise in applying this rule where the facts upon which the legal inference that there was probable cause, are exhibited by the defendant in his evidence; since it will ordinarily be a question for the jury to say whether or not this evidence is to be believed.

§ **1621. Where the Question arises upon a Written Statement.** — Cases may arise, however, where the evidence of the facts which show that there was probable cause may be presented by the defendant, and yet the court will, without invading the province of the jury, grant a nonsuit or direct a verdict for the defendant. This will take place where the whole question is in-

[1] Moody *v.* Deutsch, 85 Mo. 237; Sharpe *v.* Johnston, 59 Mo. 557; Meysenberg *v.* Engelke, 18 Mo. App. 346; Cole *v.* Curtis, 16 Minn. 182, 193.

[2] Stone *v.* Crocker, 24 Pick. (Mass.) 81, 85; citing Golding *v.* Crowle, Sayer, 1. To the same effect is Masten *v.* Deyo, 2 Wend. (N. Y.) 424, 426; Burlingame *v.* Burlingame, 8 Cow. (N. Y.), 142; Murray *v.* Long, 1 Wend. (N. Y.) 140.

[3] Grant *v.* Moore, 29 Cal. 644, 645.

volved in the interpretation of a document which is introduced in evidence by the defendant. In such a case the court, in nonsuiting the plaintiff or directing a verdict for the defendant, may do no more than exercise its peculiar office of declaring the legal effect of the instrument. This view of the question was taken by Parke, J., where a letter had been sent by the plaintiff to the defendant, threatening him with criminal prosecution, whereupon the defendant had prosecuted the plaintiff criminally for sending the threatening letter, which prosecution had given rise to the civil action by the plaintiff against the defendant. Referring to this feature of the question, the learned judge, in his separate opinion, said: "It having been proved that the plaintiff was the writer of the letter to the defendants, it became a question on the construction of that document, whether there was a probable cause for preferring the indictment. I think that of itself was sufficient to justify the charge; and it was for the judge to construe the written instrument, and to decide whether the letter did not import that the plaintiff was about to accuse the defendants of obtaining goods on false pretenses. I think the fair construction of the letter is that the party by whom it was written, intended to make that charge against the defendants; for the writer speaks of circumstances which render it incumbent on his clients to bring the matter under the notice of the public and of the serious consequences to the defendants if the money be not paid; and if so, it is also clear that the object in writing was to extort money from the defendants. The letter itself, therefore, afforded a reasonable ground for preferring the indictment." [1]

§ **1622. Effect of the Rule upon Pleading.** — The rule that probable cause is a question of law has this effect upon pleading, at least under the common-law system, that a plea justifying an arrest by a private person, on suspicion of felony, must show the circumstances, so that the court may judge from them, on *demurrer*, whether the suspicion were reasonable,[2] in other words,

[1] Blachford *v.* Dod, 2 Barn. & Adl. 179, 186.

[2] Mure *v.* Kaye, 4 Taunt. 34; Brown *v.* Connelly, 5 Blackf. (Ind.) 390; Morris *v.* Corson, 7 Cow. (N. Y.) 281.

whether they amount to probable cause. Moreover, this being a question of law, it is not enough for the plaintiff, in his declaration or complaint, to state that the criminal prosecution was commenced maliciously and without probable cause; for whether it was commenced without probable cause, is a mere conclusion of law; but he must set out facts upon which the conclusion of law is that it was commenced without probable cause.[1]

§ 1623. **When Error of Submitting Question of Probable Cause to Jury no Cause of Reversal.** — Where the question of probable cause is thus erroneously submitted to the jury, still if, on a review of the case on error or appeal, it should appear, from the facts not disputed at the trial, that there was evidently a want of probable cause, a verdict for the plaintiff will not be set aside; since it is competent for the reviewing court to pronounce the law upon the undisputed facts, and if they see that the jury have not erred in point of law, although the charge was erroneous, no injury has been done to the defendant of which he has a right to complain.[2] But if the evidence as to any material fact is contradicted, or leaves the question doubtful whether the fact existed or not, then such an error is good ground for a reversal; inasmuch as the reviewing court cannot take upon itself the office of drawing inferences from conflicting testimony, — this being the exclusive province of the jury.[3] The foregoing is a good illustration of the general rule, that while it is error to submit questions of law to the jury, yet if this is done and the jury decide the questions rightly, it will be no ground for disturbing their verdict.[4]

[1] Pangburn *v.* Bull, 1 Wend. (N. Y.) 345; Reynolds *v.* Kennedy, 1 Wils. 232.

[2] Pangburn *v.* Bull, 1 Wend. (N. Y.) 345, 352.

[3] *Ibid.* 353.

[4] *Ante*, § 1020.

ARTICLE II. — JURY, HOW INSTRUCTED IN SUCH ACTIONS.

SECTION

1627. Jury how Instructed in such Cases.
1628. What Facts justify a Person in Charging Another with the Commission of a Given Crime.
1629. Errors in Instructing Juries in these Cases.
1630. Error to define Probable Cause in general Terms, and to submit the Question of the Want of it to the Jury.
1631. [Continued.] A Contrary Practice in some Jurisdictions.
1632. Example of an early Charge which was held to submit the whole Question both of Law and Fact to the Jury, and to be hence Erroneous.
1633. Precedents of Instructions in these Cases.
1634. As to Malice. *a*. Conclusion that Express Malice is Necessary.
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1638. Effect of acting upon the Advice of Counsel. *a*. when a Defense.
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1640. Concurrence of Malice and Want of Probable Cause. *a*. Burden on Plaintiff to show affirmatively these two Elements.
1641. *b*. Another Precedent.
1642. *c*. Another Precedent.
1643. *d*. No Recovery for the Malicious Prosecution of a Guilty Person.
1644. As to Probable Cause. *a*. Defining Probable Cause.
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1646. *c*. Burden on Plaintiff to show Want of Probable Cause.
1647. *d*. Want of Probable Cause not Inferable from Malice.
1648. *e*. Hypothetical State of Facts Constituting Evidence of a Want of Probable Cause for Prosecuting a Charge of Larceny.
1649. *f*. Contra: Hypothetical State of Facts declared to constitute Probable Cause in the same Case.
1650. *g*. Not a Question of Guilt, but of Reasonable Ground of Suspicion.
1651. *h*. That Honest and Well-founded Belief is Probable Cause.
1652. *i*. That a Magistrate's Discharge is Prima Facie Evidence of a Want of Probable Cause.
1653. *j*. But not Conclusive Evidence.
1654. As to Aiders and Abettors. *a*. Must Approve, Encourage and Countenance the Prosecution.
1655. *b*. Or Counsel advise or Participate in it.
1656. Circumstances which Preclude Punitive Damages, where the Prosecution was for Larceny.

§ 1627. Jury how instructed in such Cases: Further suggestions. — It is said that, "if the facts are contested, the court must leave them to the jury, with instructions as to what is

probable cause."[1] It is also said: "After the facts are given in evidence, it is for the court to say, in its instructions to the jury, whether or not they make up probable cause."[2] The authorities generally concur in the view that the question must be submitted to the jury, where the facts are in dispute, upon hypothetical questions, which are so drawn as to inform the jury that a given state of facts which the evidence tends to establish, does or does not constitute probable cause, leaving the jury to determine whether or not such facts existed.[3] It follows from this that where, taking all the evidence together and giving full effect to all that it tends to prove, it does not show want of probable cause for the prosecution, the court may properly so instruct the jury;[4] although it would seem that, as the want of probable cause is essential to sustain the action, the court ought, in such a case, to nonsuit the plaintiff or direct a verdict for the defendant.[5] While the court may inform the jury that certain facts do or do not constitute probable cause for setting on foot a criminal prosecution, yet a request for an instruction which states the facts partially, omitting some which should be considered in connection with those stated, and declaring that the facts stated do not constitute probable cause, — is properly refused.[6]

§ **1628. What facts justify a Person in charging another with the Commission of a given Crime.** — It was justly observed, in a case in the Supreme Court of the District of Columbia, that "it is not everybody who is supposed to know, neither prosecutor nor jury, what facts make up a crime; and therefore it is necessary that the court should tell the jury what facts justify a person in alleging crime."[7] Accordingly, we find that it is the frequent practice of the courts, in instructing juries in actions for malicious prosecution, to explain to them what acts constitute the crime which the defendant charged against the

[1] Ash *v.* Marlow, 20 Oh. 119.

[2] Israel *v.* Brooks, 23 Ill. 575, 577; citing Jacks *v.* Stimpson, 13 Ill. 703.

[3] Cole *v.* Curtis, 16 Minn. 182, 193.

[4] Stone *v.* Crocker, 24 Pick. (Mass.) 81, 85.

[5] *Ante*, § 1620.

[6] Brennan *v.* Tracy, 2 Mo. App. 510.

[7] Tolman *v.* Phelps, 12 Wash L. Rep. 587.

plaintiff; for this, where the evidence is conflicting, is necessary to enable the jury, under the other instructions of the court, to say whether or not there was probable cause; and even where the evidence is not conflicting, it is relevant on the question of malice.

§ 1629. Errors in Instructing Juries in these Cases. — In a case of this kind it has been held error for the judge to leave the question whether or not there was probable cause to the jury, without other instruction than the remark that he was *inclined to believe* that there was evidence enough given of probable cause to protect the defendant. The jury ought to be instructed by the judge as to the law involved in the question of probable cause, that is, what constitutes a legal excuse for the defendant, and whether the facts relied upon in the defense, on the supposition of their being found true by the jury, made out a probable cause.[1] Seemingly opposed to the foregoing, but not really so, is the decision in an elaborately considered case of this kind, where the following instruction was requested by the defendants and refused: "If the jury believe the testimony and evidence produced by the defendants, the facts thereby proved show a probable cause for the procuring the issuance of the search warrant." It was held that this instruction was properly refused, — the court, speaking through McMillan, J., saying: "If the instruction under consideration had been given, the court would have withdrawn that question from the jury and determined for itself what facts were established, which would have been error. If the defendants believed their evidence established a state of facts which constituted probable cause for the prosecution, they should have enucleated such facts from the evidence, and requested the court to charge that, if the jury found such facts to be proved, they constituted probable cause." [2]

[1] Masten *v.* Deyo, 2 Wend. (N. Y.) 424. Compare Burlingame *v.* Burlingame, 8 Cow. (N. Y.) 142, and Murray *v.* Long, 1 Wend. (N. Y.) 140, where the judges at circuit granted nonsuit because probable cause was shown, which decisions were upheld in the appellate court.

[2] Cole *v.* Curtis, 16 Minn. 182, 193. The court cite: Schenck *v.* Butsh, 32 Ind. 338.

§ 1630. **Error to define Probable Cause in General Terms, and to submit the Question of the Want of it to the Jury.** — Several courts have therefore reached the conclusion that, in instructing the jury in an action for malicious prosecution, it is error for the court, to define, in general terms, what constitutes probable cause, and then to tell the jury that it is a question for them to decide whether or not there was probable cause for the prosecution which is the foundation of the action. Such a charge commits to the jury more than it is their legitimate province to determine. Concerning an instruction of this kind it was said by the Court of Appeals of New York: "The jury are told that it is their province to determine whether the facts and circumstances proved in evidence do or do not establish the want of probable cause. The judge does not decide whether these facts and circumstances are sufficient or not, provided the jury believe them to be proved, but leave the whole matter to the determination of the jury. If the judge had supposed that the truth of the facts, as sworn to, admitted of a doubt, he should have expressed his opinion of the law arising upon those facts if proved, and then submitted to the jury the question whether they were credibly proved or not." [1] Concerning a similar instruction, it was said by Currey, C. J., in giving the opinion of the Supreme Court of California: "The law makes it the duty of a judge who tries an action for malicious prosecution, to instruct the jury that, as they may find and determine certain questions of fact, properly submitted to them, to be true or untrue, so must be their verdict for the plaintiff or for the defendant; not that they should determine the question of the want of probable cause or the contrary. It may sometimes be difficult to state to the jury what the testimony is, and what facts, if found to be true, establish the plaintiff's allegation of want of probable cause; but, difficult as it may be, this duty is cast on the judge in these kind of actions, because he is presumed to know, much better than the jury can, what facts show the existence of probable cause or the want of it." [2]

[1] Bulkeley v. Keteltas, 6 N. Y. 384, 388.

[2] Grant v. Moore, 29 Cal. 644, 653.

§ 1631. [Continued.] **A Contrary Practice in some Jurisdictions.** — Notwithstanding the foregoing, several cases are found — and the list could no doubt be extended, — where the trial courts have, with the approval of the appellate courts, submitted the question of probable cause to the jury upon general definitions as to its meaning, leaving them to apply to the facts the general proposition of law thus communicated to them.[1] It is not to be inferred that the courts which approve this practice deny the rule that the question whether or not there was probable cause, upon facts conceded or found, is a question of law for the the court; they merely entertain a different conception of the meaning of the rule, or, more probably in some instances, they annex this meaning to the analogous rule, already referred to,[2] that the question of probable cause is a mixed question of law and fact.

§ 1632. EXAMPLE OF AN EARLY CHARGE WHICH WAS HELD TO SUBMIT THE WHOLE QUESTION, BOTH OF LAW AND FACT TO THE JURY AND TO BE HENCE ERRONEOUS. — In the leading case of *Panton* v. *Williams*[3] the subject of the manner in which the question of the want of probable cause is to be decided, and the manner in which the jury are to be instructed in these actions in respect of such questions where the facts are complicated, was carefully considered in the Exchequer Chamber. The following charge, as described in the bill of exceptions, given to the jury by Lord Denman, C. J., was held to have submitted to the jury both the law and the fact in respect of this question, and to have been hence erroneous: —

"And the counsel for the defendant having closed his case, the Lord Chief Justice directed the jury that the question for them to consider was, whether the defendant had acted maliciously and with reasonable or probable cause; that, as to the malice, that term did not imply personal ill-will; that if the defendant had acted from any indirect motive, this was sufficient proof of malice; that, as to the probable cause, malice without probable cause would be insufficient, because frequently justice was set in motion by interested parties; that the action therefore could not succeed unless there was an absence of probable cause. And his Lordship proceeded to sum up the evidence. And his Lordship having summed up the evidence, further directed the jury that, if they thought there

[1] Humphries *v.* Parker, 52 Me. 502; Green *v.* Cochran, 43 Ia. 544, 549; Callahan *v.* Caffarata, 39 Mo. 136.

[2] *Ante*, § 1619.

[3] 1 Gale & Dav. 504; *s. c.* 2 Ad. & El. (N. S.) 169, 192.

was reasonable and probable cause for taking these steps against the young woman, their verdict must be for the defendant; that they were to take a dispassionate view of the state of Mr. Barton Panton's mind on the 12th of February, 1838; that, if they thought there was a strong impression against Mr. Thos. Williams and against any one who was concerned with him, then that was reasonable and probable cause; that if, on the other hand, they should think there was no reasonable or probable cause, then they must trace his motives to some other matter, and consider whether the importance he might attach to convicting Mr. Thomas Williams, and his anxiety to place him in an unfavorable position in Newgate, actuated him, — if so, they must find for the plaintiff. And the Lord Chief Justice further stated to the jury that, as to the advice of counsel, if there was no reasonable or probable cause, his Lordship thought that the consulting counsel did not vary it; that it appeared to his Lordship that it was not a question of law in a case of this sort whether there was a reasonable or probable cause, but that it was altogether a question of fact for the jury, and that he should act wrong if he were to take the question from their consideration; that it also seemed clear to his Lordship that the question was not, as against Thomas Williams alone, but whether there was probable cause as against the plaintiff; that one circumstance had been observed, that is, that the former wills had been properly prepared, that that did not appear to his Lordship very strong, but that they were to consider it. Whereupon the counsel learned in the law for the said defendant did then and there except to the aforesaid opinion and direction of the Lord Chief Justice, and did insist that his Lordship was bound to direct the jury that if there was probable cause as against Thomas Williams, there was so as against the plaintiff. And further, that his Lordship was bound to state to the jury what facts, if proved, would amount to probable cause, leaving to them only the question whether they believed the evidence adduced in order to prove such facts. And further, that his Lordship was bound to direct the jury that the following facts, if they or any of them were proved, constituted, and each of them constituted, probable cause, that is to say [presenting a category of seven propositions of fact]. And the counsel for the defendant further excepted and objected that the Lord Chief Justice ought not to leave the question whether there was or was not probable cause for the prosecution to the jury, as a question for them, without telling them what would be probable cause."

It is perceived that the substantial question upon the bill of exceptions was correctly stated by the counsel for the plaintiff in error, in arguing the case in the Exchequer Chamber,[1] to be whether the judges were bound to state to the jury, as a direction in point of law, that certain facts, if proved, amounted to probable cause. After argument, the court took time to advise upon the question, and finally the judgment of the court was drawn up by Tindal, C. J. He said: "Upon this bill of exceptions we take the broad question between the parties to be

[1] The case was argued before Tindal, C. J., Bosanquet, Coltman and Maule, JJ., Lord Abinger, C. B., Parke, Alderson and Rolfe, BB.

this: Whether, in a case in which the question of reasonable and probable cause depends not upon a few simple facts, but upon facts which are numerous and complicated, and upon inferences to be drawn therefrom, it is the duty of the judge to inform the jury, if they find the facts to be proved, and the inferences to be warranted by such facts, the same do or do not amount to reasonable or probable cause, so as thereby to leave the question of fact to the jury, and the abstract question of law to the judge; and we are all of opinion that it is the duty of the judge so to do. In the more simple cases, where the question of reasonable and probable cause depends entirely upon the proof of the facts and circumstances which gave rise to and attended the prosecution, no doubt has ever existed, from the time of the earliest authorities, but that such question is purely a question of law, to be decided by the jury. In *Cox* v. *Wirrall*,[1] and in *Pain* v. *Rochester*,[2] each of which was an action on the case for falsely and maliciously procuring the plaintiff to be indicted for felony, the defendant in each action set forth in the plea the facts and circumstances that induced him to indict; and the plaintiff having in each instance demurred, it was the court which had to determine, as a matter of law, and not the jury, as a matter of fact, whether the statement in the plea did or did not form a sufficient excuse. And in the case last referred to the very distinction now under consideration was laid down by the court, upon the objection then taken, that the plea amounted to a general issue only, the court holding it to be a good plea '*per doubt del lay gents;* for that the defendant confessed the procurement of the indictment, but avoided it *by matter in law.*' And although the practice which then obtained has been altered for a great length of time, by introducing into the declaration not only the statement that the charge was false and malicious, but also that it was made without reasonable or probable cause, and thereby compelling the plaintiff to give some evidence thereof and enabling the defendant to prove his case under the plea of not guilty, — yet the rule of law that this question belongs to the judge only, and not to the jury, is not, by such alteration in pleading, in any way impaired. And, still further, the authorities collected in the case *Johnstone* v. *Sutton*,[3] and the authority of that case itself, and also the decision of Buller, J., there cited, proves incontestably that it is a question for the jury, whether the facts brought forward in evidence be true or not, but that what is reasonable or probable cause is matter of law. There have been some cases in the later books, which appear at first sight to

[1] Cro. Jac. 193.

[2] Cro. Eliz. 871.

[3] 1 T. R. 510, 519.

have somewhat relaxed the application of that rule, by seeming to leave more than the mere question of the facts proved to the jury; but, upon further examination, it will be found that, although there has been an apparent, there has been no real departure from the rule. Thus, in some cases, the reasonableness and probability of the ground for the prosecution has depended not merely upon the proof of certain facts, but upon the question whether other facts, which furnished an answer to the prosecution, were known to the defendant at the time it was instituted. Again, in other cases, the question has turned upon the inquiry whether the facts stated to the defendant at the time, and which formed the ground of prosecution, were believed by him or not; in other cases the inquiry has been whether, from the conduct of the defendant himself, the jury will infer that he was conscious that he had no reasonable or probable cause; but in these, and many other cases which might be suggested, it is obvious that the knowledge, the belief, and the conduct of the defendant, are really so many additional facts for the consideration of the jury; so that, in effect, nothing is left to the jury but the truth of the facts proved and the justice of the inferences to be drawn from such facts, both which investigations fall within the legitimate province of the jury; whilst, at the same time, they have received the law from the judge, that, according as they find the facts proved or not proved, and the inferences warranted or not, there was reasonable and probable ground for the prosecution, or the reverse. And such being the rule of law, where the facts are few and the case simple, we cannot hold it to be otherwise where the facts are more numerous and complicated. It is undoubtedly attended with greater difficulty in the latter case, to bring before the jury all the combinations of which numerous facts are susceptible, and to place in a distinct point of view the application of the rule of law, according as all or some only of the facts and inferences from facts are made out to their satisfaction; but it is equally certain that the task is not impracticable, and it rarely happens but that there are some leading facts in each case which present a broad distinction to their view, without having recourse to the less important circumstances that have been brought before them. Upon the whole, as the question both of law and of fact was left in this case entirely to the jury, we think the exception must be allowed and that there must be a *venire de novo*." [1]

[1] Panton *v.* Williams, 1 Gale & Dav. 504, 520; *s. c.* 2 Ad. & El. (N. S.) 169, 192. Where the court charged the jury that, if from the testimony before them, they should be of opinion that the prosecutions before the jus-

§ **1633. Precedents of Instructions in these Cases.** — The subject under consideration will now be further illustrated by setting out a number of instructions upon different elements of fact which arise in these actions, which have been approved on appeal or error, and by referring to others which, though approved in like manner, are deemed to be of secondary or doubtful value.

§ 1634. As to Malice. — *a.* Conclusion that Express Malice is Necessary. — "On the question of malice in the prosecution, there is a distinction between legal malice and actual or express malice. Legal malice means a wrongful act done intentionally, without sufficient cause or excuse. It is not necessary to render an act legally malicious, that the party doing it is actuated by a feeling of ill-will or hatred. If the jury should find that the prosecution was commenced without probable cause, as before explained, they are at liberty to infer malice, so far as proof of malice is required to sustain the action. Express malice is something beyond this, and is shown by evidence of personal hatred, desire and determination to injure another, and other facts showing express active malice toward the other party. The fact that express malice is shown may enhance the damages beyond what may be given when only legal malice is shown." [1]

tice were malicious, and without probable cause, and that the defendant knew the facts to be so, before and at the time of such prosecutions, they ought to find damages for the plaintiff, otherwise they should find the defendant not guilty, — it was held that the court erred, because the instruction submitted both the law and the facts to the jury. Pangburn *v.* Bull, 1 Wend. (N. Y.) 345, 350, 352.

[1] In Humphries *v.* Parker, 52 Me. 502, 506, the court, in passing upon this instruction, which was given, hold that the doctrine of implied malice has no place in actions for malicious prosecutions, but that actual malice must be shown. The court, nevertheless, approved this instruction, or rather declined to sustain exceptions thereto. Walton, J., in giving the opinion of the court, said: "If the first and concluding sentences of the charge upon this point stood alone, we should feel constrained to say that it gave the jury to understand that malice in law was alone sufficient to maintain the action, and that malice in fact would have no other effect than to enhance the damages, and the exceptions would have to be sustained. But these sentences do not stand alone; and the context shows that the presiding judge did not use the term legal malice as synonymous with malice in law; that he used it to distinguish malice in its enlarged legal sense, from malice in its more restricted popular sense; and we think the whole charge taken together must

§ 1635. *b.* May be either Malice in Fact or Malice in Law. — "There are two kinds of malice: malice in fact, and malice in law. The former, in common acceptation, means ill-will against a person; the latter a wrongful act done intentionally. If, therefore, the jury believe from the evidence, that the defendant caused plaintiff to be arrested for larceny, as charged in plaintiff's petition, and that the defendant was moved thereto by ill-will against the plaintiff, or that the prosecution was wrongfully instituted by the defendant, and was without probable cause, the jury must find for the plaintiff." [1]

§ 1636. *c.* What Motive Constitutes Malice in Such Cases. — "Whether the defendants have been actuated by malice is a question of fact to be determined by the jury only; and in determining it, they should consider all the facts and circumstances in the case, and unless they find the defendants were actuated by malice, they cannot find a verdict against them. But by malice is not meant merely malignity or ill-will, but it includes every sinister or improper motive; that is, every motive other than a desire to bring to punishment a party believed to be guilty of a crime. If, for instance, in this case, the defendants were in whole or in part actuated by a desire to obtain possession of the oil, alleged to have been stolen [by plaintiff] they must in law, be held to have been actuated by malice." [2]

have given the jury unmistakably to understand that malice in fact was essential to maintenance of the action for malicious prosecution, and was therefore unexceptionable." The following instruction, approved by the Supreme Court of Missouri in Callahan *v.* Caffarata, 39 Mo. 136, is here given, though not recommended, as containing an accurate statement of the distinction between malice in fact and malice in law: "The jury are instructed that there are two kinds of malice — malice in fact, and malice in law: the former, in common acceptation, means ill-will against a person; the latter is a wrong act against a person done intentionally. If, therefore, the jury believe, from the evidence that defendant Caffarata was moved by ill-will against the plaintiff, or that the imprisonment of plaintiff was wrongfully and intentionally caused by him, they ought, as against him, to find that the imprisonment was malicious."

[1] Approved in Hill *v.* Palm, 38 Mo. 15. This instruction, standing alone — not cured by others given — would be bad, as submitting to the jury the question of law, whether the prosecution was without probable cause.

[2] Approved in Vinal *v.* Core, 18 W. Va. 1, 74. The court said (p. 74): "As we have seen, if a person instigates a prosecution against another, basing his action on certain facts known to him, and the court considers, that on these facts a reasonable man of ordinary caution, acting conscientiously, would believe the party guilty of the crime charged, then his conduct was based upon probable

§ 1637. *d.* That the Jury may infer Malice from the Want of Probable Cause. — "The court further instructs the jury, that if they believe, from the facts and circumstances as given in evidence, that the defendant had not a probable cause for the prosecution, they may infer malice from such want of probable cause." [1] Or thus: "The jury are instructed that if they believe from the evidence that the arrest and imprisonment of plaintiff was without probable cause, then the jury are at liberty to infer that it was malicious." [2]

cause, and he is fully justified by law, I care not how malignant he may be, or by what improper motives he may have been actuated. But, if on the contrary, he has instigated the prosecution without probable cause, based on the actual facts known to him, either personally or from the information of others, he will be held responsible, unless he is excused by a jury being satisfied, that he was actuated *only* by a desire to bring to justice one believed to be guilty of a crime; and when there was no probable cause, he cannot be excused, if in instigating the prosecution he was actuated either in *whole or in part* by any other motive than the public good."

[1] Approved in Chapman *v.* Cawrey, 50 Ill. 517, 518. In Ahern *v.* Collins (39 Mo. 146) the following instruction is found: "If the jury believe from the evidence, that the arrest of plaintiff was made without reasonable or probable cause, then the law presumes, in the absence of testimony establishing the contrary, that such arrest was made with malice." Although this instruction was apparently approved by the Supreme Court, it must be pointed out that it is plainly erroneous, for the reason that the existence of malice is not presumed from the want of probable cause, as a conclusion of law, but the law leaves the jury at liberty to draw the inference of malice or not from the want of probable cause, as they may think fit. That malice may be inferred from the want of a probable cause for instituting the previous prosecution, see Wood *v.* Weir, 5 B. Mon. (Ky.) 544; Blunt *v.* Little, 3 Mason (U. S.), 112; Hall *v.* Hawkins, 5 Humph. (Tenn.) 357; Stone *v.* Stevens, 12 Conn. 219; Merriam *v.* Mitchell, 13 Me. 439; Bennett *v.* Black, 1 Stew. (Ala.) 39; Garrison *v.* Pearce, 3 E. D. Smith (N. Y.), 255; Murray *v.* Long 1 Wend. (N. Y.) 140; Grinnell *v.* Stewart, 52 Barb. (N. Y.) 544; Turner *v.* Walker, 3 Gill & J. (Md.) 377; Carrico *v.* Meldrum, 1 A. K. Marsh. (Ky.) 224; Newell *v.* Downs, 8 Black. (Ind.) 523; York *v.* Chilton, 4 La. Ann. 377; Hayes *v.* Hayman, 20 La. Ann. 336. It must be found by the jury, or the action cannot be sustained. Hence, it must always be submitted to them to find whether it existed. The court has no right to find it, nor to instruct the jury that they may return a verdict for the plaintiff without it. Even the inference of malice from the want of probable cause, is one which the jury alone can draw. Stewart *v.* Sonneborn, 98 U. S. 187, 193, citing Wheeler *v.* Nesbit, 24 How. (U. S.) 545; Newell *v.* Downs, 8 Black. (Ind.) 523; Johnson *v.* Chambers, 10 Ired. L. (N. C.) 287; Van Voorhees *v.* Leonard, 1 Thomp. & C. (N. Y.) 148; Schofield *v.* Ferrers, 47 Pa. St. 194; Mitchell *v.* Jenkins, 5 Barn. & Ad. 588.

[2] Approved in Callahan *v.* Caffarata, 39 Mo. 136. For a similar form, see Hill *v.* Palm, 38 Mo. 75.

§ 1638. EFFECT OF ACTING UPON THE ADVICE OF COUNSEL. — *a.* WHEN A DEFENSE. — "The court instructs the jury, for the defendant, that, if they believe, from the evidence in the case, that the defendant fully, fairly and truthfully stated all the facts and circumstances in relation to the alleged riot, to respectable counsel, and that such counsel advised him that he had reasonable cause to institute the criminal proceeding against this plaintiff, and the defendant, in good faith, acted upon such advice, then the plaintiff cannot maintain this action, whether such advice was correct or not, and whether the defendant in the criminal prosecution was guilty or not, and the jury must find for the defendant." [1]

§ 1639. *b.* AND WHEN NOT. — "If you believe from the evidence, that the defendant consulted an attorney, and made a full and fair representation to him of the facts, that said attorney advised the prosecution, and that defendant acted in good faith upon such advice, then you should find for the defendant. - - - - If, however, the defendant consulted counsel, as a means of covering malice, and did not believe the advice given him, or that the plaintiff was guilty of the crime charged against him, but commenced the prosecution as a means to get rid of the liability on the note in question, then the fact that he consulted counsel cannot avail him." [2]

[1] Approved in Skidmore *v.* Bricker, 77 Ill. 165.

[2] Approved in McCarty *v.* Kitchen, 59 Ind. 505; citing Scotten *v.* Longfellow, 40 Ind. 23; McCullough *v.* Rice, 59 Ind. 580; Burgett *v.* Burgett, 43 Ind. 78; Smith *v.* Zent, 59 Ind. 362. In the case of Center *v.* Spring, 2 Ia. 393, 397, 406, the following instruction, — deficient, it is perceived, in some of the elements in the two above given, — was tendered and refused: "If the jury find from the evidence, that the defendant acted under the advice of counsel, given on a fair statement of the real facts and circumstances in the case, they will find for the defendant." The refusing of it was held error. The court, in its opinion, correctly recites the rule, including an element which the instruction omits, namely, that of acting *bona fide* upon the advice so given. As perceived by the language of the instruction above given in § 1638, the principle is recognized that the party may make a fair statement of the facts to counsel and procure the advice of counsel and yet not act *bona fide* upon the advice, because not believing the advice to be sound. This element the instruction under consideration omits, and to that extent it is imperfect. The court, speaking through Wright, C. J., stated the law correctly thus: "If the defendant made a fair statement of all the facts in the case to counsel, and acted upon the advice given upon such statement, is he liable, if that opinion should be erroneous and unwarranted? Aside from authority, this court would no

§ 1640. CONCURRENCE OF MALICE AND WANT OF PROBABLE CAUSE. — *a.* BURDEN ON PLAINTIFF TO SHOW AFFIRMATIVELY THESE TWO ELEMENTS. — "That in order to entitle plaintiff to recover in this action, he must prove affirmatively to the satisfaction of the jury, by a preponderance of the evidence, that the defendants sued out the warrant against the plaintiff without any reasonable or probable cause therefor, and also that, in so doing, they were actuated by malice towards the plaintiff, and that unless the want of probable or reasonable cause and malice concurred, at the time said warrant was sued out, the plaintiff cannot recover." [1]

be united on this question. We have no doubt, however, that the decided current of authorities, sustains the position assumed by appellant, and we shall so hold. Where a party lays all the facts before counsel, before beginning proceedings, and acts *bona fide*, upon the opinion given by such counsel, though that opinion is erroneous and unwarranted, he is not liable to this action. This is the general expression of the rule. If, however, the defendant misrepresents the facts to such counsel, if he does not act in good faith under the advice received; if he does not himself believe that there is cause for the prosecution or action; if counsel and client act in bad faith, in originating and urging the prosecution; he will not be protected; and in such cases, the integrity or *bona fides* of his conduct, is a question of fact for the jury. Snow *v.* Allen, 1 Stark. 502; Ravenga *v.* Mackintosh, 2 Barn. & Cres. 693; Hall *v.* Suydam, 6 Barb. (N. Y.) 84; Blunt *v.* Little, 3 Mason (U. S.), 102; Stone *v.* Swift, 4 Pick. (Mass.) 389; Tompson *v.* Mussey, 3 Me. 305; Williams *v.* Vanmeter, 8 Mo. 339; Turner *v.* Walker, 3 Gill & J. (Md.) 378; Stevens *v.* Fasset, 27 Me. 266; Wills *v.* Noyes, 12 Pick. (Mass.) 324; Hall *v.* Hawkins, 5 Humph. (Tenn.) 357; Sommer *v.* Wilt, 4 Serg. & R. (Pa.) 19; Wood *v.* Weir, 5 B. Mon. (Ky.) 544; 2 Greenl. Ev., § 459."

[1] Approved in Vinal *v.* Core, 18 W. Va. 1, 62. This instruction, standing alone — not supplemented by others given — would obviously be erroneous, as submitting to the jury the question what is probable or reasonable cause. That malice in the previous prosecution is a necessary ingredient in actions of this kind, whether the previous prosecution were criminal or civil, see *ante*, § 1595, and cases cited; also the following: Farmer *v.* Darling, 4 Burr. 1791; Nicholson *v.* Coghill, 4 Barn & Cres. 21; Webb *v.* Hill, 3 Carr. & P. 485; Burhans *v.* Sandford, 19 Wend. (N. Y.) 417; Cotton *v.* Huidekoper, 2 Pa. 149; Kelton *v.* Bevins; Cook (Tenn.), 90; Wiggin *v.* Coffin, 3 Story (U. S.), 1; Cook *v.* Walker, 30 Ga. 519; Jacks *v.* Stimpson, 13 Ill. 701; Hurd *v.* Shaw, 20 Ill. 354; Wade *v.* Walden, 23 Ill. 425; Israel *v.* Brooks, 23 Ill. 575; Cummings *v.* Parks, 2 Ind. 148; Ammerman *v.* Crosby, 26 Ind. 451; Ritchey *v.* Davis, 11 Iowa, 124; Malone *v.* Murphy, 2 Kan. 250; Kearney *v.* Holmes, 6 La. Ann. 373; Murphy *v.* Redler, 16 La. Ann. 1; Robertson *v.* Spring, 16 La. Ann. 252; Dickinson *v.* Maynard, 20 La. Ann. 66; McLellan *v.* Cumberland Bank, 24 Me. 566; Stone *v.* Crocker, 24 Pick. (Mass.) 81; Greenwade *v.* Mills, 31 Miss. 464; Riney *v.* Vanlandingham, 9 Mo. 816; Frissell *v.* Relfe, 9 Mo. 859; Moore *v.* Sanborin, 42 Mo. 490; Foshay *v.*

§ 1641. *b.* Another Precedent. — "The plaintiff charges the defendant with prosecuting him (the plaintiff), for larceny, falsely, maliciously, and without reasonable or probable cause for said prosecution; the plaintiff must therefore prove, to the satisfaction of the jury, that the defendant did prosecute the plaintiff on a charge of larceny; that the charge was false; that the defendant was instigated by malice against the plaintiff; that he made the charge without reasonable or probable cause to believe the plaintiff guilty; and, unless all this be proved to the satisfaction of the jury, they will find for the defendant." [1]

§ 1642. *c.* Another Precedent. — "If the jury is satisfied that the defendant caused plaintiff to be arrested at his residence in the city of St. Louis, and caused him to be conveyed thence by police officers and he was then discharged, and that such arrest was made without reasonable or probable cause and maliciously, then the jury will find for plaintiff in such sum as they believe he ought to recover." [2]

§ 1643. *d.* No Recovery for the Malicious Prosecution of a Guilty Person. — "If, at the time of the commencement of the prosecution against this plaintiff, the defendant had probable cause for believing the plaintiff [Green] was guilty of the crime of seducing the woman, Caroline, and he was the father of her unborn child, then your verdict should be for the defendant, although you may find that, in the part he took in the matter, he was actuated by malice; to hold him liable he must have been actuated by malice and a want of probable cause." [3]

Ferguson, 2 Denio (N. Y.), 617; Besson *v.* Southard, 10 N. Y. 236; Hall *v.* Suydam, 6 Barb. (N. Y.) 83; Bulkeley *v.* Smith, 2 Duer (N. Y.), 261; Campbell *v.* O'Brien, 9 Rich. L. (S. C.) 204; McNeese *v.* Herring, 8 Tex. 151; Hitson *v.* Forrest, 12 Tex. 320; Caudler *v.* Petit, 2 Hall (N. Y.), 315; Murray *v.* Long, 1 Wend. (N. Y.) 140; Bell *v.* Ursury, 4 Litt. (Ky.) 334; Campbell *v.* Threlkeld, 2 Dana (Ky.), 425; Turner *v.* Walker, 3 Gill & J. (Md.) 377; Pangburn *v.* Bull, 1 Wend. (N. Y.) 345; M'Cormick *v.* Sisson, 7 Cow. (N. Y.) 715; Marshall *v.* Maddock, Litt. (Ky.) Sel. Cas. 106; O'Driscoll *v.* M'Burney, 2 Not. & M. (S. C.) 54; Morris *v.* Corson, 7 Cow. (N. Y.) 281; Thomas *v.* DeGraffenreid, 2 Not. & M. (S. C.) 143; Garrard *v.* Willet, 4 J. J. Marsh. (Ky.) 628; Smith *v.* Shackleford, 1 Not. & M. (S. C.) 36; Stone *v.* Stevens, 12 Conn. 219; Young *v.* Gregory, 3 Call (Va.), 446; Blunt *v.* Little, 3 Mass. (U. S.) 102; Lyon *v.* Fox, 2 Browne (Pa.) (Appendix), 67.

[1] Approved in Hill *v.* Palm, 38 Mo. 23.

[2] Approved in Ahern *v.* Collins, 39 Mo. 146.

[3] Approved in Green *v.* Cochran, 43 Iowa, 544, 549. The court said: "This instruction clearly presents the doctrine that the defendant can be held

§ 1644. As to Probable Cause. — *a.* Defining Probable Cause. — "Probable cause is a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the person accused is guilty of the offense charged.[1]"

§ 1645. *b.* Stating Definition Negatively. — "The jury are instructed that, unless they believe from the evidence that, at the time of the arrest and imprisonment of plaintiff upon the offense charged, there was a reasonable ground of suspicion of his guilt and supported by circumstances sufficiently strong in themselves to warrant a prudent

liable only for his malice and want of probable cause." These precedents are given with the *caution* that such instructions cannot be properly given under the principles already announced in this chapter (*ante*, § 1630) unless the jury are elsewhere in the same series of instructions properly advised, upon hypothetical instructions drawn from the evidence in the case, as to what facts which the evidence tends to prove do or do not constitute probable cause; otherwise they are plainly open to the vice of submitting the question of probable cause to the jury. See *ante*, §1613,

[1] Approved in Shaul *v.* Brown, 28 Ia. 38, 49, 50; citing and relying on Munns *v.* Dupont, 3 Wash. C. C. (U. S.) 31; *s. c.* 1 Am. L. C. 200. Substantially the same instruction was approved in Chapman *v.* Cawrey, 50 Ill. 511, 512, 517. See also Spengler *v.* Davy, 15 Gratt. (Va.) 381, 388; Wilmarth *v.* Mountford, 4 Wash. C. C. (U. S.) 82; Foshay *v.* Ferguson, 2 Denio (N. Y.), 617, 619; Hall *v.* Suydam, 6 Barb. (N. Y.) 84, 86; Cabiness *v.* Martin, 3 Dev. L. (N. C.) 454; Raulston *v.* Jackson, 1 Sneed (Tenn.), 129. Other definitions: "There must be a reasonable cause such as will operate on the mind of a discreet man; there must also be a probable cause, such as will operate on the mind of a reasonable man; at all events, such as would operate on the mind of the party making the charge; otherwise there is no probable cause for him." Broad *v.* Ham, 5 Bing. (N. C.) 722, 725, per Tindal, C. J. "Probable cause is anything which will create in the mind of a reasonable man, the belief that a felony existed, and that the party charged was in any way concerned in it." Braveboy *v.* Cockfield, 2 McMull. L. 274. "Probable cause in general may be understood to be such conduct on the part of the accused, as may induce the court to infer, that the prosecution was undertaken from public motives." Ulmer *v.* Leland, 1 Me. 136, 138. "Probable cause is such a state of facts in the mind of the prosecutor as would lead a man of ordinary caution and prudence to believe or entertain an honest and strong suspicion that the person arrested is guilty." Bacon *v.* Towne, 4 Cush. (Mass.) 238, 239. "Such a state of facts, actually existing, known to the prosecutor personally or by information derived from others, as would in law justify the setting on foot of the prosecution; that is such as, in the judgment of the court, would lead a man of ordinary caution, acting conscientiously upon these actual facts, to believe the person guilty." Vinal *v.* Core, 18 W. Va. 1, 40. See also *ante*, § 1600.

man in the belief that plaintiff was guilty of the crime for which he was imprisoned, then there existed no probable cause for his arrest, and the jury will find accordingly." [1]

§ 1646. *c.* BURDEN ON PLAINTIFF TO SHOW WANT OF PROBABLE CAUSE. — "The burden is on the plaintiff to show affirmatively, by circumstances or otherwise, that the defendant had no ground for the prosecution — no such reasonable ground for suspicion, sufficiently strong in itself — as to warrant a cautious man in believing that the plaintiff was guilty of the offense charged." [2]

§ 1647. *d.* WANT OF PROBABLE CAUSE NOT INFERABLE FROM MALICE. — "You cannot infer want of probable cause from malice." [3]

§ 1648. *e.* HYPOTHETICAL STATE OF FACTS CONSTITUTING EVIDENCE OF A WANT OF PROBABLE CAUSE FOR PROSECUTING A CHARGE OF LARCENY. — "If you find that the defendant, previous to the commencement of the prosecution, believed the plaintiff to be an honest man; and find that the plaintiff, and defendant, just before the taking of the pup in question by the plaintiff, disputed as to whether or not the plaintiff was entitled to the pup, the plaintiff claiming that he was, and the defendant denying it; and further find that the defendant knew, when he commenced the prosecution, that plaintiff had taken said pup under a claim of right and that he took it openly, and not secretly in the daytime, and without other suspicious circumstances,— such fact would be evidence of want of probable cause." [4]

§ 1649. *f.* CONTRA: HYPOTHETICAL STATE OF FACTS DECLARED TO CONSTITUTE PROBABLE CAUSE IN THE SAME CASE. — "If, on the other hand, you find that the plaintiff took the pup in question secretly and without the knowledge of Brown and concealed the same; and that such taking was without any claim of right known to Brown; and find that those facts alone were known to Brown; and that Brown made a reasonable effort to ascertain the facts of the case, and learned only the above; and find that Brown really believed that Shaul had stolen the pup,— such facts would constitute probable cause." [5]

[1] Approved in Callahan *v.* Caffarata, 39 Mo. 136.

[2] Approved in Shaul *v.* Brown, 28 Ia. 38, 49, 50.

[3] Approved in Shaul *v.* Brown, 28 Ia. 38, 49, 50; *Ante*, § 1608.

[4] Approved in Shaul *v.* Brown, 28 Ia. 38, 49, 50.

[5] Approved in Shaul *v.* Brown, 28 Ia. 38, 49, 50. For a similar precedent where the criminal prosecution was for the larceny of a quantity of coal-oil, see Vinal *v.* Core, 13 W. Va. 1, 72.

§ 1650. *g.* NOT A QUESTION OF GUILT BUT OF REASONABLE GROUND OF SUSPICION. — "The question of probable cause does not depend on the question whether Shaul was guilty in point of fact, nor whether Brown, in fact, believed him guilty; but the question is, were the facts and circumstances within Brown's knowledge and upon which he acted, sufficient in themselves to raise a reasonable ground of suspicion in the mind of an ordinarily cautious man; and did Brown believe Shaul guilty." [1]

§ 1651. *h.* THAT HONEST AND WELL-FOUNDED BELIEF IS PROBABLE CAUSE. — "If the jury believe, from the evidence, that the defendant honestly believed that the plaintiff had committed a crime, breach of the peace, or misdemeanor, or had threatened to commit a crime, misdemeanor or breach of the peace, and if defendant's belief was founded on circumstances tending to show that he had committed, or was about to commit, such offense, such belief, so founded, negatives the idea of want of probable cause for the prosecution, and the jury will find for the defendant." [2]

1652. *i.* THAT A MAGISTRATE'S DISCHARGE IS PRIMA FACIE EVIDENCE OF A WANT OF PROBABLE CAUSE. — "That, if the jury believe, from the evidence, that the plaintiff was arrested on the warrant, on the charge of grand larceny, was examined on said charge, and, after said examination before the justice, as alleged in the declaration, was discharged from prosecution thereon, as alleged, then such discharge is *prima facie* evidence that there was want of probable cause, for such criminal prosecution sufficient to throw the burden of the proof on the defendants of rebutting the inference, that there was such want of probable cause for charging the plaintiff with the crime set out in the warrant in the declaration mentioned; and, if the jury believe from the evidence, that there was want of probable cause for charging the plaintiff with said crime, then the jury have the right to infer malice in the defendants in beginning such prosecution." [3]

§ 1653. *j.* BUT NOT CONCLUSIVE EVIDENCE. — "The acquittal by the justice of the plaintiff of the charge in the warrant, is not in this action

[1] Approved in Shaul *v.* Brown, 28 Ia. 38, 49, 50, citing and relying upon Munns *v.* Dupont, 3 Wash. C. C. 31; *s. c.* 1 Am. L. C. 200; *Ante*, §§ 1600, 1605.

[2] Approved in Chapman *v.* Cawrey, 50 Ill. 512, 517.

[3] Approved in Vinal *v.* Core, 18 W. Va. 69, 70.

conclusive evidence of the want of probable cause; and if the jury believe from all the evidence adduced before them, that the facts and circumstances so existed at the time of suing out the warrant, created a well grounded belief of the plaintiff's guilt, as charged in the warrant, then the plaintiff is not entitled to recover." [1]

§ 1654. As to Aiders and Abettors. — *a.* Must approve, Encourage and Countenance the Prosecution. — "The court instructs the jury that in this case the burden of proof is on the plaintiff to establish, by a preponderance of evidence, that the defendants, Blew and Johnson, or either of them, were present at the time of the committing of the trespass against plaintiff, aiding or abetting the said McDonald and Cannon in making the said arrest, or by some act or means approving or encouraging or countenancing the same, or that, being absent, said arrest was made with the knowledge or indorsement of said Blew and Johnson, or either of them, prior to the making of the same; and the mere presence of either Blew or Johnson at the time the arrest was made will not of itself make them liable, unless they, by some means or act approved, encouraged and countenanced the same." [2]

§ 1655. *b.* Or Counsel, Advise or Participate in it, etc. — "That in order to entitle plaintiff to recover against the defendant, B. S. Compton, the jury must believe from the evidence that the warrant was sued out by him, or counseled and advised by him, or that he voluntarily participated in the prosecution, and that it was carried on with his countenance and approval, or that he unlawfully entered into a conspiracy with his co-defendant, A. S. Core, to have said warrant issued without reasonable or probable cause therefor, and with malice towards the plaintiff." [3]

§ 1656. Circumstances which preclude Punitive Damages, where the Prosecution was for Larceny. — If from the evidence the jury believe, that the plaintiff, having possession of said oil, alleged in the

[1] Approved in Vinal *v.* Core, 18 W. Va. 166. This instruction is given with the *caution* that the last clause of it is open to the vice of submitting the question of probable cause to the jury — a vice which could be cured only by a proper submission of it on hypothetical instructions in other portions of the charge, which was done in the elaborate charge in this case.

[2] Approved in Cooper *v.* Johnson, 81 Mo. 483, 487.

[3] Approved in Vinal *v.* Core, 18 W. Va. 1, 62, 63.

warrant to have been stolen by him, knew that this oil belonged to the West Virginia Oil & Oil Land Company, or their assignee Core, and the plaintiff had no *bona fide* claim thereto, and, if from the evidence, the jury believe, that, so knowing, the plaintiff removed this oil without the consent of its owners, and appropriated it to his own use, with the fraudulent purpose of getting an undue advantage, then such misconduct on the part of the plaintiff, while it would not justify the defendants in causing him to be arrested for larceny, would render it entirely improper in the jury, if the plaintiff proves his right to recover, to award to him, in this case, punitive damages, and the compensatory damages, which he may be entitled to recover, must be mitigated or diminished, as a portion of these damages are given for the injury to the plaintiff's character, which character would be affected by such fraudulent conduct, if proven." [1]

[1] Approved in Vinal *v.* Core, 18 W. Va. 1, 67, 68.

CHAPTER LIV.

NEGLIGENCE.

ARTICLE I. — WHAT QUESTIONS FOR THE COURT AND WHAT FOR THE JURY.
ARTICLE II. — PRECEDENTS OF INSTRUCTIONS.

ARTICLE I. — WHAT QUESTIONS FOR THE COURT AND WHAT FOR THE JURY.

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1713. How Jury Instructed in Actions for Negligence.

§ **1661. How this Question generally arises.** — In almost every action for damages for an injury happening through the alleged negligence of the defendant or his servants, the question is complicated by the element of contributory negligence, and an effort is made to have the judge take the case from the jury, either upon the ground that the evidence, taking it most strongly in favor of the plaintiff, fails to disclose what is called *evidence of negligence*, or upon the ground that an inference of contribu-

tory negligence arises, either out of the plaintiff's own evidence, or out of evidence which stands undisputed in the case. In either of these cases it is conceded by all courts, as a general rule, that the judge ought to take the case from the jury, either by nonsuiting the plaintiff, or by directing the jury to return a verdict for the defendant, according to the mode of practice in vogue in the particular jurisdiction. As this species of litigation has grown to be very frequent of late years, in consequence of the extension of railway lines and the multiplication of railway accidents, it is thought proper to devote some space to the consideration of the question, under what circumstances the judge, in such an action, ought to take the case from the jury.

§ **1662. The Legal Idea of Negligence.** — The largest conception of negligence is that it is a failure to perform some duty. But this falls short of a definition, because many other actionable wrongs and all actionable breaches of contract consist of failures, either inadvertent, unavoidable or intentional, to perform some duty imposed by the laws of the social state, or voluntarily assumed by compact. A more accurate idea of actionable negligence is that it is a failure, through inadvertence, recklessness, or wantonness, to perform some duty which the party owes to another. This duty may be a negative duty of avoiding injury to him or his property; or it may be an affirmative duty, assumed by contract, of caring for his person or his property. In either case it is the duty of taking care to avoid injury to another.[1] In either case the law exacts no more than that degree of care, skill, diligence and attention, which are *reasonable* under the circumstances of the case, or in view of the nature of the duty assumed. Negligence has accordingly been defined to be "the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs,

[1] "Negligence is a violation of the obligation which enjoins care and caution in what we do. But this duty is relative, and where it has no existence between particular parties, there can be no such thing as negligence, in the legal sense of the term." Tonawanda R. Co. *v.* Munger, 5 Denio (N. Y.), 266.

would do, or doing something which a prudent and reasonable man would not do." [1] Is it for a technical legal scholar, sitting on the judicial bench, to decide what this ideal reasonable man would or would not do under given circumstances? or is it to be decided by twelve men, drawn from various walks of life, who may apply to its solution their average judgment and experience? This is the question which we are now to consider. The careful reader will not fail to perceive that it is merely a branch of the larger question, elsewhere discussed, whether the question of *reasonableness* is a question of law for the court or a question of fact for the jury.[2]

§ 1663. Question of Law or of Fact: General Statement of Doctrine. — Whether a defendant or his servants have been negligent, or, on the other hand, whether the plaintiff was guilty of negligence contributing to the injury, will generally be a question for the jury;[3] though, in the view of some courts, it is a question for the court, where there is no conflict as to the evidence.[4] In Illinois the question of *comparative negligence* — a peculiar rule prevailing in that State, — is for the jury.[5] Accordingly, in that State an instruction is properly refused which

[1] Blyth *v.* Birmingham Waterworks, 11 Exch. 784.

[2] *Ante.* § 1530, *et seq.*

[3] Allender *v.* Chicago &c. R. Co., 37 Iowa, 264; Zemp *v.* Wilmington &c. R. Co., 9 Rich. L. (S. C.) 84; Memphis &c. R. Co. *v.* Whitfield, 44 Miss. 467; Crissey *v.* Hestonville R. Co., 75 Pa. St. 83; Sullivan *v.* Phila. &c. R. Co., 30 Pa. St. 234; Thatcher *v.* Great Western R. Co., 4 Upper Canada C. P. 543; Simmons *v.* New Bedford &c. Steamboat Co., 97 Mass. 361; Brehm *v.* Great Western R. Co., 34 Barb. (N. Y.) 256; Smith *v.* New York &c. R. Co., 6 Duer (N. Y.), 25.

[4] Halpin *v.* Third Avenue R. Co., 8 Jones & Sp. (N. Y.) 175. See also Gagg *v.* Vetter, 41 Ind. 228, 254; Louisville &c. R. Co. *v.* Murphy, 9 Bush (Ky.), 522; Costello *v.* Landwehr, 28 Wis. 522, 529; Grigsby *v.* Chappell, 5 Rich. L. (S. C.) 446; Pittsburgh &c. R. Co. *v.* Evans, 53 Pa. St. 250; Flemming *v.* Western Pacific R. Co., 49 Cal. 253; Van Lien *v.* Scoville Man. Co., 4 Daly, 554; Foot *v.* Wiswall, 14 Johns. (N. Y.) 304; Thring *v.* Central Park R. Co., 7 Robt. (N. Y.) 616; Biles *v.* Holmes, 11 Ired. L. (N. C.) 16; Dascomb *v.* Buffalo &c. R. Co., 27 Barb. (N. Y.) 221; Dublin &c. R. Co. *v.* Slattery, 3 App. Cas. 1155, 1201, per Lord Blackburn; Barton *v.* St. Louis &c. R. Co., 52 Mo. 253, 258; Bell *v.* Hannibal &c. R. Co., 72 Mo. 50, 57; Owens *v.* Hannibal &c. R. Co., 58 Mo. 386, 393.

[5] Chicago &c. R. Co. *v.* Bonifield, 104 Ill. 223; Pennsylvania R. Co. *v.* Conlan, 101 Ill. 93.

tells the jury, as a matter of law, that certain facts *per se* constitute negligence.[1] A better opinion is that, whether the facts are disputed or undisputed, *if different minds might honestly draw different conclusions from them*, the case should properly be left to the jury, and that, in order to withdraw such a case from the jury, the facts should not only be undisputed, but the inferences, in respect of the defendant's failure of duty which arises upon those facts, should be indisputable.[2] This view conforms to the principle that inferences of fact from circumstances or transactions of an ambiguous character must be drawn by the jury, and not by the court.[3] Stated differently, when, in such an action, the circumstances under which the parties have acted are complicated and the general knowledge and experience of mankind would not at once condemn the act as careless, the question of

[1] *Ibid.*; Pennsylvania R. Co. *v.* Conlan, *supra*. See also Wabash R. Co. *v.* Elliott, 98 Ill. 481. Except in cases mentioned in § 1672, *post*.

[2] Railroad Co. *v.* Stout, 17 Wall. (U. S.) 657; Fernandez *v.* Sacramento City R. R., 4 Cent. L. J. 82; Detroit &c. R. Co. *v.* Van Steinberg, 17 Mich. 99; State *v.* Manchester &c. R. Co., 52 N. H. 529; Gaynor *v.* Old Colony &c. R. Co., 100 Mass. 208, 212; McGrath *v.* Hudson River R. Co., 32 Barb. (N. Y.) 144; *s. c.* 19 How. Pr. (N. Y.) 211; Bridges *v.* North London R. Co., L. R. 7 H. L. 213, Beers *v.* Housatonic R. Co., 19 Conn. 566; Vinton *v.* Schwab, 32 Vt. 612; Pennsylvania Canal Co. *v.* Bentley, 66 Pa. St. 30, 34; Wyatt *v.* Citizens' R. Co., 55 Mo. 485; Norton *v.* Ittner, 56 Mo. 351; Stoddard *v.* St. Louis &c. R. Co., 65 Mo. 514; Jenkins *v.* Little Miami R. Co., 2 Disney (Oh.), 49; McLain *v.* Van Zandt, 7 Jones & Sp. (N. Y.) 347.

[3] Conover *v.* Middletown, 42 N. J. L. 382. "The true position is this: Negligence (with the exception hereafter to be noted) is always a logical inference, to be drawn by the jury from all the circumstances of the case, under the instructions of the court In all cases in which the evidence is such as not to justify the inference of negligence, so that a verdict of negligence would be set aside by the court, then it is the duty of the court to instruct the jury to negative negligence. In all other cases, the question is for the jury, subject to such advice as may be given by the court as to the force of the inferences. The only exception to this rule is that elsewhere discussed, where a statute declares that a party doing or omitting certain things is to be treated as negligent. In such cases all that the jury has to decide is whether the thing in question was done or omitted. If so, negligence is juridically imputed, and this must be declared by the court." Whart. Neg., § 420. This statement of doctrine has been quoted with approval by the Supreme Court of Missouri (Bell *v.* Hannibal &c. R. Co., 72 Mo. 50, 58),—overlooking the fact that in that State the judge does not give "advice" to the jury "as to the force of the inferences."

negligence should be submitted to the jury.[1] Thus, questions of contributory negligence in cases of persons run over in the highway,[2] of the teams of *travelers colliding* upon the highway,[3] of injuries to travelers from *defects in the highway*,[4] whether in the day or the night time,[5] including the question of the traveler's *rate of speed*[6] at the time of the injury, of the *competency of his driver*,[7] and whether the traveler was making a *reasonable* or

[1] Gaynor *v.* Old Colony &c. R. Co., 100 Mass. 208; Patterson *v.* Wallace, 1 Macq. H. L. Cas 748; Johnson *v.* Hudson &c. R. Co., 20 N. Y. 65; Philadelphia &c. R. Co. *v.* Spearen, 47 Pa. St. 300; Mangam *v.* Brooklyn &c. R. Co., 38 N. Y. 455; West Chester &c. R. Co. *v.* McElwee, 67 Pa. St. 311; Seabrook *v.* Hecker, 2 Robt. (N. Y.)291; Hayeroft *v.* Lake Shore &c. R. Co., 64 N. Y. 636.

[2] Williams *v.* Grealy, 112 Mass. 79; Quirk *v.* Holt, 99 Mass. 164; Fernandez *v.* Sacramento City R. R., 4 Cent. L. J. 82; Belton *v.* Baxter, 58 N. Y. 411; *s. c.* 54 N. Y. 245; Myers *v.* Dixon, 45 How. Pr. (N. Y.) 48; Baxter *v.* Second Avenue R. R. Co., 3 Robt. (N. Y.) 510; Williams *v.* O'Keefe, 9 Bosw. (N. Y.) 536; Pendril *v.* Second Avenue R. Co., 43 How. Pr. (N. Y.) 399; 2 Jones & Sp. (N. Y.) 481; Johnson *v.* Hudson River R. Co., 20 N. Y. 65.

[3] Welling *v.* Judge, 40 Barb. (N. Y.) 193; Larrabee *v.* Sewall, 66 Me. 376; Campbell *v.* Kearney, 45 How. Pr. (N. Y.) 87; Smith *v.* Clark, 3 Lans. (N. Y.) 208; Park *v.* O'Brien, 23 Conn. 347; Griggs *v.* Fleckenstien, 14 Minn. 81; *post*, §§ 1822–1824.

[4] Woods *v.* Boston, 121 Mass. 337; Barstow *v.* Berlin, 34 Wis. 357; Weisenberg *v.* Appleton, 26 Wis. 56; Driscoll *v.* New York, 11 Hun (N. Y.), 101 (with which compare Gilman *v.* Deerfield, 15 Gray (Mass.), 577); Cremer *v.* Portland, 36 Wis. 92; Spofford *v.* Harlow, 3 Allen (Mass.), 176; Sheehy *v.* Burger, 62 N. Y. 558; Cox *v.* Westchester Turnpike Road, 33 Barb. (N. Y.) 414; Conroy *v.* Twenty-third Street R. Co., 52 How. Pr. (N. Y.) 39; Gillespie *v.* Newberg, 54 N. Y. 408; *post*, § 1749 *et seq.*

[5] Maloy *v.* New York &c. R. Co , 58 Barb. (N. Y.) 182; Swift *v.* Newbury, 36 Vt. 355; Rector *v.* Pierce, 3 Thomp. & Cook (N. Y.), 416; Durant *v.* Palmer, 29 N. J. L. 544, 548; Wright *v.* Saunders, 58 Barb. (N. Y.) 214; *s. c.* affirmed, 3 Keyes (N. Y.), 323; Vale *v.* Bliss, 50 Barb. (N. Y.) 358; Bateman *v.* Ruth, 3 Daly (N. Y.), 378; Barton *v.* Springfield, 110 Mass 131; Perkins *v.* Fond du Lac, 34 Wis. 435; Stier *v.* Oskaloosa, 41 Ia. 353.

[6] Elgin *v.* Renwick, 86 Ill. 498; Oakland R. Co. *v.* Fielding, 48 Pa. St. 320; Palmer *v.* Portsmouth, 43 N. H. 265; Bly *v.* Haverhill, 110 Mass. 520; Stevens *v.* Boxford, 10 Allen (Mass.), 25; Rigby *v.* Hewitt, 5 Exch. 240; Damon *v.* Scituate, 119 Mass. 66; Baker *v.* Portland, 58 Me. 199; Whitney *v.* Cumberland, 64 Me. 541; Reed *v.* Deerfield, 8 Allen (Mass.), 522. But see Heland *v.* Lowell, 3 Allen (Mass.), 407.

[7] Cobb *v.* Standish, 94 Me. 198; Bigelow *v.* Rutland, 4 Cush. (Mass.) 247; Blood *v.* Tynesborough, 103 Mass. 509; Babson *v.* Rockport, 101 Mass. 93; Bronson *v.* Southbury, 37 Conn. 199.

proper *use of the highway* at the time,[1] even where the particular use of the highway was prohibited by law;[2] questions of negligent injuries to persons through *noxious agents* which have been left exposed,[3] through the use of other dangerous agents,[4] through the *exposure of person and property* in situations only slightly dangerous;[5] or, in the case of injuries to employés through the use of *defective machinery*,[6] or through the

[1] Britton *v.* Cunnington, 107 Mass. 347; Babson *v.* Rockport, 101 Mass. 93; Bigelow *v.* Reed, 51 Me. 325; Cleveland *v.* Spier, 16 C. B. (N. S.) 399; Hunt *v.* Salem, 121 Mass. 294; Ryerson *v.* Abington, 102 Mass. 526; Gregory *v.* Adams, 14 Gray (Mass.), 242.

[2] Davies *v.* Mann, 10 Mees. & W. 546; *s. c.* 2 Thomp. Neg. 1105; Steele *v.* Burkhardt, 104 Mass. 59; Kearns *v.* Snowden, 104 Mass. 63, note; Greenwood *v.* Callahan, 111 Mass. 298; Streett *v.* Laumier, 34 Mo. 469; Griggs *v.* Fleckenstein, 14 Minn. 81; Albert *v.* Bleeker Street R. Co., 2 Daly (N. Y.), 389; Neanow *v.* Uttech, 46 Wis. 581; Klipper *v.* Coffey, 44 Md. 117; Spofford *v.* Harlow, 3 Allen (Mass.), 176; *s. c.* 1 Thomp. Neg. 383; Butterfield *v.* Forrester, 11 East, 60; *s. c.* 2 Thomp. Neg. 1104; Welch *v.* Wesson, 6 Gray (Mass.), 505; *s. c.* 2 Thomp. Neg. 1077; Rigby *v.* Hewitt, 5 Exch. 240; Baker *v.* Portland, 58 Me. 199, 205. In some of the New England courts this principle has been held not to apply where the traveler was violating the law by traveling on Sunday — a conclusion which is founded not in judicial sense, but in religious bigotry. Bosworth *v.* Swansey, 10 Met. (Mass.) 363; Jones *v.* Andover, 10 Allen (Mass.), 18; Connolly *v.* Boston, 117 Mass. 64; Lyons *v.* Desotelle, 124 Mass. 387; Smith *v.* Boston &c. R. R., 120 Mass. 490; Hinckley *v.* Penobscot, 42 Me. 89; Johnson *v.* Irasburgh, 47 Vt. 28, Hamilton *v.* Boston, 14 Allen (Mass.), 475. *Contra*, Sutton *v.* Wauwatosa, 29 Wis. 21; Greer, J., in Philadelphia &c. R. Co. *v.* Philadelphia &c. Tow Boat Co., 23 How. (U. S.) 209, 218.

[3] McKee *v.* Bidwell, 74 Pa. St. 218; McNamara *v.* Northern Pacific R. Co., 50 Cal. 581; Clark *v.* Chambers, 3 Q. B. Div. 327; *s. c.* 7 Cent. L. J. 11; 17 Alb. L. J. 505.

[4] Hanlon *v.* Ingram, 3 Ia. 81; Frankford &c. Turnpike Co. *v.* Philadelphia &c. R. Co., 54 Pa. St. 345; Lackawanna &c. R. Co. *v.* Doak, 52 Pa. St. 379; McCully *v.* Clarke, 40 Pa. St. 399; Crist *v.* Erie R. Co., 1 Thomp. & C. (N. Y.) 435. Proper equipments being shown, however, by uncontradicted testimony, for controlling the escape of fire, no question remains for the jury. Read *v.* Morse, 34 Wis. 315; Spaulding *v.* Chicago &c. R. Co., 33 Wis. 589.

[5] Ackhart *v.* Lansing, 48 How. Pr. 374; Patrick *v.* Pote, 117 Mass. 297; Clayards *v.* Dethick, 12 Q. B. 439.

[6] Norton *v.* Ittner, 56 Mo. 351; Cumberland &c. R. Co. *v.* State, use of Hogan, 45 Md. 229; Cumberland &c. R. Co. *v.* State, use of Fazenbaker, 37 Md. 156; Hayden *v.* Smithville Man. Co., 29 Conn. 548; Lake Shore &c. R. Co. *v.* Fitzpatrick, 31 Oh. St. 479; Fort *v.* Whipple, 11 Hun (N. Y.), 586; Dorsey *v.* Phillips &c. Co., 42 Wis. 583. If the defect is glaring, and the employer continues in the use of the instrument or machinery, he will be held to be

employment of *incompetent fellow workmen*,[1] including in such cases the effect of orders given to subordinates;[2] — all these and many other cases are ordinarily to be *submitted to the jury*.

§ 1664. When a question for the jury: Where the facts are Controverted. — The question of negligence is, then, a *question of fact* for the jury where the facts which, if true, would constitute "evidence of negligence," are controverted.[3] To illustrate: In Maryland, if it appear that the plaintiff was injured in consequence of having *voluntarily* put his *arm out of the window* of a railway coach, he cannot recover. Yet if there is a conflict of testimony as to *how* his arm came to be thus exposed, the case must *go to the jury*.[4]

§ 1665. Where Fair-minded Men might draw Different Inferences from Uncontroverted Facts. — The case must also *go to the jury* where, although the facts are not controverted, fair-minded men might differ as to whether the inference of negligence should be drawn from them.[5]

guilty of negligence as a matter of law. Patterson *v.* Pittsburgh &c. R. Co., 76 Pa. St. 389; Conroy *v.* Vulcan Iron Works, 62 Mo. 35; Mehan *v.* Syracuse &c R. Co., 73 N. Y. 585. See *post*, §§ 1738, 1739.

[1] Joch *v.* Dankwardt, 85 Ill. 381; *post*, § 1737.

[2] Locke *v.* Sioux &c. R. Co., 46 Ia. 109.

[3] Saltonstall *v.* Stockton, 1 Taney's Dec. 11; Pittsburgh &c. R. Co. *v.* Andrews, 39 Md. 329; Chicago City R. Co. *v.* Young, 62 Ill. 238; Bernhardt *v.* Rensselaer &c. R. Co. 32 Barb. (N. Y.) 166.

[4] Pittsburgh &c. R. Co. *v.* Andrews, 39 Md. 329. See *post*, § 1792. It has been reasoned that, in an action for negligence where the direct fact in issue is established by *undisputed evidence*, and such fact is decisive of the cause, the question is a question of law for the court; and that the jury have no office to perform. Dascomb *v.* Buffalo &c. R. Co. 27 Barb. (N. Y.) 222. But this is true only where the facts are so unequivocal that reasonable minds could not draw different conclusions from them.

[5] Gaynor *v.* Old Colony &c. R. Co., 100 Mass. 208; Paterson *v.* Wallace, 1 Macq. H. L. Cas. 748; Johnson *v.* Hudson &c. R. Co., 20 N. Y. 65; Phila. &c. R. Co. *v.* Spearen, 47 Pa. St. 300; Mangam *v.* Brooklyn &c. R. Co., 38 N. Y. 455; West Chester &c. R. Co. *v.* McElwee, 67 Pa. St. 311; Seabrook *v.* Hecker, 2 Robt. (N. Y.) 291; Haycroft *v.* Lake Shore &c. R. Co., 64 N. Y. 636; McCarragher *v.* Gaskell, 42 Hun (N. Y.), 451; Thurber *v.* Harlem &c. R. Co., 60 N. Y. 331; Stackus *v.* New York Central &c. R. Co., 79 N. Y. 464; Wait *v.* Agricultural Ins. Co., 13 Hun (N. Y.), 371; *ante*, § 1663.

§ 1666. Where the Facts are Controverted and the Inference Doubtful. — The case must also *go to the jury* where, at the same time, the facts are in dispute and the inferences which fair-minded men would draw from them are doubtful.[1] More briefly, the question of negligence is said to be for the jury when there is a substantial doubt as to the facts, or as to the inferences to be drawn from them,[2] and it is for the court only when the facts are undisputed and the inference of negligence is clear.[3]

§ 1667. When a Question for the Judge: General Rule Suggested. — Obviously the question is for the decision of the judge in cases which are the antithesis of those stated in the preceding section. Recurring to the principle that, upon a motion for a nonsuit or for a peremptory instruction to find for the defendant, which motion is sometimes called a *demurrer to the evidence*, every fact which the evidence tends to prove is to be taken as having been proved in favor of the plaintiff,[4] — it may be said as a general rule, that the judge is authorized to nonsuit the plaintiff or to direct a verdict for the defendant, according to the mode of practice in the particular jurisdiction, in either of the two following cases: —

(1.) Where all the facts which the plaintiff's evidence fairly tends to prove, if admitted to be true, would not authorize a conclusion that the defendant has been guilty of negligence as matter of law.

[1] Nichols *v.* Sixth Avenue R. Co., 38 N. Y. 131. See also Railroad Co. *v.* Stout, 17 Wall. (U. S.) 657; Fernandez *v.* Sacramento City R. Co., 4 Cent. L. J. 82; Detroit &c. R. Co. *v.* Van Steinburg, 17 Mich. 99; State *v.* Railroad Co., 52 N. H. 529; Gaynor *v.* Old Colony &c. R. Co., 100 Mass. 208, 212; McGrath *v.* Hudson River R. Co., 32 Barb. (N. Y.) 144; *s. c.* 19 How. Pr. (N. Y.) 211; Bridges *v.* North London R. Co., L. R. 7 H. L. 213; Beers *v.* Housatonic R. Co., 19 Conn. 566; Vinton *v.* Schwab, 32 Vt. 612; Pennsylvania Canal Co. *v.* Bentley, 66 Pa. St. 30, 34; Wyatt *v.* Citizens' R. Co., 55 Mo. 485; Norton *v.* Ittner, 56 Mo. 351; Stoddard *v.* St. Louis &c. R. Co., 65 Mo. 514; Jenkins *v.* Little Miami R. Co., 2 Disney (Oh.), 49; Mauerman *v.* Siemerts, 71 Mo. 101, 104.

[2] Crissey *v.* Hestonville &c. R. Co., 75 Pa. St. 83; Barton *v.* St. Louis R. Co., 52 Mo. 253; Keller *v.* New York Central R. Co., 24 How. Pr. (N. Y.) 172.

[3] Dickens *v.* New York &c. R. Co., 1 Abb. App. Dec. 504.

[4] *Post*, § 2212, *et seq.*

(2.) Where, either upon the plaintiff's evidence, assuming it to be true, or upon the state of facts shown by the evidence in the whole case, which stand undisputed and which ought not therefore to be left to the decision of the jury, an inference unavoidably arises that the person injured was guilty of negligence, materially and directly contributing to produce the accident complained of.

§ 1668. There must be Evidence legally tending to prove Negligence. — It is often laid down that the preliminary function of the judge on such a motion is not to weigh the evidence, but is limited strictly to determining whether there is or is not *evidence legally tending to prove* the fact affirmed, — *i.e.*, evidence from which, if credited, it may *reasonably be inferred*, in legal contemplation, that the fact affirmed exists, laying entirely out of view the effect of all modifying or countervailing evidence.[1] Stated in another way, it is said that, "when the evidence given at the trial, with all the inferences that the jury could justifiably draw from it, is so insufficient to support a *verdict* for the plaintiff, that such a verdict, if returned, must be *set aside*, the court is not bound to submit the case to the jury, but may direct a verdict for the defendant."[2] Nothing is gained by these statements in an accurate understanding of the rule, since they leave undefined the question, what evidence is to be deemed evidence legally tending to prove negligence.

§ 1669. What is meant by "Evidence tending to prove." — "It is apparent," said Scholfield, J., in a recent case in Illinois, "that evidence tending to prove means more than a *scintilla* of evidence, but evidence upon which the jury could, without acting unreasonably in the eye of the law, decide in favor of the plaintiff, or the party producing it. It is not intended by this practice

[1] Frazer *v.* Howe, 106 Ill. 563, 573; Simmons *v.* Chicago &c. R. Co., 110 Ill. 340. See also Hubner *v.* Feige, 90 Ill. 208; Crowe *v.* People, 92 Ill. 231; Pennsylvania Co. *v.* Stoelke, 104 Ill. 201.

[2] Simmons *v.* Chicago &c. R. Co., 110 Ill. 340; Lake Shore &c. R. Co. *v.* O'Conner, 115 Ill. 255, 261.

that the function of the jury to pass upon questions of fact is to be invaded, any more than it is intended that such function is to be invaded by a motion to set aside a verdict and for a new trial, upon the ground of the want of evidence to sustain the verdict. In neither case is the court authorized to weigh the evidence and decide where the preponderance is." [1] The principle that the *trial court* will not weigh evidence on a motion for a new trial, and grant a new trial where the verdict is manifestly against the preponderance of the evidence, is certainly not acceded to in all jurisdictions; but the rule stated is in some jurisdictions applicable only to the procedure of appellate courts.[2]

[1] Bartelott *v.* International Bank, 119 Ill. 259, 272. The learned judge cites: Hilliard New Tr., page 339, sec. 9, *et seq.*; Johnson *v.* Moulton, 2 Ill. 532; Lowry *v.* Orr, 6 Ill. 70; Morgan *v.* Ryerson, 20 Ill. 343.

[2] In Johnson *v.* Moulton, *supra*, it is said to be a well settled rule of law that in trials by jury the *weight of the testimony* is a question to be decided by the jury exclusively, and that their decision consequently cannot be assigned for error. In Lowry *v.* Orr, 6 Ill. 70, 83, the rule of law is said to be well established, "that, in cases where the verdict of the jury has been given *contrary to the evidence*, or where there is no evidence at all to support the verdict, the court will interfere and relieve the party prejudiced by such finding, by the grant of a new trial. But where there is a contrariety of evidence on both sides, and the facts and circumstances, by fair and reasonable intendment, will warrant the inferences of the jury, courts will reluctantly, if ever, disturb their verdict, notwithstanding it may appear to be against the strength and weight of the testimony. So, where the verdict depends upon the credibility of the witnesses, it is the peculiar province of the jury to judge of that credibility, to attach such weight to the testimony of each as may seem to be proper, after a due consideration of all the circumstances arising in the particular case, such as the relationship of the witness to one or both of the parties in the controversy, his supposed interest in the event of the suit, his means of knowledge in respect of the matters in dispute, his appearance upon the stand, his manner of testifying, his general character for veracity, and the like and to find their verdict accordingly." These observations are no doubt made from the standpoint of the appellate court, and are nothing other than a more extended way of stating the general proposition that, in actions at law, questions of fact will not be reviewed on appeal or error. City of Mattoon *v.* Fallin, 113 Ill. 249. It is a sound rule that, within the limits prescribed by statutes, the granting of new trials on the ground that the verdict is against the evidence, or against the weight of the evidence, or rendered in disregard of the evidence, is a matter addressing itself to the *sound discretion* of the trial judge, which discretion, as a general rule, is not reviewable in any appellate proceeding, though the contrary is the case in two or three jurisdictions.

§ 1670. Rule that there must be Reasonable Evidence of Negligence. — The English rule, established by the House of Lords in a recent case, upon a full consideration of the previous decisions in that country, is that it is for the judge to say whether any facts have been established by sufficient evidence, from which negligence can be *reasonably and legitimately inferred;* and it is for the jury to say whether, from those facts, when submitted to them, negligence ought to be inferred.[1] The judge may decide the case by a peremptory instruction, or by directing a nonsuit, according to the practice of the court, where, assuming all the evidence which works in favor of the plaintiff to be true, no fair-minded man can draw from it the inference that the defendant was guilty of a want of that degree of care which he was bound to exercise under the circumstances. More broadly, the judge so decides where there has been no failure of duty on the part of the defendant, — as where the accident arose from something which the defendant was not bound to anticipate and guard against.[2] The English rule was thus expressed by Lord Cairns, L. C.: "The judge has a certain duty to discharge, and the jurors have another and a different duty. The judge has to say whether any facts have been established by evidence from which negligence may be reasonably inferred; the jurors have to say whether, from those facts, when submitted to them, negligence ought to be inferred. It is, in my opinion, of the greatest importance in the administration of justice that these separate functions should be maintained, and should be maintained distinct. It would be a serious inroad on the province of the jury, if, in a case where there are facts from which negligence may reasonably be inferred, the judge were to withdraw the case from the jury, upon the ground that, in his opinion, negligence ought not to be inferred; and it would, on the other hand, place in the hands of the jurors a power which might be exercised in the most

The statutory limit in some States is that the judge cannot grant more than two new trials, on the ground that the jury have found against the weight of the evidence.

[1] Metropolitan R. Co. *v.* Jackson, 3 App. Cas. 193.

[2] Daniel *v.* Metropolitan &c. R. Co., L. R. 5 H. L. 45.

arbitrary manner, if they were at liberty to hold that negligence might be inferred from any state of facts whatever."[1] The following rule, laid down in England, has been approved in America: "It is not enough to say there was some evidence. A *scintilla* of evidence, or a mere surmise that there may have been negligence on the part of the defendants, clearly would not justify the judge in leaving the case to the jury. There must have been evidence on which the jury might reasonably and properly conclude that there was negligence."[2] Another expression of the doctrine is that the court ought to direct a verdict for the defendant, where the jury cannot infer negligence from the facts in evidence without *reasoning irrationally and contrary to common sense*. "These facts and circumstances," said Holmes, J., "must be such as would warrant a jury in inferring from them the fact of negligence by reasoning in the ordinary way, according to the natural and proper relation of things, and consistently with the common sense and experience of mankind.[3] A jury is not to be left or permitted to act by reasoning in any other way on such facts. Where it is plain that the jury could not find a verdict on the evidence offered without reasoning irrationally against all ordinary common sense and against all proper notions of justice and right, or against law, or without being influenced by undue sympathy, prejudice, gross misjudgment or mistaken impressions of the law and facts of the case,—the court will

[1] Metropolitan R. Co. *v.* Jackson, 3 App. Cas. 193, 197; *s. c.* 47 L. J. (C. P.) 303. The following English cases may be referred to as illustrating this doctrine and the extreme difficulty of applying it in practice: Bridges *v.* North London R. Co., L. R. 7 H. L. 213; *s. c.* 43 L. J. Q. B. 151; Robson *v.* Northeastern R. Co., 46 L. J. Q. B. 50; *s. c.* in Ct. of App., 2 Q. B. Div. 85. These two cases, decided before the case first cited, do not come up to the rule there laid down, and must be understood as qualified by it. They substantially hold that, in all actions against railroad companies for personal injuries, if any evidence whatever of negligence is offered, the question whether there was evidence on the part of the company is for the jury, and not for the court. But this is perhaps merely another form of stating the same rule. For what is "evidence of negligence," unless it is evidence from which the inference of negligence may be reasonably drawn. See also Rose *v.* Northeastern R. Co., 2 Exch. Div. 248; *s. c.* 46 L. J. (Exch.) 374.

[2] Cornman *v.* Eastern Counties R. Co., 4 Hurl. & N. 781; Beaulieu *v.* Portland Co., 48 Me. 291, 296.

[3] Citing 1 Greenl. Ev., §§ 44, 48.

declare as a matter of law that there is no competent evidence to be submitted to the jury." [1]

§ 1671. Difficulties of Applying this Rule in Practice. — In whatever frame of language judges attempt to set this rule, it will be found that nothing is more difficult than the application of it in actual practice. A few circumstances exist where acts of carelessness have so frequently recurred that the judges have fallen into a rule in dealing with them, which is that the law conclusively ascribes negligence to them, — such, for instance, as the act of a traveler who drives upon a railway without looking or listening for an approaching train.[2] On the other hand, the judges have held, in respect of certain acts frequently recurring before them for decision, that no negligence is to be imputed to such acts as matter of law, but that it may be a question for the jury whether, under the circumstances, they afford evidence for the conclusion of negligence as a conclusion of fact. Such, for instance, is held in respect of the speed at which a railway train may be driven, the rule being that no rate of speed can be held negligent as matter of law, unless it is a rate prohibited by statute. Between these lie a middle class of cases in which the judicial courts are divided in opinion as to whether a particular act of seeming or possible carelessness, which has resulted in injury in cases which have frequently come before them, is to be deemed negligent as matter of law. Of this character is the act of a passenger in riding with his elbow out of the window of the coach. Outside of these three classes lies a fourth class, where, for the purpose of promoting the safety of person or property, the legislature has forbidden the doing of certain acts, — as, for instance, the driving of a locomotive or of a railway train at a greater rate of speed than a prescribed rate within the limits of an incorporated city; the failure of a railway company to maintain a fence of a certain description on its right of way for the purpose of excluding domestic animals from its track, and many other like cases. In all such cases, the statute having conclusively ascribed

[1] Callahan *v.* Warne, 40 Mo. 132, 136. [2] *Post*, §§ 1686, 1800, *et seq.*

negligence to the act done or omitted, the only question for decision will be whether there was a proximate causal connection between such act and the injury which happened; and this again will sometimes be a question for the court and sometimes for the jury, depending upon the circumstances of the case.

§ 1672. **Violations of Statutory Duties.** — As a general rule, the violation of a duty enjoined by a statute, or by a valid municipal ordinance, enacted for the protection of person or property, is *negligence per se*. In such cases, the courts, in instructing juries, assume that there was negligence as matter of law, provided the facts are undisputed, or charge them that the doing or omitting of the particular act was negligence.[1]

§ 1673. **Violation of a Duty Enjoined by the Common Law.**— There is no ground for a distinction between cases of a violation of a duty enjoined by statute, and that of the violation of a duty enjoined in a particular situation by a positive rule of the common law,[2] especially where the statute is merely declaratory of the common law.[3] And it may be said, as a general rule, where the circumstances of a case are such that the standard of duty is fixed and defined by law and is the same under all circumstances, that the omisssion of this duty is negligence, and the court may so declare to the jury.[4]

§ 1674. **Where the Negligence is Clearly Defined and Palpable.** — It is also said that, where the negligence is "clearly defined and palpable," such that no verdict of a jury could make

[1] Karle *v.* Kansas City &c. R. Co., 55 Mo. 476; Norton *v.* Ittner, 56 Mo. 351, per Napton, J.; Gray *v.* Pullen, 5 Best & S. 970; Hale *v.* Sittingbourne &c. R. Co., 6 Hurl. & N. 488; *s. c.* 30 L. J. (Exch.) 81; 9 Week. Rep. 274; 3 L. T. (N. S.) 750; *post*, § 1719.

[2] Thomas *v.* Western Union Tel. Co., 100 Mass. 156.

[3] Compare, on this point, Gray *v.* Pullen (5 Best & S. 970), where the plaintiff recovered on the ground of a violation of a duty declared by statute; and Saddler *v.* Henlock, 4 El. & Bl. 570, where, on similar facts, it was held that the plaintiffs could not recover, no such duty having been enjoined by statute.

[4] West Chester &c. R. Co. *v.* McElwee, 67 Pa. St. 311, 315; McCully *v.* Clark, 40 Pa. St. 399.

it otherwise, it should be decided by the judge as a question of law.[1] This rule, more fully stated, is that, where "there is no controversy as to the facts, and from these it clearly appears what course a person of ordinary prudence would pursue under the circumstances, the question of negligence is purely one of law."[2] According to the current of judicial opinion a quarter of a century ago, cases where the question of negligence could thus be withdrawn from the jury were comparatively rare.[3] But the experience of courts in later years in actions of this kind, especially in railway damage suits, has been that, in almost every case where the question is submitted to the jury, a verdict is returned for the plaintiff, and manifestly with little consideration to the evidence or the justice of the case. The courts have therefore developed a stronger tendency, in recent than in former times, toward withdrawing such questions from juries.

§ **1675. Where the Inference of Negligence and of Care are Equally Balanced.** — An idea is found in some of the cases to the effect that, in order to entitle the plaintiff to succeed in any kind of action, he must submit something in the nature of evidence sufficient to *move the court*. The proper conception of the law under this head is, that it is sufficient for the plaintiff to submit some substantial evidence, tending to show a right of recovery upon the ground laid in his declaration, petition or complaint. In a leading English case this idea was thus expressed by Erle, C. J.: "The plaintiff is not entitled to succeed unless there be affirmative proof of negligence on the part of the defendant or his servants; and there can be no such proof, unless it be shown that there existed some duty, owing from the defendant to the plaintiff, and that there has been a breach of that duty. * * * Where it is a perfectly even balance, upon the evidence, whether the injury complained of has resulted from the

[1] Rudolphy *v.* Fuchs, 44 How. Pr. (N. Y.) 155, 160; Houfe *v.* Fulton, 29 Wis. 296.

[2] Fernandez *v.* Sacramento City R. Co., 52 Cal. 45; *s. c.* 4 Cent. L. J. 82.

[3] Detroit &c. R. Co. *v.* Van Steinburg, 17 Mich. 99; Rudolphy *v.* Fuchs, 44 How. Pr. (N. Y.) 155, 160; Railroad Co. *v.* Stout, 17 Wall. 657.

want of proper care on the one side or on the other, the party who founds his claim upon the imputation of negligence fails to establish his case."[1] In the same case the doctrine was thus expressed by Williams, J., in his concurring opinion: "I wish merely to add that there is another rule of the law of evidence, which is of the first importance, and is fully established in all the courts, viz.: that where the evidence is equally consistent with either view, — with the existence or non-existence of negligence, — it is not competent to the judge to leave the matter to the jury. The party who affirms negligence has altogether failed to establish it. This is a rule which ought never to be lost sight of."[2]

§ 1676. Whether the Negligence was the Proximate or Remote Cause of the Injury: General Statement of Doctrine. — It is only where the act of negligence proved is the proximate cause of the resulting damage, that the plaintiff can recover. In like manner it is only where the act of contributory negligence, which has been established by the testimony, was the proximate cause of the resulting damage, that it will bar a recovery. Another expression of this rule is found in making use of the words *proximate damage* and *remote damage*, instead of the words proximate cause and remote cause. The two expressions embrace the same juridical idea. The meaning is that, if the connection between the imputed wrongful act, and the damage which happened in consequence of it, is remote or speculative, there can be no recovery. A better expression of the rule is that proximate, immediate or direct damages are the *ordinary and natural results* of the negligent or other wrongful act; such as are *usual*, and such as therefore might have been *expected* to flow from it, and therefore ought to have been *foreseen* and guarded against. This rule puts into the category of remote damages all which are the result of an accidental or unusual combination of circumstances, which would not be reasonably anticipated, which the negligent party could not therefore be expected to provide

[1] Cotton *v.* Wood, 8 C. B. (N. S.) 568, 571; *s. c.* 1 Thomp. Neg. 361.

[2] *Ibid.*; see also the opinion of Lord Blackburn in Dublin &c. R. Co. *v.* Slattery, 3 App. Cas. 1155.

against, and over which, in many cases, he would have no control.[1] Much space would be required to expound and illustrate this doctrine, and therefore it will not be attempted.[2]

§ 1677. When a Question for the Judge and when for the Jury. — In actions for damage for negligence the general rule is, within limits already indicated, that, whether the damage which accrued to the plaintiff is the *proximate* or the *remote* result of the negligence of the defendant, is a *question of fact* for the jury :[3] that is to say, when *doubt* arises as to whether the damages are direct and proximate, or speculative and remote, the question should be submitted to the jury, under proper instructions.[4] But here, as in other cases, where the inference to be drawn from the facts proved is so plain that fair-minded men could not debate about it, the judge may properly decide it by a peremptory instruction.[4]

[1] Henry *v.* Southern Pacific R. Co., 50 Cal. 183; Rigby *v.* Hewitt, 5 Exch. 240; Fairbanks *v.* Kerr, 70 Pa. St. 86; Morrison *v.* Davis, 20 Pa. St. 171; McGrew *v.* Stone, 53 Pa. St. 436; Scott *v.* Hunter, 46 Pa. St. 192; Lake *v.* Milliken, 62 Mo. 240; Stark *v.* Lancaster, 57 N. H. 88; Atchison &c. R. Co. *v.* Stanford, 12 Kan. 354; Marble *v.* Worcester. 4 Gray (Mass.), 395; Bennett *v.* Lockwood, 20 Wend. (N. Y.) 223; Procter *v.* Jennings, 6 Nev. 83; Doggett *v.* Richmond &c. R. Co., 78 N. C. 305; Phillips *v.* Dickerson, 85 Ill. 11; The State *v.* Manchester &c. R. R., 52 N. H. 528, 552. See *post*, §§ 1720, 1722, 1723, 1724.

[2] See 2 Thomp. Neg. 1063 to 1101.

[3] Patten *v.* Chicago &c. R. Co., 32 Wis. 524; Oliver *v.* La Valle, 36 Wis. 592; Poeppers *v.* Missouri &c. R. Co., 67 Mo. 715; 7 Cent. L. J. 252; Fairbanks *v.* Kerr, 70 Pa. St. 86; Saxton *v.* Bacon, 31 Vt. 540; Littleton *v.* Richardson, 32 N. H. 59.

[4] Clemens *v.* Hannibal &c. R. Co., 53 Mo. 366; Toledo &c. R. Co. *v.* Pindar, 53 Ill. 447; Patten *v.* Chicago &c. R. Co., 32 Wis. 524; Hoag *v.* Lake Shore &c. R. Co., 85 Pa. St. 293; *s. c.* 4 W. N. Cas. 552; 6 Cent. L. J. 95; 5 Reporter, 80; Scott Hunter, *v.* 46 Pa. St. 192; Saxton *v.* Bacon, 31 Vt. 540; Tuff *v.* Warman, 2 C. B. (N. S.) 739; Lake *v.* Milliken, 62 Me. 240; Stark *v.* Lancaster, 57 N. H. 88, 91; Willey *v.* Belfast, 61 Me. 569; Fernandez *v.* Sacramento City R. R., 4 Cent. L. J. 82. See also Bridge *v.* Grand Junction R. Co., 3 Mee. & W. 248; Davies *v.* Mann, 10 Mee. & W. 548; *s. c.* 2 Thomp. Neg. 1105; Colchester *v.* Brooke, 7 Q. B. 337; Radley *v.* London &c. R. Co., L. R. 9 Exch. 71; *s. c.* 1 App. Cas. 754 (reversing L. R. 10 Exch. 100); 43 L. J. (Exch.) 73; 44 L. J. (Exch.) 73; 33 L. T. (N. S.) 209; *s. c.* 2 Thomp. Neg. 1108.

[4] For instances where the question was held to be a question for the jury, see 2 Thomp. Neg., p. 1100, § 12. It is held in Missouri that "when there is no conflict in the testimony, and all causes contributing to produce an injury are known and unquestioned, whether a given act in the chain of

§ **1678. Evidence Failing to Connect the Negligence with the Accident.**— In an action for damages for negligence, where the evidence entirely fails to connect the negligence with the fact of the accident, the court should direct the jury that the plaintiff cannot recover ;[1] though in many cases the *physical facts* surrounding the accident will be such as to create a probability that the accident was the result of negligence, in which case the physical facts are themselves evidential, and furnish what the law terms evidence of negligence, in conformity with the maxim *res ipsa loquitur*.[2] But the decisions do not apply this principle with uniform consistency. Thus, where, in an action against a railroad company for killing the plaintiff's cow, the only evidence was that the bell of the defendant's locomotive was not rung nor the whistle sounded, as it approached a public crossing where the cow was run over and killed,— it was held that the court ought to have directed a verdict for the defendant, because there was no evi-

causation is the remote or proximate cause of such injury, is a question of law for the court." Henry *v.* St. Louis &c. R. Co., 76 Mo. 288, 293. In such cases the court will decide the question as matter of law, either upon demurrer to a petition, declaration or complaint (Bank of Commerce *v.* Ginocchio, 27 Mo. App. 661), or upon clear and undisputed evidence presented at the trial. It is a rule in Pennsylvania that, where, in actions for damages for negligence, there is any dispute about the facts, the question of remote or proximate cause is for the jury. But where the facts are not disputed, the court should determine the question as a matter of law. West Mahanoy Tp. *v.* Watson, 112 Pa. St. 574; *s. c.* 3 Atl. Rep. 866, per Paxson, J.; West Mahanoy Tp. *v.* Watson, 9 Atl. Rep. 430, 433.

[1] Holman *v.* Chicago &c. R. Co. 62 Mo. 562; *post*, § 1720.

[2] See 2 Thomp. Neg., p. 1227 *et seq.* Illustrations of this principle will be found in Kearney *v.* London &c. R. Co., L. R. 5 Q. B. 411 and L. R. 6 Q. B. 759; *s. c.* 2 Thomp. Neg. 1220; Byrne *v.* Boadle, 2 Hurl. & Colt, 722; *s. c.* 33 L. J. (Exch.) 13; 9 L. T. (N. S.) 450; 12 Week. Rep. 279; Briggs *v.* Oliver, 4 Hurl. & Colt. 403; *s. c.* 35 L. J. (Exch.) 163; 14 L. T. (N. S.) 412; 14 Week. Rep. 658; Mullen *v.* St. John, 57 N. Y. 567; Vincett *v.* Cook, 4 Hun (N. Y.), 318; Lyons *v.* Rosenthal, 11 Hun (N. Y.), 46; Warren *v.* Kaufman, 2 Phila. (Pa.) 259; Hays *v.* Gallagher, 72 Pa. St. 136; Thomas *v.* Western Union Tel. Co., 100 Mass. 156; Buesching *v.* St. Louis Gas Light Co., 73 Mo. 219, reversing *s. c.* 6 Mo. App. 85; 6 Cent. L. J. 458. Compare Scott *v.* London &c. Dock Co., 10 Jur. (N. S.) 1108; Higgs *v.* Maynard, 12 Jur. (N. S.) 705; *s. c.* 1 Harr. &. Ruth. 581; 14 Week. Rep. 610; 14 L. T. (N. S.) 332; Lane *v.* Salter, 4 Rob. (N. Y.) 239; Worster *v.* Forty-second St. R. Co., 50 N. Y. 203.

dence connecting the negligence of the defendant with the fact of the accident.[1] On the other hand, where a corporation had left an unguarded stairway leading to a cellar way of his building, in the sidewalk of a public street in a populous city, and the plaintiff's husband was found dead in the excavation with its neck broken, it was held that there was evidence of negligence to go to the jury.[2]

§ 1679. Whether the Plaintiff or the Person Injured was Guilty of Contributory Negligence: In General. — It is a general rule of law, except in cases in the admiralty courts relating to the collision of vessels, that, in an action for damages for negligence, if it appear that the negligence, that is, the want of ordinary care on the part of the plaintiff or the party killed or injured, contributed in any degree to produce the catastrophe, the plaintiff cannot recover;[3] and that, except in one or two jurisdictions

[1] Holman *v.* Chicago &c. R. Co., 62 Mo. 562. Compare Stoneman *v.* Atlantic &c. R. Co., 58 Mo. 503; Owens *v.* Hannibal &c. R. Co., 58 Mo. 386.

[2] Buesching *v.* St. Louis Gas Light Co., 73 Mo. 219; reversing *s. c.* 6 Mo. App. 85.

[3] Lord Campbell, C. J., in Dowell *v.* Gen. Steam Nav. Co., 5 El. & Bl. 195; Witherly *v.* Regent's Canal Co., 12 C. B. (N. S.) 2; *s. c.* 6 L. T. (N. S.) 255; 3 Fost. & Fin. 61; Brownell *v.* Flagler, 5 Hill (N. Y.), 282; Robinson *v.* Western Pacific R. Co., 48 Cal. 409, 421; Needham *v.* San Francisco &c. R. Co., 37 Cal. 409; Gay *v.* Winter, 34 Cal. 153; Flemming *v.* Western Pacific R. Co., 49 Cal. 253; Hearne *v.* Southern Pacific R. Co., 50 Cal. 482; Johnson *v.* Canal &c. R. Co., 27 La. Ann. 53; Knight *v.* Pontchartrain R. Co., 23 La. Ann. 462; Laicher *v.* New Orleans, &c. R. Co., 23 La. Ann. 320; Coombs *v.* Parington, 42 Me. 332; Munger *v.* Tonawanda &c. R. Co., 4 N. Y. 349; Thrings *v.* Central Park R. Co., 7 Robt. 616; Morris *v.* Phelps, 2 Hilt. (N. Y.) 38; Collins *v.* Albany &c. R. Co., 12 Barb. (N. Y.) 492; Johnson *v.* Hudson River R. Co., 20 N. Y. 73; Wilds *v.* Hudson River R. Co., 24 N. Y. 430 (reversing *s. c.* 33 Barb. (N. Y.) 503); *s. c.* 29 N. Y. 315; Sheffield *v.* Syracuse &c. R. Co., 21 Barb. (N. Y.) 339; Dougan *v.* Champlain Transp. Co., 6 Lans. (N. Y.) 430; Baxter *v.* Second Ave. R. Co., 3 Robt. (N. Y.) 510; Railroad Co. *v.* Norton, 24 Pa. St. 465; Stiles *v.* Geesey, 71 Pa. St. 439; Catawissa R. Co. *v.* Armstrong, 49 Pa. St. 186; Heil *v.* Glanding, 42 Pa. St. 493; O'Brien *v.* Phila. &c. R. Co., 3 Phila. (Pa.) 76; Willard *v.* Pinard, 44 Vt. 34; Murphy *v.* Deane, 101 Mass. 455; McCully *v.* Clarke, 40 Pa. St. 399; Vanderplank *v.* Miller, 1 Mood. & M. 169; Vennall *v.* Garner, 1 Cromp. & M. 21; Lack *v.* Seward, 4 Car. & P. 106; Luxford *v.* Large, 5 Car. & P. 421; Woolf *v.* Beard, 8 Car. & P. 373; Kent *v.* Elstob, 3 East, 18; Broadwell *v.* Swigert, 7 B. Mon. (Ky.) 39. Instructions as to contributory negligence, *post*, §§ 1721 *et seq.*; 1739, 1762, 1764, 1765, 1791, 1792, 1793, 1794, 1807, 1808.

where the so-called doctrine of *comparative negligence* prevails, the law "has no scales to determine in such cases whose wrongdoing weighed most in the compound that occasioned the mischief."[1] There is a difference of judicial opinion upon the question whether, in such a case, the *burden* rests on the plaintiff averring and proving that, at the time of the accident, he, or the person killed, or injured, was in the exercise of due care."[2]

[1] Railroad Co. *v.* Norton, 24 Pa. St. 469; Stiles *v.* Geesey, 71 Pa. St. 439; Wilds *v.* Hudson River R. Co., 24 N. Y. 432; Allen *v.* Hancock, 16 Vt. 230; Northern Central R. Co. *v.* Gies, 31 Md. 357; Larkin *v.* Taylor, 5 Kan. 433, 445; Northern Central R. Co. *v.* Price, 29 Md. 420.

[2] The rule that the *burden of proof is upon the plaintiff* to show the absence of contributory negligence on his part exists in the following States: *Massachusetts:* Lane *v.* Cromble, 12 Pick. (Mass.) 177; Adams *v.* Carlisle, 21 Pick. (Mass.) 146; Bigelow *v.* Rutland, 4 Cush. (Mass.) 247; Bosworth *v.* Swansey, 10 Metc. (Mass.) 363, 365; Parker *v.* Adams, 12 Metc. (Mass.) 415, 417; Lucas *v.* New Bedford &c. R. Co., 6 Gray (Mass.), 64; Robinson *v.* Fitchburg &c. R. Co., 7 Gray (Mass.), 92; Callahan *v.* Bean, 9 Allen (Mass.), 401; Hickey *v.* Boston &c. R. Co., 14 Allen (Mass.), 429, 431; Gaynor *v.* Old Colony R. Co., 100 Mass. 208; Murphy *v.* Deane, 101 Mass. 455; Allyn *v.* Boston &c. R. Co., 105 Mass. 77; Lane *v.* Atlantic Works, 107 Mass. 104. *Maine:* Gleason *v.* Bremen, 50 Me. 222, 224; Buzzel *v.* Laconia Man. Co., 48 Me. 113. See also Dickey *v.* Maine Tel. Co., 46 Me. 483; Perkins *v.* Eastern &c. R. Co., 29 Me. 307; Merrill *v.* Hampden, 26 Me. 234; Kennard *v.* Burton, 25 Me. 39, 49. *Iowa:* Rusch *v.* Davenport, 6 Iowa, 443; Reynolds *v.* Hindman, 32 Iowa, 146, 148; Plaster *v.* Illinois &c. R. Co., 35 Iowa, 449; Carlin *v.* Chicago &c. R. Co., 37 Iowa, 316; Muldowney *v.* Illinois &c. R. Co., 39 Iowa, 615; *s. c.* 36 Iowa, 462; 32 Iowa, 176; Patterson *v.* Burlington &c. R. Co., 38 Iowa, 279; Way *v.* Illinois &c. R. Co. 40 Iowa, 341. *Illinois:* Aurora Branch, R. Co. *v.* Grimes, 13 Ill. 585; Dyer *v.* Talcott, 16 Ill. 300; Galena &c. R. Co. *v.* Fay, 16 Ill. 558; Chicago *v.* Major, 18 Ill. 349; Galena &c. R. Co. *v.* Jacobs, 20 Ill. 478; Chicago &c. R. Co. *v.* Hazzard, 26 Ill. 373; Chicago &c. R. Co. *v.* Gregory, 58 Ill. 272; Kepperly *v.* Ramsden, 83 Ill. 354. *Connecticut:* Beers *v.* Housatonic R. Co., 19 Conn. 566; Park *v.* O'Brien, 23 Conn. 339; Fox *v.* Glastenbury, 29 Conn. 204. *Mississippi:* Vicksburg *v.* Hennesy, 54 Miss. 391. *Michigan:* Detroit &c. R. Co. *v.* Van Steinburg, 17 Mich. 99, 119. *Indiana:* Hathaway *v.* Toledo &c. R. Co., 46 Ind. 25, 30; Evansville &c. R. Co. *v.* Dexter, 24 Ind. 411; Evansville &c. R. Co. *v.* Hiatt, 17 Ind. 102, 105. See also Mt. Vernon *v.* Dusouchett, 2 Ind. 586; Wabash &c. Canal *v.* Mayer, 10 Ind. 400; Indianapolis &c. R. Co. *v.* Keely's Administrator, 23 Ind. 133; Toledo &c. R. Co. *v.* Bevin, 26 Ind. 443; Jeffersonville R. Co. *v.* Hendricks, 26 Ind. 228; Pittsburgh &c. R. Co. *v.* Vining's Administrator, 27 Ind. 513; Michigan &c. R. Co. *v.* Lantz, 29 Ind. 528; Jackson *v.* Indianapolis &c. R. Co., 47 Ind. 454; Riest *v.* Goshen, 42 Ind. 339. The *contrary rule*, that contributory negligence is *matter of de-*

§ 1680. Where an Unavoidable Inference of Contributory Negligence arises out of the Plaintiff's own Evidence. — It is apprehended that, under either rule, where an unavoidable infer-

fense, in respect of which the burden of proof rests on the defendant, is the rule in the following States: *Pennsylvania:* Beatty *v.* Gilmore, 16 Pa. St. 463; Erie *v* Schwingle, 22 Pa. St. 384; Pennsylvania Canal Co. *v.* Bentley, 66 Pa. St. 30; Bush *v.* Johnston, 23 Pa. St. 209; Hays *v.* Gallager, 72 Pa. St. 136 (explaining Waters *v.* Wing, 59 Pa. St. 211); Allen *v.* Willard, 57 Pa. St. 374; Mallory *v.* Griffey, 85 Pa. St. 275; Weiss *v.* Pennsylvania R. Co., 79 Pa. St. 387; Pennsylvania R. Co. *v.* Weber, 76 Pa. St. 157; *s. c.* 72 Pa. St. 27. See Pennsylvania R. Co. *v.* McTighe, 46 Pa. St. 316. *Missouri:* Thompson *v.* North Missouri R. Co., 51 Mo. 190; Hicks *v.* Pacific R. R., 65 Mo. 34; *s. c.* 64 Mo. 430; Schuerman *v.* Missouri R. Co., 3 Mo. App. 565. *Wisconsin:* Prideaux *v.* Mineral Point, 43 Wis. 513, 524; Hoyt *v.* Hudson, 41 Wis. 105; Achtenhagen *v.* Watertown, 18 Wis. 331; Potter *v.* Chicago &c. R. Co., 22 Wis. 615; *s. c.* 21 Wis. 372; Milwaukee &c. R. Co. *v.* Hunter, 11 Wis. 160. The above cases overrule the contrary doctrine, held in Dressler *v.* Davis, 7 Wis. 527; and Chamberlin *v.* Milwaukee &c. R. Co., 7 Wis. 425, 431. *Kentucky:* Paducah &c. R. Co. *v.* Hoehl, 12 Bush (Ky.), 41; Louisville &c. Canal Co. *v.* Murphy, 9 Bush (Ky.), 522. *Maryland:* Frech *v.* Phila. &c. R. Co. 39 Md. 574. See Irwin *v.* Sprigg, 6 Gill (Md.), 200, 206; Baltimore *v.* Marriott, 9 Md. 160. *Kansas:* Kansas &c. R. Co. *v.* Pointer, 14 Kan. 37; *s. c.* 9 Kan. 620. *Alabama:* Smoot *v.* Wetumpka, 24 Ala. 112. *Minnesota:* Hocum *v.* Wutherick. 22 Minn. 152. *New Jersey:* New Jersey Express Co. *v.* Nichols, 32 N. J. L. 166; *s. c.* 33 N. J. L. 434; Durant *v.* Palmer, 29 N. J. L 544; Moore *v.* Central R. Co., 24 N. J. L 268. *California:* Gay *v.* Winter, 34 Cal. 153, 164; Robinson *v.* Western Pacific R. Co., 48 Cal. 409, 426; McQuilken *v.* Central Pacific R. Co., 50 Cal. 7. In *New York* the rule seems not to be settled: Warner *v.* New York &c. R. Co., 44 N. Y. 465 (reversing *s. c.* 45 Barb. (N. Y.) 299; Besiegel *v.* New York &c. R. Co., 14 Abb. Pr. (N. s.) 29; Curren *v.* Warren &c. Man. Co., 36 N. Y. 153; Suydam *v.* Grand Street &c. R. Co., 41 Barb. (N. Y.) 375; De Benedetti *v.* Mauchin, 1 Hilt. (N. Y.) 213; Burke *v.* Broadway &c. R. Co., 34 How. Pr. (N. Y.) 239; Holbrook *v.* Utica &c. R. Co., 12 N. Y. 236; *s. c.* 16 Barb. (N. Y.) 113; Spencer *v.* Utica &c. R. Co., 5 Barb. (N. Y.) 337; Ryan *v.* Hudson &c. R. Co., 1 Jones & Sp. (N. Y.) 137; Gillespie *v.* Newburg, 54 N. Y. 468, 471. But see Johnson *v.* Hudson River R. Co., 20 N. Y. 65; *s. c.* 6 Duer (N. Y.), 633; 5 Duer (N. Y.), 21; Robinson *v.* New York &c. R. Co., 65 Barb. (N. Y.) 146; Hackford *v.* New York &c. R. Co., 6 Lans. (N. Y.) 381; *s. c.* 43 How. Pr. (N. Y.) 222; Squire *v.* Central Park &c. R. Co., 4 Jones & Sp. (N. Y.) 436; and Button *v.* Hudson River R. Co., 18 N. Y. 248. So in *Vermont, Ohio, Louisiana,* and *Texas:* Lester *v.* Pittsford, 7 Vt. 158; Barber *v.* Essex, 27 Vt. 62; Hyde *v.* Jamaica, 27 Vt. 443; Hill *v.* New Haven, 37 Vt. 501; Walker *v.* Westfield, 39 Vt. 246; Moore *v.* Shreveport, 3 La. Ann. 645; Walker *v.* Herron, 22 Texas 55, 61; Little Miami R. Co. *v.* Stevens, 20 Ohio, 415, 417.

ence of *contributory negligence* arises out of the plaintiff's own evidence, or out of other evidence which stands undisputed in the case, the plaintiff must be either nonsuited, a demurrer to the evidence sustained, or a peremptory instruction given to find for the defendant, according to the form of practice in the particular jurisdiction.[1] In Missouri, where, as above seen, contributory negligence is ordinarily regarded as a matter of extrinsic defense, to be pleaded and proved by the defendant, the rule under this head has been stated thus: "That it is not incumbent on the plaintiff in the first instance to show that he was free from negligence, or in the exercise of ordinary care at the time of receiving the injury complained of, but that the concurring negligence of the plaintiff is a matter of defense, and the burden of showing it is therefore upon the defendant. If, however, it appears, without any conflict of evidence, from the plaintiff's own case, or from the cross-examination of his witnesses, that he was guilty of negligence approximately contributing to produce the injury, it would be the duty of the court to take the case from the jury, by declaring, as a matter of law, that the plaintiff cannot recover."[2]

§ 1681. Where the Evidence leaves the Facts or Inferences in Doubt. — The grounds on which courts proceed in determining whether the question of the *contributory negligence* of the plaintiff or person injured is to be decided by the judge or by the jury, is substantially the same as those on which they

[1] Davis *v.* Detroit &c. R. Co., 20 Mich. 105, 120; Flemming *v.* Western Pacific R. Co., 49 Cal. 253; McQuilken *v.* Central Pacific R. Co., 50 Cal. 7; Donaldson *v.* Milwaukee &c. R. Co., 21 Minn. 293; Brown *v.* Milwaukee &c. R. Co., 22 Minn. 165; Callahan *v.* Warne, 40 Mo. 131; Norton *v.* Ittner, 56 Mo. 351; New Jersey Express Co. *v.* Nichols, 32 N. J. L. 166; *s. c.* affirmed 33 N. J. L. 434; Owen *v.* Hudson River R. Co., 35 N. Y. 516; Curran *v.* Warren Man. Co., 36 N. Y. 153; Mackey *v.* New York &c. R. Co., 27 Barb. (N. Y.) 528; Jalie *v.* Cardinal, 35 Wis. 118, 129; Seigel *v.* Eison, 41 Cal. 109; Park *v.* O'Brien, 23 Conn. 339; Kansas Pacific R. Co. *v.* Brady, 17 Kan. 380; Brown *v.* European &c. R. Co., 58 Me. 384.

[2] Buesching *v.* St. Louis Gas Light Co., 73 Mo. 219, 229; Zimmerman *v.* Hannibal &c. R. Co., 71 Mo. 476, 491; Stephens *v.* City of Macon, 83 Mo. 345, 355. See also Milburn *v.* Kansas City &c. R. Co., 86 Mo. 104.

proceed in determining whether the question of the negligence of the defendant is to be decided by the judge or the jury. It is said that, if the plaintiff's evidence leaves the facts in doubt or only tends to prove them, the evidence of contributory negligence on both sides should go to the jury.[1] Again, it is said that usually the question of contributory negligence is a question of fact, to be left to a jury under suitable instructions.[2] But there are many cases where the facts are undoubted and unequivocal, and where the inference of carelessness arising thereupon is one which all fair-minded persons would draw; in all which cases the court may decide it as a question of law.[3] It has been further reasoned that contributory negligence is to be decided by the court as a question of law, when the facts are clearly settled, and the course which common prudence dictates can be readily discerned; but when the facts are doubtful, or when they are such that it is doubtful whether the act imputed to the plaintiff as negligence was such as a person of ordinary prudence would have performed, it is to be submitted to the jury, under instructions from the court. If it is a question to be decided, upon admitted facts, whether a man of common prudence would have acted as the plaintiff did, and the common knowledge and experience of men do not require the court to determine whether the plaintiff's conduct was negligence, the question of contributory negligence is to be submitted to the jury under proper instructions.[4] Thus, where a person, driving recklessly at nightfall, rode his horse against a pole put up in a street to obstruct the passage;[5] where a person attempted to cross a bridge across which a plank a foot in height had been fastened to indicate that the bridge was impassable;[6] where a person attempted to pass over a causeway which was overflowed with

[1] Prideaux *v.* Mineral Point, 43 Wis. 513; Hoyt *v.* Hudson, 41 Wis. 105.

[2] Beers *v.* Housatonic R. Co., 19 Conn. 570; Smith *v.* Union R. Co., 61 Mo. 591.

[3] Butterfield *v.* Forrester, 11 East, 60; Cornelius *v.* Appleton, 22 Wis. 635; Fox *v.* Glastonbury, 29 Conn. 205.

[4] Fernandes *v.* Sacramento &c. R. Co., 52 Cal. 45.

[5] Butterfield *v.* Forrester, 11 East, 60; *s. c.* 2 Thomp. Neg. 1104.

[6] Cornelius *v.* Appleton, 22 Wis. 635.

water;[1]—in these and many like cases, contributory negligence has been declared as matter of law.

§ 1682. Where the Presumption of Contributory Negligence Arises upon Uncontradicted Testimony. — The rule of the foregoing cases rests upon the clearest principles; but there is more difficulty in upholding the rule which has been declared in one State, that it is the duty of the court to direct a verdict for the defendant, where the inference of *contributory negligence* necessarily arises upon *uncontradicted testimony* in the case;[2] since testimony may be uncontradicted, and yet the jury may be at at liberty to discredit it. The general rule is that the credibility of witnesses is for the jury. The question how far jurors are to be indulged in disbelieving testimony which is apparently credible and not surrounded with circumstances of suspicion, may be a difficult one; but it is believed that the sound rule is that, where the inference of contributory negligence necessarily arises upon such testimony, the court ought not to submit the case to the jury, because it would be bound to grant a new trial if they should find in disregard of the testimony.[3]

§ 1683. Where, notwithstanding the Contributory Negligence of the Plaintiff, the Defendant might have avoided the Injury by the Exercise of Reasonable Care. — It does not follow in all cases, even though an unavoidable inference of contributory negligence arises out of the plaintiff's evidence, that the case is *not* to be submitted to the jury; since there is another rule, invented by the courts to mitigate the severe injustice of the earlier doctrine of contributory negligence, which is this: That, notwithstanding the plaintiff may have been negligent in exposing himself or his property to the injury which happened, yet if the defendant or his servants saw the exposed situation of the person injured, or of the thing which received the injury, or (as some courts extend the rule) might, by the exercise of ordi-

[1] Fox *v.* Glastonbury, 29 Conn. 205.

[2] Maher *v.* Atlantic &c. R. Co., 64 Mo. 267, 275; Fletcher *v.* Atlantic &c. R. Co., 64 Mo. 484, 488.

[3] *Ante*, § 1668.

nary care, have seen it, in time to have prevented the injury,[1] by the exercise of the like care, but nevertheless proceeded negligently forward and inflicted the injury, — the plaintiff will not be precluded from a recovery, but the question must go to the jury.[1]

§ 1684. Whether Negligence to attempt to Alight from a Moving Train. — Whether it is negligence in a passenger to attempt to alight from a railway train while in motion is a *question of fact* for the jury.[2] For stronger reasons, it is a question for the jury whether a person is guilty of negligence in attempting to alight from a *street railway* car while in motion; and where this is the only negligence which appears, it is error to direct a verdict for the defendant.[3] This doctrine has been modified in Missouri, so as to hold that, if the party leaps from a *train* in *rapid motion* to avoid being carried beyond the stopping place, this is negligence.[4]

§ 1685. Passenger Guilty of known Violation of Rules. — It has been held that, where the injury arises from a known violation of the rules of the carrier by the passenger, the *question is for the court* and there can be no recovery.[5]

[1] Davies *v.* Mann, 10 Mees. & W. 546; *s. c.* 6 Jur. 954; 12 L. J. (Exch.) 10; 2 Thomp. Neg. 1105; Ostertag *v.* Pacific R. Co., 64 Mo. 421; Radley *v.* London &c. R. Co., L. R. 9 Exch. 71; *s. c.* 43 L. J. (Exch.) 73; 1 App. Cas. 754 (reversing L. R. 10 Exch. 100; 44 L. J. Exch. 73; 33 L. T. (N. S.) 209); 2 Thomp. Neg. 1108 Tuff *v.* Warman, 5 C. B. (N. S.) 573; Northern Central R. Co. *v.* Geis, 31 Md. 357; Northern Central R. Co. *v.* Price, 29 Md. 420; Hassa *v.* Junger, 15 Wis. 598; Scott *v.* Dublin &c. R. Co., 11 Ir. Rep. C. L. (N. S.) 377; Donaldson *v.* Mississippi &c. R. Co., 18 Ia. 280, 288; Cummins *v.* Presley, 4 Harr. (Del.) 315. *Contra*, Pittsburgh *v.* Greer, 22 Pa. St. 54; Atlantic &c. R. Co. *v.* Ayres, 53 Ga. 12; Western R. Co. *v.* Johnson, 38 Ga. 409; Whirley *v.* Whiteman, 1 Head (Tenn.), 610; Nashville &c. R. Co. *v.* Carroll, 6 Heisk. (Tenn.) 367; Stiles *v.* Geesey, 71 Pa. St. 439.

[2] Waller *v.* Hannibal &c. R. Co., 83 Mo. 608; Doss *v.* Mo. &c. R. Co., 59 Mo. 27, 37; Loyd *v.* Hannibal &c. R. Co., 53 Mo. 509. For an instruction on this subject, see *post*, § 1794.

[3] Wyatt *v.* Citizens R. Co., 55 Mo. 485.

[4] Nelson *v.* Atlantic &c. R. Co., 68 Mo. 593; Price *v.* St. Louis &c. R. Co., 72 Mo. 414, 418. Compare R. R. Co. *v.* Aspell, 23 Pa. St. 147; Abel *v.* Ill. Cent. R. R., 59 Ill. 131; Chicago &c. R. Co. *v.* Randolph, 53 Ill. 510; Gavet *v.* R. Co., 16 Gray (Mass.), 501; Filer *v.* New York Cent. R. Co., 49 N. Y. 47.

[5] Balt. etc. R. Co. *v.* Wilkinson, 30 Md. 224, 232; *post*, § 1791.

§ **1686. Traveler failing to look and listen on approaching Railway Crossing.** — A mass of cases may be cited to the effect that a traveler who approaches a railway crossing and advances upon the track without looking or listening for an approaching train, is guilty of contributory *negligence as a matter of law*, and cannot recover damages from the railway company if he is hurt by a collision with the train.[1] But even this principle is not universally adhered to. In Illinois it is said that "it is always a *question of fact*, for the jury to determine from the evidence, whether the person injured has exercised proper care and caution in crossing a railroad track, and not a question of law. It was the province of the jury to determine whether the plaintiff was guilty of negligence."[2] In the same jurisdiction it is further said: "It is undoubtedly the duty of a person approaching a place of danger to do so cautiously, and with due and proper care for his safety, and the law requires that he should exercise such care as ordinarily prudent and cautious men would observe under the circumstances surrounding him. But the degree of care he is required to exercise cannot be formulated as a rule of conduct; for it is manifest that the conduct of ordinarily cautious and

[1] Chicago &c. R. Co. *v.* Damerell, 81 Ill. 450; *s. c.* 3 Cent. L. J. 768; Rockford &c. R. Co. *v.* Byam, 80 Ill. 528; Bellefontaine &c. R. Co. *v.* Hunter, 33 Ind. 335; Allyn *v.* Boston &c. R. Co., 105 Mass. 77; Morse *v.* Erie &c. R. Co., 65 Barb. (N. Y.) 490; Haring *v.* New York &c. R. Co., 13 Barb. (N. Y.) 9; Mitchell *v.* New York &c. R. Co., 2 Hun (N. Y.), 535; *s. c.* 5 N. Y. S. C. (T. & C.) 1; Benton *v.* Central R. R., 42 Iowa, 192; New Orleans &c. R. Co. *v.* Mitchell, 52 Miss. 808; Gorton *v.* Erie &c. R. Co., 45 N. Y. 660; Reynolds *v.* New York &c. R. Co., 58 N. Y. 248; *s. c.* 2 N. Y. S. C. (T. & C.) 644; Cleveland &c. R. Co. *v.* Elliot, 28 Ohio St, 340; Railroad Co. *v.* Houston, 95 U. S. 697; *s. c.* 6 Cent. L. J. 132; Lake Shore &c. R. Co. *v.* Sunderland, 2 Bradw. (Ill.), 307; Fletcher *v.* Atlantic &c. R. Co., 64 Mo. 484; Leduke *v.* St. Louis &c. R. Co., 4 Mo. App. 485; Den Blaker's Executrix *v.* New Jersey &c. R. Co., 7 Reporter, 626; Cordell *v.* New York &c. R. Co., 19 Alb. L. J. 134; North Pennsylvania R. Co. *v.* Heileman, 49 Pa. St. 60; Lake Shore &c. R. Co. *v.* Miller, 25 Mich. 274. Case where there was evidence sufficient to take the question to the jury, where the action was against a railway company to recover damages for an injury received at a road crossing: Byrne *v.* New York &c. R. Co. (N. Y.), 10 Northeast. Rep. 539; affirming *s. c.* 36 Hun (N. Y.), 647; *s. c.* on former appeal, 83 N. Y. 620; *post*, § 1800 *et seq.*

[2] Pennsylvania R. Co. *v.* Frana, 112 Ill. 405; Chicago &c. R. Co. *v.* Hutchinson (Ill.), 11 N. East. Rep. 855.

prudent men would vary as the circumstances presented might be varied."[1] And it is to be borne in mind that such a case is an apt one for the operation of the principle already stated,[2] that, although the traveler may negligently expose himself in such a situation, yet if the servants of the railway company in charge of the train either saw, or might, by the exercise of reasonable care, have seen him in his exposed situation, — he will not be precluded by his contributory negligence from recovering damages, but there will be a case to go to the jury.

§ 1687. In the Case of Injuries to Children. — (*a.*) General Observations. — A doctrine formerly obtained in some courts of this country called *imputed negligence*, under the operation of which, if a child, of such tender age as not to be capable of caring for its own safety, was negligently exposed to danger by its parent or guardian and injured, the negligence of the parent or guardian would be imputed to the child, and the child could not recover damages for the injury.[3] This rule, though approved at one time in several American jurisdictions,[4] has been denied in others,[5] and seems fast going by the board. Notwithstanding this rule, if it can be shown that the child, at the time of the injury, was *sui juris*, capable of caring for its own safety, the parents are justified in allowing it a certain degree of freedom of action, and it is then incumbent upon it to exercise care for its own protection, but only such care as can reasonably be expected of a child of its maturity and capacity.[6] In view of this

[1] Chicago &c. R. Co. *v.* Hutchinson, *supra*.

[2] *Ante*, § 1683.

[3] A type of the cases thus holding is Hartfield *v.* Roper, 21 Wend. (N. Y.) 615; *s. c.* 2 Thomp. Neg. 1121; Mangam *v.* Brooklyn R. Co., 38 N. Y. 455, 459; Waite *v.* Northeastern R. Co., El. Bl. & El. 719 (*s. c.* affirmed in Exchequer Chamber, El. Bl. & El. 728).

[4] 2 Thomp. Neg. 1184, § 33, and cases cited.

[5] *Id.* 1185, *et seq*; *post*, § 1728.

[6] Lynch *v.* Nurdin, 1 Q. B. 29; *s. c.* 4 Per. & Dav. 672; 2 Thomp. Neg. 1140; Railroad Co. *v.* Gladmon, 15 Wall. (U. S.) 401; Railroad Co. *v.* Stout, 17 Wall. (U. S.) 657; Baltimore &c. R. Co. *v.* Fryer, 30 Md. 47; State *v.* Baltimore &c. R. Co., 24 Md. 84; Baltimore &c. R. Co. *v.* McDonnell, 43 Md. 534; McMahon *v.* Northern Cent. R. Co., 39 Md. 438; East Saginaw City R. Co. *v.* Bohn, 27 Mich. 503, 514; Robinson *v.* Cone, 22 Vt. 213; 2 Thomp. Neg.,

rule two questions arise: 1. At what age or period of a child's development shall it be held *sui juris* for the purpose of the decision of cases of this kind? 2. Whether this is a question of law or of fact. Where the age of the child admits of no doubt as to its capacity to avoid danger, the court will decide this question as a matter of law. Thus, it has been held, as a matter of law, that a child three years and seven months old is not *sui juris;*[1] and likewise in the case of children of the age of two years,[2] one year and five months,[3] two years and four months,[4] two years and nine months,[5] three years,[6] under five

p. 1129; Birge *v.* Gardiner, 19 Conn. 507; Bronson *v.* Southbury, 37 Conn. 199; Rauch *v.* Lloyd, 31 Pa. St. 358; Smith *v.* O'Connor, 48 Pa. St. 218; Pennsylvania R. Co. *v.* Kelly, 31 Pa. St. 372; Oakland R. Co. *v.* Fielding, 48 Pa. St. 320; Mowrey *v.* Central Park R. Co., 51 N. Y. 667; Costello *v.* Syracuse &c. R. Co., 65 Barb. (N. Y.) 92; Pendrill *v.* Second Ave. R. Co., 2 Jones & Sp. (N. Y. Sup.) 481; Mangam *v.* Brooklyn R. Co., 38 N. Y. 461; Thurber *v.* Harlem &c. R. Co., 60 N. Y. 326; O'Mara *v.* Hudson &c. R. Co., 38 N. Y. 445; Sheridan *v.* Brooklyn &c. R. Co., 36 N. Y. 39; Fallon *v.* Central Park R. Co., 64 N. Y. 13; Casey *v.* New York &c. R. Co., 6 Abb. N. C. (N. Y.) 104; Reynolds *v.* New York &c. R. Co., 58 N. Y. 248; McGovern *v.* New York &c. R. Co., 67 N. Y. 417; Maher *v.* Central Park R. Co., 67 N. Y. 52; Haycroft *v.* Lake Shore &c. R. Co., 2 Hun (N. Y.), 489; Philadelphia &c. R. Co. *v.* Spearen, 47 Pa. St. 300, 304; Pittsburgh &c. R. Co. *v.* Caldwell, 74 Pa. St. 421; Brown *v.* European &c. R. Co., 58 Me. 384; Paducah &c. R. Co. *v.* Hoehl, 12 Bush (Ky.), 41; Lawler *v.* Northampton Gas Co., 2 Allen (Mass.), 307; Lynch *v.* Smith, 104 Mass. 53; Mulligan *v.* Curtis, 100 Mass. 512; McMillan *v.* Burlington &c. R. Co., 46 Ia. 231; Chicago &c. R. Co. *v.* Becker, 76 Ill. 25; *s. c.* 84 Ill. 483; Weick *v.* Lander, 75 Ill. 93; Kerr *v.* Forgue, 54 Ill. 482; Chicago &c. R. Co. *v.* Murray, 71 Ill. 601; Chicago &c. R. Co. *v.* Stumps, 69 Ill. 409; Toledo &c. R. Co. *v.* Miller, 76 Ill. 278; Boland *v.* Missouri &c. R. Co., 36 Mo. 484; Kempinger *v.* St. Louis &c. R. Co., 3 Mo. App. 581; Coleman *v.* Southeastern R. Co., 4 Hurl. & Colt. 699; Ewen *v.* Chicago &c. R. Co., 38 Wis. 613. *Contra*, Honegsberger *v.* Second Ave. R. Co., 1 Keyes (N. Y.), 570; *s. c.* 33 How. Pr. (N. Y.) 195; 2 Abb. App. Dec. (N. Y.) 378 (reversing 1 Daly (N. Y.), 89); Burke *v.* Broadway &c. R. Co., 49 Barb. (N. Y.) 529, and Squire *v.* Central Park R. Co., 4 Jones & Sp. (N. Y. Super.) 436, are not the law; *post*, § 1733.

[1] Mangan *v.* Brooklyn R. Co., 38 N. Y. 455; *s. c.* 36 Barb. (N. Y.) 230.

[2] Hartfield *v.* Roper, 21 Wend. (N. Y.) 615; Wright *v.* Malden &c. R. Co. 4 Allen (Mass.), 283.

[3] Krieg *v.* Wells, 1 E. D. Smith, 76.

[4] Callahan *v.* Bean, 9 Allen (Mass.), 401; Toledo &c. R. Co. *v.* Grable, 88 Ill. 441.

[5] Evansville &c. R. Co. *v.* Wolf, 59 Ind. 89; O'Flaherty *v.* Union R. Co., 45 Mo. 70.

[6] Mascheck *v.* St. Louis R. Co., 3 Mo. App. 600.

years,[1] five years,[2] four years,[3] nearly four years,[4] six years,[5] and it would seem, in the case of a child seven years of age.[6] For the same reason, a boy nearly eleven years old, active and intelligent, has been pronounced by court not incapable of taking care of himself upon the street;[7] and so of a boy thirteen years of age.[8] In *Downs* v. *New York &c. Railroad Company*,[9] the plaintiff, an infant twelve years of age, traveling with his mother upon the defendant's cars, being unable to find a seat in the car with her, by permission, went into another, and there remained until the train reached a station. In attempting to leave the car and return to his mother, he received an injury. The court held, that it was not negligence *per se* for the mother to permit him to go from one car to another, under the circumstances. If there is any doubt of the child being of the age and capacity that in law constitutes one *sui juris*, it should be submitted to the jury, to say by their verdict whether he is so or not. Such was held to be the proper course in the case of a child between six and seven years,[10] ten years,[11] eight years,[12] nearly seven years,[13] six years,[14] five and one-half years,[15] five years,[16] and four years and seven months old.[17] Similarly, courts have refused to declare it

[1] Lafayette &c. R. Co. *v.* Huffman, 28 Ind. 289.

[2] Jeffersonville &c. R. Co. *v.* Bowen, 40 Ind. 545; *s. c.* 49 Ind. 154; McGarry *v.* Loomis, 63 N. Y. 104; Pittsburgh &c. R. Co. *v.* Caldwell, 74 Pa. St. 421.

[3] Lehman *v.* Brooklyn, 29 Barb. (N. Y.) 234; North Pennsylvania R. Co. *v.* Mahoney, 57 Pa. St. 187.

[4] McLain *v.* Van Zandt, 7 Jones & Sp. 347.

[5] Chicago *v.* Starr's Administrator, 42 Ill. 174; Meeks *v.* Southern Pac. R. Co., 52 Cal. 602.

[6] Pittsburgh &c. R. Co. *v.* Vining's Administrator, 27 Ind. 513.

[7] McMahon *v.* New York, 33 N. Y. 642, 647. See also Nagle *v.* Allegheny &c. R. Co. (Sup. Ct. Pa. 1879), 6 W. N. C. 510; *s. c.* 8 Cent. L. J. 307.

[8] Achtenhagen *v.* Watertown, 18 Wis. 321.

[9] 47 N. Y. 83.

[10] Honegsberger *v.* Second Avenue R. Co., 1 Keyes, (N. Y.) 570; *s. c.* 33 How. Pr. 195; 2 Abb. App. Dec. 378.

[11] Lovett *v.* Salem &c. R. Co., 9 Allen (Mass.), 557; Karr *v.* Parks, 40 Cal. 188.

[12] Drew *v.* Sixth Avenue R. Co., 26 N. Y. 49.

[13] Oldfield *v.* Harlem R. Co., 14 N. Y. 310; *s. c.* 3 E. D. Smith, 103.

[14] Cosgrove *v.* Ogden, 49 N. Y. 225.

[15] Barksdull *v.* New Orleans &c. R. Co., 23 La. Ann. 180.

[16] Karr *v.* Parks, 40 Cal. 188.

[17] Lynch *v.* Smith, 104 Mass. 53; St. Paul *v.* Kuby, 8 Minn. 154.

negligence, as a matter of law, to send out a child two years and eight months old, under the care of another eight years of age;[1] one three and one-half years old in company with another nine years of age;[2] one a little over three years old in company with another between nine and ten;[3] one four years and five months old in company with another of twelve years and six months;[4] and one six years of age in company with another of ten.[5] Much, however, in the foregoing cases depends upon the character of the place where the child is permitted to be, — whether a busy or an unfrequented street, or whether other circumstances of danger are ordinarily present.[6] When the age of the child is such that he is close upon the dividing line between that class of children whom the court will pronounce *non sui juris* and that which is relegated to the decision of the jury, and the question relates to the negligence of his parents in suffering him to go at large unattended, it is not surprising to find testimony that the child is one of more than ordinary intelligence and activity,[7] or possessed of discretion in advance of his years and size.[8]

§ **1688.** *b.* **Care required of the Custodian of the Child.** — The care which the parents or custodians of children are obliged to take of them, in order to enable them to recover damages for a hurt received while in such custody where the doctrine of imputed negligence, which renders the child responsible for the negligence of the parent or other custodian, prevails, is, in general, a question for the jury.[9]

[1] O'Flaherty *v.* Union R. Co., 45 Mo. 70.

[2] Mulligan *v.* Curtis, 100 Mass. 512.

[3] Ihl *v.* Forty-second Street R. Co., 47 N. Y. 317.

[4] East Saginaw City R. Co. *v.* Bohn, 27 Mich. 503.

[5] Chicago &c. R. Co. *v.* Becker, 76 Ill. 25; *s. c.* 84 Ill. 483.

[6] Karr *v.* Parks, 40 Cal. 188; Chicago &c. R. Co. *v.* Starr's Administrator, 42 Ill. 174; Pittsburgh &c. R. Co. *v.* Vining's Administrator, 27 Ind. 513.

[7] Oldfield *v.* Harlem R. Co., 14 N. Y. 310; Barksdull *v.* New Orleans &c. R. Co., 23 La. Ann. 180.

[8] Lynch *v.* Smith, 104 Mass. 53. At what age not incapable of contributory negligence as matter of law, see Bridger *v.* Ashville &c. R. Co. (S. C.), 3 S. E. Rep. 860.

[9] Mangam *v.* Brooklyn &c. R. Co., 38 N. Y. 455; Kay *v.* Pennsylvania R. Co., 65 Pa. St. 269; Phila. &c. R. Co.

§ 1689. Illustrative Cases where Negligence declared as Matter of Law. — Examples of contributory negligence as a matter of law may be found in the act of persons walking upon railway tracks without taking adequate precautions to discover approaching trains; [1] crawling under or through railway cars, while stopped temporarily upon the track; [2] riding upon the platform of a railway passenger car ;[3] riding with the arm or a portion of the body protruding from window of railway car; [4]

v. Long, 75 Pa. St. 257; Pittsburgh &c. R. Co. *v.* Pearson, 72 Pa. St. 169; O'Brien *v.* McGlinchy, 68 Me. 552. Compare Hyde *v.* Scyssor, Cro. Jac. 538; 3 Bla. Comm. 140; Brockbank *v.* Whitehaven &c. R. Co., 7 Hurl. & N. 834; Whitcomb *v.* Barre, 37 Vt. 148; Laughlin *v.* Eaton, 54 Me. 156; Kavanaugh *v.* Janesville, 24 Wis. 618; Smith *v.* St. Joseph, 55 Mo. 456; McKinney *v.* Western Stage Co., 4 Iowa, 420; Rogers *v.* Smith, 17 Ind. 323; Long *v.* Morrison, 14 Ind. 595.

[1] Carroll *v.* Minnesota &c. R. Co., 13 Minn. 930; Green *v.* Erie R. Co., 11 Hun (N. Y.), 333; Herring *v.* Wilmington &c. R. Co., 10 Ired. (N. C.) 402; Kenyon *v.* New York &c. R. Co., 5 Hun (N. Y.), 479; Donaldson *v.* Milwaukee &c. R. Co., 21 Minn. 293. See also Elwood *v.* New York &c. R. Co., 4 Hun (N. Y.), 808; Gonzales *v.* New York &c. R. Co., 50 How. Pr. (N. Y.) 126; Poole *v.* North Carolina &c. R. Co., 8 Jones L. (N. C.) 340; Illinois &c. R. Co. *v.* Hall, 72 Ill. 222; Illinois &c. R. Co. *v.* Hetherington, 83 Ill. 510; Harlan *v.* St. Louis &c. R. Co., 64 Mo. 480; *s. c.* 2 Thomp. Neg. 439; Carlin *v.* Chicago &c. R. Co., 37 Iowa, 316; Murphy *v.* Chicago &c. R. Co., 45 Iowa, 661; *s. c.* 38 Iowa, 539; Laicher *v.* New Orleans R. Co., 28 La. Ann. 320; Bancroft *v.* Boston &c. R. Co., 11 Allen (Mass.), 34; *s. c.* 97 Mass. 275; Michigan &c. R. Co. *v.* Campau, 34 Mich. 468; Carroll *v.* Minnesota &c. R. Co., 13 Minn. 30; Donaldson *v.* Milwaukee &c. R. Co., 21 Minn. 293; Lake Shore &c. R. Co. *v.* Hart, 87 Ill. 529; Rothe *v.* Milwaukee &c. R. Co., 21 Wis. 256; O'Donnell *v.* Missouri &c. R. Co., 8 Cent. L. J. 414; Morgan *v.* Nashville &c. R. Co., 58 Tenn. 379; Philadelphia &c. R. Co. *v.* Spearen, 47 Pa. St. 300; *post*, § 1803.

[2] Ostertag *v.* Pacific &c. R. Co., 64 Mo. 421; Central &c. R. Co. *v.* Dixon, 42 Ga. 327; Chicago &c. R. Co. *v.* Dewey, 26 Ill. 255; Chicago &c. R. Co. *v.* Coss, 73 Ill. 394; Gahagan *v.* Boston &c. R. Co., 1 Allen (Mass.), 187; 7 Cent. L. J. 107; Stillson *v.* Hannibal &c. R. Co., 67 Mo. 671; McMahon *v.* Northern &c. R. Co., 39 Md. 438; Lewis *v.* Baltimore &c. R. Co., 38 Md. 588.

[3] Hickey *v.* Boston &c. R. Co., 14 Allen (Mass.), 29; Quinn *v.* Illinois &c. R. Co., 51 Ill. 495.

[4] Todd *v.* Old Colony &c. R. Co., 3 Allen (Mass.), 18; *s. c.* 7 Allen (Mass.), 207; Pittsburgh &c. R. Co. *v.* Andrews, 39 Md. 329; Indianapolis &c. R. Co. *v.* Rutherford, 29 Ind. 82; Morel *v.* Mississippi Ins. Co., 4 Bush (Ky.), 535; Pittsburgh &c. R. Co. *v.* McClurg, 56 Pa. St. 294; Louisville &c. R. Co. *v.* Sickings, 5 Bush (Ky.), 1; Holbrook *v.* Utica &c. R. Co., 12 N. Y. 236. *Contra*, however, Spencer *v.* Milwaukee &c. R. Co., 17 Wis. 487; Chicago &c.

leaping from a train of cars while the same is in motion,[1] or landing at a place obviously not designed for the reception of passengers. In all these cases, unless there are special circumstances tending to exonerate the plaintiff from the imputation of contributory negligence, the question is to be decided by the court, and not by the jury.

§ 1690. Presumption of Negligence in the Case of Injuries to Passengers: General rule. — It is a general rule, in actions for damages against carriers of passengers, that, where the injury is shown to have proceeded from something under the control of the carrier, whether it relate to the character of vehicle or other means of transportation, or to the conduct of his servants, and where it is not conclusively shown to have proceeded from some accidental source beyond his control, a presumption arises that he has been negligent in the discharge of the high degree of care which the law imposes upon him.[2]

R. Co. *v.* Pondrom, 51 Ill. 333; Winters *v.* Hannibal &c. R. Co., 39 Mo. 468; Barton *v.* St. Louis &c. R. Co., 52 Mo. 253; *post*, § 1793.

[1] Railroad Co. *v.* Aspell, 23 Pa. St. 147; Jeffersonville &c. R. Co. *v.* Hendrick's Administrator, 26 Ind. 228; Morrison *v.* Erie R. Co., 56 N. Y. 302; Burrows *v.* Erie R. Co., 63 N. Y. 556; Damont *v.* New Orleans &c. R. Co., 9 La. Ann. 441; Dougherty *v.* Chicago &c. R. Co., 86 Ill. 467; Gavett *v.* Manchester &c. R. Co., 16 Gray (Mass.), 501; Lucas *v.* New Bedford &c. R. Co., 6 Gray (Mass.), 64; Ginnon *v.* New York &c. R. Co., 3 Robt. (N. Y.) 25; Illinois &c. R. Co. *v.* Slatton, 54 Ill. 139; Ohio &c. R. Co. *v.* Schiebe, 44 Ill. 460; Ohio &c. R. Co. *v.* Stratton, 78 Ill. 88; *s. c.* 3 Cent. L. J. 415; *post*, § 1794.

[2] Bowen *v.* New York &c. R. Co., 18 N. Y. 408; Christie *v.* Griggs, 2 Camp. 79; *s. c.* Thomp. Carr. Pass. 181; Baltimore &c. R. Co. *v.* Wightman, 29 Gratt. (Va.) 431, 444; Great Western R. Co. *v.* Braid, 1 Moo. P. C. C. 101; *s. c.* 9 Jur. (N. S.) 339; 11 Week. Rep. 444; Carpue *v.* London &c. R. Co., 5 Q. B. 749, per Lord Denham, C. J., at *nisi prius;* Skinner *v.* London &c. R. Co., 5 Exch. 786; Meier *v.* Pennsylvania R. Co., 64 Pa. St. 225; Laing *v.* Colder, 8 Pa. St. 479, 483, per Bell, J.; Sullivan *v.* Philadelphia &c. R. Co., 30 Pa. St. 234, 239; Farish *v.* Reigle, 11 Gratt. (Va.) 697; Wilkie *v.* Bolster, 3 E. D. Smith (N. Y.), 327; Stokes *v.* Saltonstall, 13 Pet. (U. S.) 181; *s. c.* Thomp. Carr. Pass., p. 183; Railroad Co. *v.* Pollard, 22 Wall. (U. S.) 341; Holbrook *v.* Utica &c. R. Co., 16 Barb. (N. Y.) 113 (affirmed 12 N. Y. 236); Toledo &c. R. Co. *v.* Beggs, 85 Ill. 80; Pittsburgh &c. R. Co. *v.* Thompson, 56 Ill. 138; McKinney *v.* Neil, 1 McLean (U. S.), 540; Stockton *v.* Frey, 4 Gill (Md.), 406; Fairchild *v.* California Stage Co., 13 Cal. 599; Ware *v.* Gay, 11 Pick. (Mass.) 106; Yonge *v.* Kinney, 28 Ga. 111; Brehm *v.* Great Western

§ **1691. Facts from which this Presumption arises.** — This presumption arises in cases where it is shown, without more, that the injury to the passenger occurred in consequence of the defendant's stage breaking down,[1] or overturning; [2] or of the horse hitched to his omnibus kicking through the front panel of the vehicle; [3] or of the horses starting up while the passenger was alighting; [4] or of the embankment of a railway giving way; [5] or of a railway train running off the track,[6] or colliding with another train,[7] or with an object projecting from a car of a train coming in the opposite direction upon another track of the defendant;[8] or by a railway car breaking down;[9] or by the explosion of a steam boiler on the carrier's vessel,[10] or by some unknown object striking the car injuring the passenger,[11] or by the passenger being thrown down while standing in the car in consequence

R. Co., 34 Barb. (N. Y.) 256; Curtis *v.* Rochester &c. R. Co., 18 N. Y. 534; Thomp. Carr. Pass., p. 188; Galena &c. R. Co. *v.* Yarwood, 15 Ill. 468; *s. c.* 17 Ill. 509; McLean *v.* Burbank, 11 Minn. 277; Sawyer *v.* Hannibal &c. R. Co., 37 Mo. 240, 260; *post*, § 1776.

[1] Christie *v.* Griggs, 2 Camp. 79; *s. c.* Thomp. Carr. Pass. 181; Ware *v.* Gay, 11 Pick. (Mass.) 106.

[2] Farish *v.* Reigle, 11 Gratt. (Va.) 697; Stokes *v.* Saltonstall, 13 Pet. (U. S.) 181; *s. c.* Thomp. Carr. Pass. 183; McKinney *v.* Neil, 1 McLean (U. S.), 540; Stockton *v.* Frey, 4 Gill (Md.), 406; Fairchild *v.* California Stage Co., 13 Cal. 599.

[3] Simson *v.* London &c. Omnibus Co., L. R. 8 C. P. 390; *s. c.* 42 L. J. (C. P.) 112; 21 Week. Rep. 595; 28 L. T. (N. S.) 550.

[4] Roberts *v.* Johnson, 58 N. Y. 613 (affirming *s. c.* 5 Jones & Sp. 157).

[5] Great Western R. Co. *v.* Braid, 1 Moo. P. C. C. (N. S.) 101; *s. c.* 9 Jur. (N. S.) 339; 11 Week. Rep. 444; Brehm *v.* Great Western R. Co., 34 Barb. (N. Y), 256. *Contra*, Withers *v.* North Kent R. Co., 27 L. J. (Exch.) 417; *s. c.*, *nisi prius*, *sub nom.* Kent *v.* Great Northern R. Co., 1 Fost. & Fin. 165.

[6] Carpue *v.* London &c. R. Co., 5 Q. B. 749, per Lord Denham, C. J., at *nisi prius;* Sullivan *v.* Philadelphia &c. R. Co., 30 Pa. St. 234; Pittsburgh &c. R. Co. *v.* Thompson, 56 Ill. 138; *s. c.* 4 Ch. Leg. N. 9; Yonge *v.* Kinney, 28 Ga. 111; Edgerton *v.* New York &c. R. Co., 35 Barb. (N. Y.) 389; Zemp *v.* Wilmington &c. R. Co., 9 Rich. L. 84; Dawson *v.* Manchester &c. R. Co., 7 Hurl. & N. 1037. *Contra*, Bird *v.* Great Northern R. Co., 28 L. J. (Exch.) 3.

[7] Skinner *v.* London &c. R. Co., 5 Exch. 786; *s. c.* 2 Eng. Law & Eq. 360; 15 Jur. 299; New Orleans &c. R. Co. *v.* Allbritton, 38 Miss. 242, 274.

[8] Walker *v.* Erie R. Co., 63 Barb. (N. Y.) 260.

[9] Meier *v.* Pennsylvania R. Co., 64 Pa. St. 225; Toledo &c. R. Co. *v.* Beggs, 85 Ill. 80.

[10] Caldwell *v.* New Jersey Steamboat Co., 47 N. Y. 282, 293.

[11] Holbrook *v.* Utica &c. R. Co., 16 Barb. (N. Y.) 113 (affirmed 12 N. Y. 236).

of its being violently struck by another car in switching.[1] In these and many other like cases, the mere fact that the accident happened under the circumstances named, creates a presumption of negligence against the carrier which he must overcome by evidence on his part, or he must suffer a judgment for damages.[2]

§ 1692. Whether this Presumption has been repelled. — Whether the defendant has succeeded in showing a state of facts which repels this presumption, is a *question for the jury*.[3]

§ 1693. Instances of other Questions for the Jury. — In actions of this kind, the following matters have also been held questions for the jury: Whether a railway company has been guilty of negligence in not ascertaining the utility of the latest improvements which have been devised for the protection of passengers, and in not adopting them;[4] whether the act which occasioned the injury was willful and malicious, in such a sense as to be beyond the scope of the servant's authority, or whether it was mistakenly conceived to be a necessary use of force to effect a removal of the passenger from the train;[5] and whether a passenger, injured while standing on the platform of a railway passenger coach, knew that it was a prohibited place, and, if so, whether under the circumstances his act so contributed to the injury as to exonerate the carrier.[6]

§ 1694. In the Relation of Master and Servant: Who are Fellow-Servants in a Common Employment. — According to a well-known rule of law, in force in most American jurisdictions, a servant who receives a hurt in consequence of the negligence

[1] Railroad Co. *v.* Pollard, 22 Wall. (U. S.) 341.

[2] See further on this subject Thomp. Carr. Pass. 209 *et seq.*

[3] Sullivan *v.* Philadelphia R. Co., 30 Pa. St. 234; Brehm *v.* Great Western R. Co., 34 Barb. (N. Y.) 256; *post*, § 1776.

[4] Hegeman *v.* Western R. Corp., 13 N. Y. 9; *s. c.* Thomp. Carr. Pass. 160; *post*, §§ 1777, 1779, 1780.

[5] Jackson *v.* Second Ave. R. Co., 47 N. Y. 274; *post*, §§ 1784, 1785, 1786.

[6] Zemp *v.* Wilmington &c. R. Co., 9 Rich. L. (S. C.) 84.

of a fellow-servant, engaged in the same common employment with him, cannot recover damages of the master. The rule of *respondeat superior* does not apply to such a case. In an action by a servant against his master for damages arising from the negligence of a person whose relation to the plaintiff depends upon a state of *facts* which is *not disputed*, the question whether or not such person was a fellow-servant of the plaintiff, within the meaning of this rule, is a *question of law* for the court;[1] but if the facts are disputed, the law governing those relations should be declared, upon the alternatives presented by the testimony.[2] If a servant is injured by the breaking of a rope used in hoisting goods, in consequence of the neglect of a fellow-servant, who knew of the defective condition of the rope, to supply a new one, in accordance with a duty which the master has imposed upon him, the question whether the fellow-servant acted as a fellow-servant merely, or as a representative of the master, is a question of law, and it is error to submit it to a jury. What the servant was employed to do is a question of fact; the capacity in which he did it is an inference of law. In such a case, where there is any question as to the facts, they should be left to the jury, with instructions as to the legal inferences to be drawn from the facts which should be found. But where the facts are not disputed, the question is one of pure law, and the error of submitting it to the jury will require a new trial, unless the jury de-

[1] Marshall *v.* Schricker, 63 Mo. 308; McGowan *v.* St. Louis &c. R. Co., 61 Mo. 528, 532; Cook *v.* Hannibal &c. R. Co., 63 Mo. 397; Whalen *v.* Centennary, 62 Mo. 326; Compare Potter *v.* Chicago &c. R. Co., 46 Ia. 399.

[2] Marshall *v.* Schricker, *supra.* Duty of master to provide reasonably safe working place and machinery for servant: Armour *v.* Hahn, 4 Sup. Ct. Rep. (U. S.) 433; Collyer *v.* Pennsylvania R. Co. (N. J.), 6 Atl. Rep. 437; Campbell *v.* Pennsylvania R. Co. (Pa.), 2 Atl. Rep. 489; Pittsburgh C. & St. L. Ry. Co. *v.* Adams (Ind.), 5 N. E. Rep. 187; Smith *v.* Peninsular Car-works (Mich.), 27 N. W. Rep. 662; Trihay *v.* Brooklyn Lead Min. Co. (Utah), 11 Pac. Rep. 612; St. Louis & S. F. Ry. Co. *v.* Weaver (Kan.), 11 Pac. Rep. 408; Rodgers *v.* Central Pac. R. Co. (Cal.), 8 Pac. Rep. 377; Hannibal & St. J. R. Co. *v.* Fox (Kan.), 3 Pac. Rep. 320; Wilson *v.* Denver, S. P. & P. R. Co. (Col.), 2 Pac. Rep. 1; Brown *v.* Atchison, T. & S. F. R. Co. (Kan.), 1 Pac. Rep. 605; Gulf, C. & S. F. Ry. Co. *v.* Redeker (Tex.), 2 S. W. Rep. 527; Bogenschutz *v.* Smith (Ky.), 1 S. W. Rep. 578.

cide it correctly.[1] On the other hand, in an action against a railway company to recover damages for negligence resulting in the death of a section foreman, who had charge and oversight of repairs upon a certain part of the defendant's roadway, it has been held error to instruct the jury that such foreman was not engaged in the same line of duty with an engineer and fireman running with the defendant's locomotive engine, and therefore not within the rule which exempts the common employer from liability to one of his employés for damages resulting from the negligence of a fellow-servant. Whether such persons were so operating or consociating, is a question of fact for the jury, and not a question of law for the court.[2] It is said that "the definition of fellow-servant may be a question of law; but it is always a question of fact, to be determined from the evidence, whether the particular case falls within the definition."[3]

§ 1695. Whether the Servant knew that the Danger was Extra Hazardous. — One who contracts to perform labor, or render services for another, takes upon himself those risks, and only those, which are usually incident to the employment engaged in. Where the master places one employé under the control and direction of another, and the latter, in the exercise of the authority so conferred, orders the former into a place of unusual danger and thus exposes him to extraordinary peril, of the existence and extent of which he is not advised, the employer is liable. In such a case it is a *question of fact* for the jury, whether, under the circumstances shown by the evidence, the servant knew, or in the exercise of ordinary care and prudence might have known, that the danger was extraordinary.[4]

[1] Johnson *v.* Boston Tow-boat Co., 135 Mass. 209.

[2] Chicago &c. R. Co. *v.* Moranda, 108 Ill. 577; Indianapolis &c. R Co. *v.* Morgenstern, 106 Ill. 216.

[3] Indianapolis &c. R. Co. *v.* Morgenstern, *supra;* Chicago &c. R. Co. *v.* Moranda, *supra.*

[4] Thompson *v.* Chicago &c. R. Co., 14 Fed. Rep. 561. Case where, on the evidence, it was held that there was room for the jury to find that the servant, when he entered upon the service, did not know or appreciate the risk attending the work upon which he had entered, and that in the exercise of due care he was not, as matter of law, bound to know or appreciate the same: Ferren *v.* Old Colony R. Co. (Mass.), 6 Northeast. Rep. 608. The court

§ 1696. In the Case of Injuries to Children from Dangerous Premises: Whether, under Circumstances, the Defendant owed a duty to the Plaintiff. — In Pennsylvania it has been said that circumstances may beget duties which, under ordinary circumstances, cannot be implied, and that, when such circumstances are shown to exist, the question arising therefrom is not for the court, but for the jury.[1] Accordingly, where a child entered the defendant's premises, without even an implied permission, and through a gate which had been but casually left open, it was held that, as the company maintained so dangerous a trap, in a place near to a highway, where children were wont to congregate for their own amusement, the *jury must determine*, in view of all the circumstances, whether it was bound to provide against a contingency such as that which happened.[2] The same rule was applied where a child was injured on the defendant's premises by the falling of a privy wall, in a case where the child was permissively upon the premises.[3]

§ 1697. Questions of Art and Skill: Generally for the Jury. — The judge will not instruct the jury upon questions relating to a particular art, as to which he could not give an opinion without consulting a person skilled in such matters.[4] The reason of this is very plain. Such questions involve matters of fact, which are generally proved by the testimony of persons expert in the particular art or science, and, being *matters of fact*, not of law, they are to be passed upon by the jury.[5] Thus, it is a question for a jury whether a municipal corporation used due care and skill in constructing a sewer.[6]

cite: Haley *v.* Case, 142 Mass. 316; *s. c.* 7 N. E. Rep. 877; Russell *v.* Tilotson, 140 Mass. 201; *s. c.* 4 N. E. Rep. 231; Taylor *v.* Carew Manf. Co., 140 Mass. 150; *s. c.* 3 N. E. Rep. 21; Leary *v.* Boston & A. R. Co., 139 Mass. 580; *s. c.* 2 N. E. Rep. 115; Lawless *v.* Connecticut R. R. Co., 136 Mass. 1; *post*, § 1739.

[1] Hydraulic Works Co. *v.* Orr, 83 Pa. St. 332; Schilling *v.* Abernathy, 112 Pa. St. 437, 442.

[2] Hydraulic Works Co. *v.* Orr, *supra*.

[3] Schilling *v.* Abernathy, *supra*.

[4] Howland *v.* Marine Ins. Co., 2 Cranch C. C. (U. S.) 474.

[5] Silverthorn *v.* Fowle, 4 Jones L. (N. C.) 362.

[6] McClure *v.* Red Wing, 28 Minn. 186.

§ **1698. Malpractice of a Physician and Surgeon.** — Reasoning *obiter*, to the *conclusion* that such a question must ordinarily be one *of fact*, Mr. Justice Taunton said: "Take the case of an action against a surgeon, for negligence in the treatment of his patient. What law can there possibly be in the question, whether such and such conduct amounts to negligence? That must be determined entirely by the jury." [1]

§ **1699. Questions relating to Legal Practice.** — "In some cases," says the late Judge Taylor, "where the question relates to matters of legal practice, as, for instance, if a sheriff be charged with neglect of duty in not executing a writ, or if a solicitor be sued for negligence in conducting an action, — the judges would seem to be more competent than a jury to decide whether the facts proved amount to a want of reasonable care: but even in such cases it seems that the province of the judge is merely to inform the jury for what species or degree of negligence the defendant is answerable, and what duty in the particular case devolved upon him, either by the statute or common law, or the practice of the court; and then, having done this, he will leave the jury to consider the circumstances in evidence, and to decide, first, whether the defendant has performed his duty; and next, whether, in case of non-performance, the neglect was of that sort or degree which was venial or culpable, in the sense of not sustaining or sustaining an action." [2]

§ **1700. Negligence by an Attorney.** — The early English cases laid down the rule that an attorney was liable only for gross negligence, called by the judges *crassa negligentia* or *lata culpa*.[3] But why ordinary bailees or agents should be liable for ordinary negligence, and a member of the legal profession should be ex-

[1] Doorman *v.* Jenkins, 2 Ad. & El. 261. For a case where it was held error, under the peculiar circumstances, to submit to the jury the question what was proper for an *architect* to do, see Vigeant *v.* Scully, 20 Bradw. (Ill.) 437.

[2] Tayl. Ev. (8th Eng. ed.), § 37.

[3] Baikie *v.* Chandless, 3 Camp. 19, per Lord Ellenborough; Godefroy *v.* Dalton, 6 Bing. 460, 466, 467, per Tindal, C. J.

cused from liability except for gross negligence, was never satisfactorily shown, and the real reason must be ascribed to the partiality of the judges for members of their own profession. In a later case, it was laid down by Baron Alderson, in charging a jury, that the question to be considered was whether the attorney had used "reasonable skill and reasonable care," and, under the facts in evidence, he left it for them to decide the question.[1] While this question has been decided as a question of law upon established facts,[2] yet it has been the more common practice in England to submit it, as a *question of fact*, to the jury, under the judge's direction as to the law. This was done where the question was whether an attorney had been negligent in not complying with the practice of the court.[3] So, where an attorney for the plaintiff suffered the cause to be called for trial, without previously ascertaining whether a material witness, whom the plaintiff had undertaken to bring into court, had arrived, in consequence of which the plaintiff was nonsuited, — it was held, in an action against him by his client, grounded upon negligence, that it was properly left to the jury to say whether he had used reasonable care in conducting the cause; and the jury having found that he had not, the court refused to disturb the verdict.[4] On the other hand, it was ruled, as matter of law, that the conduct of an attorney who had charge of the defense of the plaintiff's action, in not producing the proper evidence of the entry of a judgment, whereby his client was nonsuited, was not actionable negligence.[5] The court proceeded upon the ground that what had been done might be attributable to an error of judgment merely, not involving a want of professional skill. Tindal, C. J., said: "It would be extremely difficult to define the exact limit by which the skill and diligence which an attorney undertakes to furnish in the conduct of a cause is bounded; or to trace precisely the dividing line between that reasonable skill and diligence which appears to satisfy his undertaking, and that *crassa negligentia* or *lata culpa*,

[1] Shilcock *v.* Passman, 7 Car. & P. 289.

[2] Godefroy *v.* Dalton, 6 Bing. 460.

[3] Hunter *v.* Caldwell, 10 Ad. & El. (N. S.) 69.

[4] Reece *v.* Righy, 4 Barn. & Ald. 202.

[5] Godefroy *v.* Dalton, 6 Bing. 460.

mentioned in some of the cases, for which he is undoubtedly responsible. The cases, however, which have been cited and commented on at the bar,[1] appear to establish, in general, that he is liable for the consequences of ignorance or non-observance of the rules of practice of this court; for the want of care in the preparation of the cause for trial, or of attendance thereon with his witnesses; and for the mismanagement of so much of the conduct of a cause as is usually and ordinarily allotted to his department of the profession; whilst, on the other hand, he is not answerable for error in judgment upon points of new occurrence, or of nice or doubtful construction, or of such as are usually entrusted to men in the higher branch of the profession of the law."[2]

§ 1701. **Whether Work is done in a "Workmanlike Manner."** — What constitutes the doing of work in a plain, substantial, workmanlike manner is a question exclusively *for the jury*. Where, in an action upon a building contract, it appeared by the terms of the contract that the work was to be done "in a plain, substantial and workmanlike manner," and it was pleaded as a defense that it was not so done, it was held error for the court to give, at the plaintiff's request, the following instruction: "By the plaintiff's undertaking to do defendant a plain, substantial and workmanlike job, he did not undertake to do a perfect one; and in determining the fact as to whether it was, when finished, a plain, substantial and workmanlike job, they can consider the material to be used, the kind of work to be done, as well as all other circumstances in the case." "This instruction," said Wagner, J., "is certainly wrong. What amounted to doing the work in a plain, substantial and workmanlike manner, was a question exclusively for the jury. But the instruction undertakes to withdraw the question from the jury, and, as a matter of law, define what the terms mean, and, as we think, it gives an entirely incorrect definition. To do a thing in a plain, substantial

[1] These were: Pitt *v.* Yalden, 4 Burr. 2060; Compton *v.* Candless, cited 3 Camp. 19; Baikie *v.* Candless, 3 Camp. 19.

[2] Godefroy *v.* Dalton, 6 Bing. 460, 467.

and workmanlike manner, would imply that it should be perfectly done for the character of the job contemplated. Surely an imperfect execution of the work, as the instruction implies, would not be a performance of the contract. Had the question been left where it properly belonged, exclusively to the determination of the jury, this error would have been avoided. As it is, the instruction was erroneous, and it was well calculated and had a direct tendency to mislead, and the judgment must be reversed." [1]

§ 1702. **Good Husbandry.** — The question whether good husbandry requires the whole of the hay raised upon a farm to be fed out upon it, is a *question of fact* for the jury. [2]

§ 1703. **Bailment: Care required of a Bailee.** —This will ordinarily be, in like manner, a *question for a jury*, and the mere fact that a gratuitous bailee loses his own money, under like circumstances, will not necessarily relieve him from the imputation of gross negligence, or take the question from the jury.[3] Thus, whether an *agister* has been negligent in the care of the animal placed in his charge, is ordinarily a question of fact.[4] In assumpsit against a bailee, it was proved that the defendant, a coffee-house-keeper, having custody of money without reward, lost it, and stated that he had unfortunately put it, with a larger sum of money belonging to himself, into his cash-box, which was kept in his tap-room; that the tap-room had a bar in it, and was open on Sunday, but that the rest of his house, which was inhabited, was not open on Sunday; and that the cash-box, with his own and the plaintiff 's money, had been stolen on that day. It was held, under these facts, that it was properly left to the jury to say whether or not the defendant had been guilty of gross negligence, that being the degree of negligence required to charge a gratuitous bailee, and also to tell them that the loss of the defendant's own money did not necessarily prove that he had taken

[1] Smith *v.* Clark, 58 Mo. 145.

[2] Wing *v.* Gray, 36 Vt. 261, 266.

[3] Doorman *v.* Jenkins, 2 Ad. & El. 256; *post*, § 1832, *et seq.*

[4] Kemp *v.* Phillips, 55 Vt. 69.

such care of the plaintiff's money as a reasonable man would ordinarily take of his own.[1]

§ **1704. Negligence in an Agent.** — The same may be said in respect of the question of gross negligence or bad faith in an agent, in failing to discharge a commission entrusted to him by his principal; this must ordinarily be a *question of fact* for a jury.[2] The question has, however, in some cases been decided as a *question of law*. Thus, where a person gratuitously undertook for another to make an entry in the custom house, and made it in a wrong name, it was held that there was no evidence to support a verdict for the plaintiff, and a new trial was ordered.[3]

§ **1705. Negligence of Municipal Corporation in respect of its Highways.** — In such cases, as in other cases where the right of recovery is predicated upon the defendant's negligence, the question of liability depends upon a want of ordinary care in the reparation of the highway;[4] and whether the defendant has

[1] Doorman *v.* Jenkins, 2 Ad. & El. 256.

[2] Moore *v.* Morgue, Cowp. 479; Watson *v.* Walker, 33 N. H. 132; Phœnix Ins. Co. *v.* Frissell, 142 Mass. 513.

[3] Shiells *v.* Blackburne, 1. H. Bl. 158. The authority of this case, if it is an authority, for the proposition that such a question is to be decided by the judge, is more than doubtful. In the subsequent case of Doorman *v.* Jenkins, 2 Ad. & El. 256, 262 *et seq.*, it was distinguished by each of the judges, and was not regarded as an authority that the question of negligence in a gratuitous bailee is not a question for a jury.

[4] This is the collected result of the following cases: Beecher *v.* Derby Bridge Co., 24 Conn. 491; Rapho *v.* Moore, 68 Pa. St. 404; Vicksburg *v.* Hennesey, 54 Miss. 391, 396; Hicks *v.* Chaffee, 13 Hun (N. Y.), 293; Ward *v.* Jefferson, 24 Wis. 342; Centralia *v.* Krouse, 64 Ill. 19; Hume *v.* New York, 47 N. Y. 639; Moore *v.* Mobile, 1 Stew. (Ala.) 284; Weightman *v.* Washington, 1 Black (U. S.), 39; Johnston *v.* Charleston, 3 So. Car. 232, 241; Winn *v.* Lowell, 1 Allen (Mass.), 177; Raymond *v.* Lowell, 6 Cush. (Mass.) 524; McDonough *v.* Virginia City, 6 Nev. 93; Wheeler *v.* Westport, 30 Wis. 392; (citing Johnson *v.* Haverill, 35 N. H. 52; Graves *v.* Shattuck, 35 N. H. 257; Winship *v.* Enfield, 42 N. H. 74; Palmer *v.* Portsmouth, 43 N. H. 265); Blake *v.* St. Louis, 40 Mo. 569, per Wagner, J.; Griffin *v.* Williamstown, 6 W. Va. 312, following Wendell *v.* Troy, 39 Barb. (N. Y.) 335 (affirmed 4 Keyes (N. Y.), 261); Chicago *v.* McGiven, 78 Ill. 347; Chicago *v.* Bixby, 84 Ill. 82; Merrill *v.* Hampden, 26 Me. 234; Lombard *v.* Chicago, 4 Biss. (U.S.) 460; Dewey *v.* Detroit, 15 Mich. 307; Chicago *v.* Crooker, 2 Bradw. (Ill.)

been guilty of such a want of ordinary care is in general a *question of fact* for the jury under proper instructions;[1] although there are cases so plain in their character that, under the operation of principles elsewhere stated, the court is authorized to withdraw the question from the jury and to declare that the highway was unsafe as matter of law.[2] The obvious reason of the rule which favors submitting this question to the jury is, that it is a question which addresses itself to the experience of practical men, and which is, in most cases, best solved by a jury.

§ **1706. Notice of Defect in Highway.** — It follows from the foregoing rule that, unless the obstruction or defect in the highway, which was the occasion of the injury, was produced by the municipal corporation itself, or by some one in privity with it,[3] it will

279; Bloomington *v.* Read, 2 Bradw. (Ill.) 542; Perkins *v.* Fayette, 68 Me. 152; El Paso *v.* Causey, 1 Bradw. (Ill.) 531; Ring *v.* Cohoes (N. Y. Ct. App. 1879), 7 Reporter, 725; *s. c.* 19 Alb. L. J. 472 (reversing 3 Hun (N. Y.), 76); Chicago *v.* Gavin, 1 Bradw. (Ill.) 302; Grayville *v.* Whitaker, 85 Ill. 439; Holmes *v.* Hamburg, 47 Iowa, 348; *post*, § 1750, *et seq.*

[1] Grayville *v.* Whitaker, 85 Ill. 439; *s. c.* 6 Cent. L. J. 97; Draper *v.* Ironton, 42 Wis. 696; *s. c.* 5 Reporter, 223; Benedict *v.* Fond du Lac, 7 Cent. L. J. 258; *s. c.* 6 Reporter, 799; McMaugh *v.* Milwaukee, 32 Wis. 200; Bryant *v.* Biddeford 39 Me. 193; Dowd *v.* Chicopee, 116 Mass. 93; Ghenn *v.* Provincetown, 105 Mass. 313; Brooks *v.* Somerville, 106 Mass. 271; Cassedy *v.* Stockbridge, 21 Vt. 391; Willard *v.* Newbury, 22 Vt. 458; Kelsey *v.* Glover, 15 Vt. 708; Sessions *v.* Newport, 23 Vt. 9; Leicester *v.* Pittsford, 6 Vt. 245; Wheeler *v.* Westport, 30 Wis. 392; Merrill *v.* Hampden, 26 Me. 234; Craig *v.* Sedalia, 63 Mo. 417; Johnson *v.* Haverhill, 35 N. H. 74; Hume *v.* New York, 47 N. Y. 639; Bagley *v.* Ludlow, 41 Vt. 425; Hull *v.* Richmond, 2 Woodb. & M. (U. S.) 337; Perry *v.* John, 79 Pa. St. 412; Stark *v.* Lancaster, 57 N. H. 88; Stack *v.* Portsmouth, 52 N. H. 224; Rice *v.* Montpelier, 19 Vt. 470; Independence *v.* Jeckel, 38 Iowa, 427; Hall *v.* Lowell, 10 Cush. 260; Green *v.* Danby, 12 Vt. 338; Burns *v.* Elba, 32 Wis. 605; Barstow *v.* Berlin, 34 Wis. 357; Cremer *v.* Portland, 36 Wis. 92; Hammond *v.* Mukwa, 40 Wis. 35; Willey *v.* Belfast, 61 Me. 569.

[2] Schmidt *v.* Chicago &c. R. Co., 83 Ill. 405; Benedict *v.* Fond du Lac, 7 Cent. L. J. 258; *s. c.* 6 Reporter, 799; Prideaux *v.* Mineral Point, 43 Wis. 513; *s. c.* 6 Cent. L. J. 428; Holley *v.* Winooski Turnpike Co., 1 Aik. (Vt.) 74; Kelsey *v.* Glover, 15 Vt. 708. But see Sessions *v.* Newport, 23 Vt. 9.

[3] Brooks *v.* Somerville, 106 Mass. 271; Monies *v.* Lynn, 119 Mass. 273; *s. c.* 121 Mass. 442; Alexander *v.* Mount Sterling, 71 Ill. 366; Springfield *v.* Le Claire, 49 Ill. 476; Chicago *v.* Johnson, 53 Ill. 91; Crosby *v.* Boston, 118 Mass. 71, 74; Rowe *v.* Portsmouth, 56 N. H. 291; Fort Wayne *v.* De Witt, 47 Ind. 391.

not be liable for damages produced by the defect, unless it had notice thereof, for a sufficient length of time before the happening of the accident, to have enabled it, by the exercise of reasonable diligence, to make the necessary repairs. It also seems settled that this notice may be express or implied,[1] but this statement does not convey to the mind a very accurate conception of a legal principle. The true rule is that the municipal corporation is under a continuing affirmative *duty of inspection* and therefore, after the lapse of a certain length of time, the court or the jury will be authorized to infer, either that it had notice and nevertheless neglected to make the repair, or that it was ignorant of the defect through negligence. Now, as negligent ignorance has the same effect in law, in actions for damages for negligence, as actual knowledge,[2] in either of these cases, in the absence of contributory negligence on the part of the plaintiff or person killed or injured, the municipal corporation will be liable. The rule under this head is believed to be correctly stated thus: The municipal corporation will not be answerable for damages caused by a defective condition of its highways, bridges, or approaches produced by some act not its own, — as by the act of a wrong-doer, by a sudden flood or other casualty, — unless (1) actual notice had come to it of such defect, and a reasonable time had elapsed before the accident to enable it to repair the same, by the exercise of reasonable diligence; or (2) unless sufficient time had elapsed between the happening of the defect and the happening of the accident to enable the corporation, by the exercise of reasonable diligence, to discover the defect and repair it. If sufficient time has thus elapsed, the jury will be authorized to infer, either that the municipal corporation had notice of the defect, or that it was guilty of negligence in not knowing it.[3]

[1] Fort Wayne *v.* De Witt, 47 Ind. 391; *post*, § 1754.

[2] Mersey Docks' Trustees *v.* Gibbs, L. R. 1 H. L. 93.

[3] Barrett *v.* St. Joseph, 53 Mo. 290; Schweickhardt *v.* St. Louis, 2 Mo. App. 571; Doherty *v.* Waltham, 4 Gray (Mass.), 596; Harper *v.* Milwaukee, 30 Wis. 365; Prideaux *v.* Mineral Point, 43 Wis. 513; *s. c.* 6 Cent. L. J. 428; Mack *v.* Salem, 6 Ore. 275; Dorlon *v.* Brooklyn, 46 Barb. (N. Y.) 604; Sweet *v.* Gloversville, 12 Hun (N. Y.), 302; Wilson *v.* Watertown, 3 Hun (N. Y.), 508; Todd *v.* Troy, 61 N. Y. 506; McGinity *v.* New York, 5 Duer (N. Y.),

And this question, whether the municipal corporation thus had notice or was negligently ignorant, is, in general, a *question for the jury*.[1] Such notice may be inferred by the jury, if the defect in the street or sidewalk had existed for a considerable length of time,[2] or so long as to render it notorious.[3]

§ 1707. Chattel Mortgage: Due Diligence in Foreclosing. — In Illinois it has been ruled, in a contest between a mort-

674; Hart *v.* Brooklyn, 36 Barb. (N. Y.) 226; Seaman *v.* New York, 3 Daly (N. Y.), 147; Bush *v.* Geneva, 3 N. Y. S. C. (T. & C.) 409; Chicago *v.* Langlass, 66 Ill. 361; Peru *v.* French, 55 Ill. 317; Reed *v.* Northfield, 13 Pick. (Mass.) 94; Doulon *v.* Clinton, 53 Iowa, 397; Rowell *v.* Williams, 29 Iowa, 210; Boucher *v.* New Haven, 40 Conn. 456; Bill *v.* Norwich, 39 Conn. 222; Rice *v.* Des Moines, 40 Iowa, 641; Clark *v.* Corinth, 41 Vt. 449; Ozier *v.* Hinesburgh, 44 Vt. 220; Hume *v.* New York, 47 N. Y. 639; Jansen *v.* Atchison, 16 Kan. 358; Chicago *v.* Murphy, 84 Ill. 224; Fahey *v.* Harvard, 62 Ill. 28; Lobdell *v.* New Bedford, 1 Mass. 153; Harrimen *v.* Boston, 114 Mass. 241; Howe *v.* Plainfield, 41 N. H. 135; Hubbard *v.* Concord, 35 N. H. 52; Ward *v.* Jefferson, 24 Wis. 342; Colby *v.* Beaver Dam, 34 Wis. 285; Goodnough *v.* Oshkosh, 24 Wis. 549; *s. c. sub nom.* Goodno *v.* Oshkosh, 28 Wis. 300; Hall *v.* Fond du Lac, 42 Wis. 274; Mosey *v.* Troy, 61 Barb. (N. Y.) 581; Reinhard *v.* New York, 2 Daly (N. Y.) 243; Manchester *v.* Hartford, 30 Conn. 118; Townsend *v.* Des Moines, 42 Iowa, 657; Schmidt *v.* Chicago &c. R. Co., 83 Ill. 405; Chicago *v.* McCarty, 75 Ill. 602; Cusick *v.* Norwich, 40 Conn. 375; Chicago *v.* Fowler, 60 Ill. 322; Chicago *v.* Crooker, 2 Bradw. (Ill.) 279; Weightman *v.* Washington, 1 Black (U. S.), 39; Noble *v.* Richmond (Va. Ct. App. 1879), 7 Reporter, 478; Atlanta *v.* Perdue, 53 Ga. 608; Fort Wayne *v.* De Witt, 47 Ind. 391.

[1] Howe *v.* Plainfield, 41 N. H. 135; Springer *v.* Bowdoinham, 7 Me. 442; Bradbury *v.* Falmouth, 18 Me. 181.

[2] Lindholm *v.* St. Paul, 19 Minn. 245; Reed *v.* Northfield, 13 Pick. (Mass.) 94; Harriman *v.* Boston, 114 Mass. 241; Howe *v.* Lowell, 101 Mass. 99; Donaldson *v.* Boston, 16 Gray (Mass.), 508; Hume *v.* New York, 47 N. Y. 639; McLaughlin *v.* Corry, 77 Pa. St. 109; Goodno *v.* Oshkosh, 28 Wis. 300; Holt *v.* Penobscot, 56 Me. 15; Springfield *v.* Doyle, 76 Ill. 202; Rockford *v.* Hildebrand, 61 Ill. 155; Bill *v.* Norwich, 39 Conn. 222; Manchester *v.* Hartford, 30 Conn. 118; Galesburg *v.* Higley, 61 Ill. 287; Crosby *v.* Boston, 118 Mass. 73; Rowe *v.* Portsmouth, 56 N. H. 291; *post*, § 1754.

[3] Requa *v.* Rochester, 45 N. Y. 129; Hart *v.* Brooklyn, 36 Barb. (N. Y.) 226, 229; Todd *v.* Troy, 61 N. Y. 506; Doulon *v.* Clinton, 33 Iowa, 397. Some exceptions have been admitted to this rule. Barnes *v.* Newton, 46 Iowa, 567; Cleveland *v.* St. Paul, 18 Minn. 279. Compare Ward *v.* Jefferson, 24 Wis. 342; McCabe *v.* Hammond, 34 Wis. 590; Griffin *v.* New York, 9 N. Y. 456; *s. c.* Selden's Notes, 223; Wallace *v.* New York, 2 Hilt. (N. Y.) 440; *s. c.* 18 How. Pr. 169. See further 2 Thomp. Neg. 762, *et seq.*

gagee of chattels and a creditor of the mortgager, that, whether due diligence has been used by the mortgager in foreclosing the mortgage after it has matured, is a mixed question of law and fact, not wholly within the province of the jury. "It is *for the court to determine* what time, under the circumstances, is reasonable, and then the jury will say whether the mortgage was foreclosed within that time."[1]

§ 1708. **Commercial Paper: Leaving Blanks which Admit of Fraudulent Alterations.** — There is a rule of law, applied within narrow limits, that, when one of two innocent persons must suffer through the fraud of a third, the loss must rather fall on the one whose negligence rendered possible the commission of the fraud. It is frequently applied in cases of fraudulent alterations of commercial paper. In such cases, if the maker or drawer has been negligent in so drawing the instrument as to leave unfilled blanks which easily admit of alterations, and if, after being so executed and delivered, the instrument is altered, and is, so altered, passed to the hands of a *bona fide* purchaser, the original maker will be liable to the *bona fide* purchaser for the amount of the instrument as thus altered. But in such cases the question whether the maker was negligent in leaving unfilled blanks in the instrument, has been held to be a *question of fact for a jury*.[2]

§ 1709. **Fraud: Prudence in relying upon Fraudulent Representations.** — Where the question related to fraud in obtaining a judgment, it was held proper to *leave to the jury* the question whether the defendants should have relied upon certain representations which were made to them, and whether they omitted reasonable prudence and caution in acting upon the plaintiff's assurances and advice.[3]

[1] Wooley *v.* Fry, 30 Ill. 158, 162.

[2] Brown *v.* Reed, 79 Pa. St. 370; *s. c.* 21 Am. Rep. 75; Leas *v.* Walls, 101 Pa. St. 57; *s. c.* 47 Am. Rep. 699. Compare Phelan *v.* Moss, 67 Pa. St. 59; *s. c.* 5 Am. Rep. 402; Garard *v.* Haddan, 67 Pa. St. 82; *s. c.* 5 Am. Rep. 412; *ante*, §§ 1399, 1400. *Reasonable time* for filling out a promissory note delivered in blank: Temple *v.* Pullen, 8 Exch. 389; Mulhall *v.* Neville, Id. 390.

[3] Greene *v.* Hallendeck, 24 Hun (N. Y.), 116.

§ **1710. Guaranty: Diligence in Proceeding against Principal Debtor in order to Charge Guarantor.** — In some jurisdictions it is held that a contract, by which one guarantees the payment of the debt of another, is conditioned upon the creditor's diligent use of the means within his power to collect the debt of the principal debtor; that it creates only a contingent liability, which becomes absolute only after the use of due and unsuccessful diligence to obtain satisfaction from the principal, or after the intervention of circumstances which excuse diligence.[1] And whether the creditor has used due diligence to collect the debt of the principal debtor, is a *question for a jury*, under all the circumstances of the case.[2]

§ **1711. Railways: Speed of a Railway Train in the Streets of a Town or City.** — Whether a railway train is running at an improper rate of speed, is a *question of fact* for the jury, where the rate of speed allowed by an ordinance of the town or city on the streets of which the train is run, is not exceeded.[3]

§ **1712. Sales: Diligence by the Purchaser of goods in obtaining Possession.** — Whether a purchaser of goods has used diligence in acquiring possession so as to protect his title against that of a subsequent purchaser, is a *question of fact* which cannot be withdrawn from the jury by an instruction.[4]

§ **1713. How Jury instructed in Actions for Negligence.** — In some cases the courts are able to do little more than to give to the jury an abstract rule or definition of negligence, leaving them to apply it to the facts, which they judge to be proved by the evidence of the particular case, — as for instance, to instruct them that, "negligence is the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, should do, or the doing

[1] Gilbert *v.* Henck, 6 Casey (Pa.), 205; Miller *v.* Burkey, 3 Casey (Pa.), 317; Isett *v.* Hoge, 2 Watts (Pa.), 128; Kramph *v.* Hatz, 52 P. St. 525, 529.

[2] Kramph *v.* Hatz, *supra*.

[3] McGrath *v.* New York &c. R. Co., 1 Thomp. & C. 243.

[4] Gradle *v.* Kern, 109 Ill. 558.

something which a prudent and reasonable man would not do.[1] With such an instruction for their guidance, it is for the jury to determine whether the parties in the particular case have so acted as to absolve themselves from the imputation of negligence,—a conclusion to be deduced by evidence of what it is customary for persons to do in similar circumstances, and by the estimate of the jurors as to what a person of ordinary prudence, similarly situated, ought to do.

Article II. — Precedents of Instructions.

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Subdivision 3. — Master and Servant.
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Subdivision 1. — General Principles.

Section
1718. General Instruction defining Negligence and Contributory Negligence.
1719. Omission of Statutory Precaution Negligence *per se*.
1720. Causal Connection between Wrong and Injury.
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1723. Non-Liability for Subsequent Aggravation by Plaintiff of his Damages.
1824. Duty of the Person Injured to Employ Surgical Aid and use Care to Diminish the Damages.

§ 1718. General Instruction defining Negligence and Contributory Negligence. — "Negligence, in a general sense, is every omission to perform a duty imposed by law for the protection of one's own

[1] Alderson, B., in Blyth *v.* Birmingham Waterworks Co., 11 Exch. 781, 784.

person or property, or that of another. Negligence, to some extent, should be measured by the character, risk and exposure of the business under consideration; and the degree of care of all parties is higher when the lives and limbs of themselves or others are endangered, than in ordinary cases. - - - - Ordinary negligence is the want of such care and diligence as reasonably prudent men generally, in regard to the subject-matter of inquiry, under such circumstances as those under consideration, would use to endeavor to prevent the injury complained of. - - - - Contributory negligence is negligence, not only upon the part of the one committing the injury, but also upon the part of him upon whom the injury is committed, and by which they both contribute thereto.[1] - - - - "By ordinary care is meant that care which a person of common prudence takes of his own concerns, or that degree of care which men of common prudence exercise about their own affairs, in the age and country in which they live. In determining what would be ordinary care in a particular case, reference must be had to the actual state of society, the business habits, and general usages peculiar to the time and country. What is done by men of ordinary prudence in any particular country, in respect to things of a like nature, whether it be more or less, in point of diligence, than what is exacted in another country, becomes, in fact, the general measure of diligence."[2]

§ 1719. OMISSION OF STATUTORY PRECAUTION NEGLIGENCE PER SE. — "If the jury believe from the evidence, that the defendants, their agents and servants, omitted to ring a bell or sound a whistle in the manner required by law, such omission constitutes a *prima facie* case of negligence, and the defendants are liable to plaintiff for the loss and damage proved to have been sustained by him by reason of such negligence."[3]

§ 1720. CAUSAL CONNECTION BETWEEN WRONG AND INJURY. — "If the jury believe from the evidence that the gunshot or pistol wounds inflicted on Andrew Jackson, were necessarily fatal, and it was a wrongful act for the defendant's employés to receive Jackson on the train at the time and place in question in his wounded condition, and that said wrongful act only hastened the death of Jackson and was

[1] Approved in Houston &c. R. Co. *v.* Randall, 50 Tex. 255.

[2] Approved in Derosia *v.* Winona &c. R. Co., 18 Minn. 149.

[3] Approved in Chicago &c. R. Co. *v.* Elmore, 67 Ill. 177. See *ante*, § 1672.

not the cause of the same, you must find a verdict for the defendant." [1]

§ 1721. General Instructions on Contributory Negligence.— "If the jury believe from the evidence that plaintiff, by his own negligence, directly contributed in any degree to the injury sued for, they will find for defendant." [2] - - - - "One who is injured by the ordinary negligence of another cannot recover damages therefor, if the injured party, by his own ordinary negligence or willful wrong, proximately contributed to the injury, so that it would not have happened but for his own fault. If the party injured by his own carelessness substantially contributed to the injury, or might, by the exercise of ordinary care, such as prudent men generally would have used under similar circumstances, have avoided the injury, he cannot recover damages." [3] - - - - "One who is injured by the mere negligence of another cannot recover any compensation for his injury, if he, by his own ordinary negligence or willful wrong, contributed to produce the injury of which he complains, so that, but for his concurring and co-operating fault, the injury would not have happened to him; except when the direct cause of the injury is the omission of the other party, after becoming aware of the injured party's negligence, to use a proper degree of care to avoid the consequences of such negligence." [4]

§ 1722. Contributory Negligence: Proximate and Remote Cause: Rule Where the Defendant's Negligence was the Proximate, and the Plaintiff's the Remote Cause of the Injury. — "If the jury be-

[1] In Jackson *v.* St. Louis &c. R. Co., 87 Mo. 422, 428, this instruction was refused, but the Supreme Court of Missouri held that it ought to have been given.

[2] Approved in Neilon *v.* Kansas City &c. R. Co., 85 Mo. 599, 601, Ray, J., *obiter*. See *ante*, § 1679 *et seq.*

[3] Approved in Houston &c. R. Co. *v.* Randall, 50 Tex. 255, 257.

[4] Approved in Cooper *v.* Central R. Co., 44 Iowa, 134, 138. Citing and relying upon Spencer *v.* Illinois Central R. Co., 29 Iowa, 55, 58. In Muldowney *v.* Illinois Central R. Co., 39 Iowa, 618, an instruction will be found applicable to the case of an injury received in coupling cars, where the plaintiff was warned by a by-stander of the danger. Other models of instruction on contributory negligence will be found in Riley *v.* West Virginia &c. R. Co., 27 W. Va. 145, 154, Walter *v.* Chicago &c. R. Co., 39 Iowa, 36; Hocum *v.* Weitherick, 22 Minn. 154; Perigo *v.* Chicago &c. R. Co., 52 Iowa, 277. And in almost any reported case of negligence, where the instructions are set out. See also Snyder *v.* Railway Co., 11 W. Va. 14, 30; Sheff *v.* Huntington, 16 W. Va. 307; Johnson *v.* Railway Co., 25 W. Va. 570; Hough *v.* Railway Co., 100 U. S. 213.

lieve from the evidence that the plaintiff's negligence contributed to the injury complained of, he cannot recover. But if such negligence was only slight, or the remote cause of the injury, he may still recover, notwithstanding such slight negligence or remote cause."[1] "Although the deceased may have been guilty of misconduct, or failed to exercise ordinary care and prudence, while a passenger on defendant's car, which may have contributed remotely to the injury or death of deceased, yet if the agents of defendant were guilty of misconduct in the management of said cars, which was the immediate cause of deceased's injury and death, and with the exercise of prudence by said agents, said injury and death might have been prevented, the defendant is liable in this suit; and if the jury find for the plaintiff, they will assess the damages at the sum of five thousand dollars, and return a verdict for the plaintiff for that sum."[2]

§ 1723. NON-LIABILITY FOR SUBSEQUENT AGGRAVATION BY PLAINTIFF OF HIS DAMAGES. — "And so, too, it was the duty of the plaintiff to use ordinary care to cure and restore herself; and if you find from the evidence that the plaintiff failed to use such ordinary care in the premises, but that she unnecessarily exposed herself in inclement weather, or otherwise, after receiving her injuries, if any she received in said accident, and thereby increased and aggravated such injuries and enhanced their evil effects, you will take these facts into account in arriving at your verdict, if you find for plaintiff; and should not allow any damages to plaintiff for any ailments, injuries or diseases, or their ag-

[1] Approved in Sawyer *v.*. Sauer, 10 Kan. 470; citing Ernst *v.* Hudson River R. Co., 35 N. Y. 9; Johnson *v.* Hudson River R. Co., 20 N. Y. 65, 76; Beers *v.* Housatonuc R. Co., 19 Conn. 566; Union Pacific R. Co. *v.* Rollins, 5 Kan. 167; Shear. & Redf. on Neg., § 33; Isbell *v.* New York &c. R. Co., 27 Conn. 393; Richmond *v.* Sacramento Valley R. Co., 18 Cal. 351.

[2] Approved in Huelsenkamp *v.* Citizens' R. Co., 37 Mo. 537, 540. The doctrine embraced in the above instructions was quite in fashion in some courts a few years ago. Lord Campbell's doctrine that if the negligence of the plaintiff contributed in any degree to the accident he could not recover (Dowell *v.* Gen. Steam Nav. Co., 5 El. & Bl. 195), worked such hardships that the courts endeavored to find roads out of it, and the above was one which they hit upon. But it did not work well. It was mere casuistry; it threw the whole thing into the scales of the loose judgments of juries, and, in effect, abolished the rule of contributory negligence. It therefore went out of fashion, and we hear very little of it in recent cases. 2 Thomp. Neg. 1151 *et seq.*; *ante*, § 1676. For another instruction of this kind, see Burham *v.* St. Louis &c. R. Co., 56 Mo. 339.

gravation, from which plaintiff has been, or may be, suffering by reason of such exposure, and from which she would not otherwise be suffering." [1]

§ 1724. Duty of the Person Injured to employ Surgical Aid and use care to Diminish the Damages. — "It was the duty of the plaintiff to use ordinary care, judgment and diligence in securing medical or surgical aid after she received the injuries complained of, if any she received; and if you find from the evidence that, after she received such injuries, if any she did receive, she failed to use such ordinary care, judgment and diligence in procuring timely medical or surgical aid; and if you further find from the evidence that, by reason of such failure, her condition is now different and worse than it would have been if she had used such ordinary care, judgment and diligence, in the premises, then if you find for the plaintiff you should take this into account in making up your verdict, and should not allow her any damages for ailments and diseases, if any, that may have resulted from such failure." [2]

[1] In approving this instruction, the Supreme Court of Indiana, speaking through Elliott, J., said: "We regard this instruction as unusually clear and forcible, and we are satisfied that it correctly states the law. A plaintiff is not bound to use extraordinary care to prevent an injury from developing into evil consequences, but is bound to the use of ordinary care and diligence. It is true that in some cases ordinary care will require a high degree of care, for care must always be proportionate to the danger in order to be even ordinary care; but there is no requirement that in any case more shall be done than a person of ordinary prudence would do under like circumstances." Louisville &c. R. Co. *v.* Falvey, 104 Ind. 409, 425; citing Beach Contr. Neg. 22. Further on the learned judge said of this instruction: "It is fair in all its parts, clear in its language, and consistent in its general tenor." *Ibid.* 426.

[2] "This instruction," said Elliott, J., "expresses the law correctly. One who is injured by the negligence of another is bound to use ordinary care and diligence in securing medical or surgical aid, but he is bound to no higher degree of care and diligence." Louisville &c. R. Co. *v.* Falvey, 104 Ind. 409, 424; citing Beach Contr. Neg. 21. In Rice *v.* DesMoines, 40 Iowa, 638, 644, there is a precedent of an instruction, approved on appeal, embodying the proposition that the plaintiff is not to have his damages diminished by reason of subsequent surgical treatment, provided he employed a surgeon of good reputation, although not the most skillful. The court cited the following cases: Collins *v.* Council Bluffs, 32 Iowa, 324, 329; Lawrence *v.* Housatonic R. Co., 29 Conn. 390; Stover *v.* Bluehill, 51 Me. 439. In Klutts *v.* St. Louis &c. R. Co., 75 Mo. 642, 645, there is a series of four instructions upon this subject, given in behalf of the defendant. These instructions, though not challenged on appeal and hence not approved in such a way as to make them authoritative precedents, were, nevertheless, drawn by skillful counsel and may be consulted as models.

Subdivision 2. — Injuries to Children.

SECTION

1727. Injury upon Railway Tracks.
1728. That the Negligence of the Parents in allowing their Child to run at large will not excuse Negligence of the Defendant in Running over it.
1729. Another Instruction on the same Hypothesis.
1730. Defendant's Instruction on the Hypothesis of Ordinary Care.
1731. Another Instruction on the Defendant's Hypothesis of Reasonable Care and of Efforts to stop Train after Discovering Child.
1732. Defendant's Instruction on the Hypothesis of Liability on the Ground of Negligence only.
1733. Instruction on the Hypothesis of Contributory Negligence in a child Eleven years old.
1734. Instruction excluding Conclusion of Negligence from the mere Happening of the Accident.

§ 1727. — INJURY UPON RAILWAY TRACK. — "The jury are instructed that, although they may believe from the evidence, that the son of plaintiffs was guilty of negligence or carelessness, which contributed to the injury, yet if they further believe, from the evidence, that the servants or agents of the defendant, managing the locomotive or cars of defendant, with which the injury was inflicted, might have avoided the said injury by the use of ordinary care and caution, the jury will find for plaintiffs."[1]

§ 1728. THAT THE NEGLIGENCE OF THE PARENTS IN ALLOWING THEIR CHILD TO RUN AT LARGE WILL NOT EXCUSE NEGLIGENCE OF THE DEFENDANT IN RUNNING OVER IT. — "The court further instructs the jury that the parents of said child were not prohibited from allowing him to go out upon the grounds adjacent to their dwelling house, even though it were close to the track of defendant's railway, in company with his sister and other small children, to play and enjoy the fresh air and sun-

[1] Approved in Ostertag *v.* Pacific Railroad, 64 Mo. 423. This case contains two other instructions, approved on appeal, as to the degree of care required of a railway company to avoid injuring children. Other useful instructions on the subject of injuries to children, drawn upon the hypotheses presented by the evidence of the opposing parties, will be found in the following cases: Farris *v.* Cass Ave. R. Co., 80 Mo. 325 (street railway); affirming *s. c.* 8 Mo. App. 588 (child two years old); Donahoe *v.* Wabash &c. R. Co., 83 Mo. 543, 550; Albertson *v.* Chicago &c. R. Co., 48 Iowa, 292; Hicks *v.* Pacific Railway, 64 Mo. 433 (child on platform struck by piece of timber on passing train).

shine; but, in allowing them this freedom, the plaintiffs were only required to use the same care and precaution to prevent them from going into dangerous places and receiving injury or harm, as ordinarily prudent people similarly situated would exercise as to their own children, and would deem adequate for this purpose; and although the jury may find that the plaintiffs were imprudent or careless in this respect, yet if the jury further find that the servants and employés of the defendant, in charge of said train, had they been exercising care and watchfulness, under the circumstances, could have seen and recognized the fact that it was a child, and could have stopped the train and prevented the injury, their finding must be for the plaintiff."[1]

§ 1729. ANOTHER INSTRUCTION ON THE SAME HYPOTHESIS. — "Although the jury may find from the evidence that the parents of the child were guilty of negligence in permitting their child to go upon the track of the railway, yet if the injury of said child could have been avoided after the employés learned of the danger in which said child was, or might have learned of his dangerous situation by the use of reasonable diligence, then they must find for the plaintiff."[2]

§ 1730. DEFENDANT'S INSTRUCTION ON THE HYPOTHESIS OF ORDINARY CARE. — "If the jury believe from the evidence that the persons in charge of the train were exercising ordinary care in running, conducting and managing the same, and that they did not discover the child upon the track or see it approaching the same, in time to prevent the injury complained of, then the plaintiff cannot recover in this action, and the finding must be for the defendant."[3]

§ 1731. ANOTHER INSTRUCTION ON THE DEFENDANT'S HYPOTHESIS OF REASONABLE CARE, AND OF EFFORTS TO STOP TRAIN AFTER DISCOVERING CHILD. — "If the jury believe from the evidence that the said child went upon the defendant's track at a place where there was no public street or highway, and that while there it was struck and killed by one of defendant's trains, and if the jury further believe from the evidence that when the persons in charge of said train, and while in the exercise of due care and watchfulness, discovered said child near or upon said track, they reversed the engine and set the brakes upon the cars of said

[1] Approved in Donahoe *v.* Wabash &c. R. Co., 83 Mo. 543, 551; *ante*, §§ 1687, 1688.

[2] Approved in Donahoe *v.* Wabash &c. R. Co., 83 Mo. 543, 551.

[3] Approved in Donahoe *v.* Wabash &c. R. Co., 83 Mo 543, 552.

train as quick as they could, and that they made use of all the appliances at their command to stop said train and avoid injury to said child, and that said train did nevertheless strike and kill said child, notwithstanding said efforts to stop the same, then the plaintiffs cannot recover in this action, and the verdict must be for the defendant." [1]

§ 1732. DEFENDANT'S INSTRUCTION ON THE HYPOTHESIS OF LIABILITY ON THE GROUND OF NEGLIGENCE ONLY. — "Although the jury may believe from the evidence that the deceased was struck and killed by a train of defendant's cars, yet that fact does not authorize the jury to find a verdict for the plaintiffs in this action; and unless it has been proved to the satisfaction of the jury that, after said child got upon the track, or its dangerous situation was discovered by those in charge of the train, or that they could have seen it by the exercise of ordinary care and watchfulness, and have stopped the same in time to have prevented the cars from striking it, then the finding must be for the defendant." [2]

§ 1733. INSTRUCTION ON THE HYPOTHESIS OF CONTRIBUTORY NEGLIGENCE IN A CHILD ELEVEN YEARS OLD. — "The jury are instructed that the son of plaintiffs was bound to exercise only such care and prudence as might reasonably be expected of a boy of his age and capacity under similar circumstances, and that the same degree of care and prudence in avoiding danger is not required from a person of tender years and imperfect discretion as from a person of mature years and greater discretion under similar circumstances; and if the jury believe, from the evidence, that the said son of plaintiffs was, at the time of the accident, of about the age of eleven years, they may take that fact into consideration in considering the question of negligence or carelessness on the part of said son." [3]

§ 1734. INSTRUCTION EXCLUDING CONCLUSION OF NEGLIGENCE FROM THE MERE HAPPENING OF THE ACCIDENT. — "In determining whether the driver of defendant negligently and carelessly drove his car, or whether the injury to the child was occasioned by his negligent and careless driving, you are to consider all the attending facts and circumstances, but you are in no wise at liberty to presume negligence or carelessness

[1] Approved in Donahoe *v.* Wabash &c. R. Co., 83 Mo. 543, 553.

[2] Approved in Donahoe *v.* Wabash &c. R. Co., 83 Mo. 543, 553.

[3] Approved in Ostertag *v.* Pacific R. Co., 64 Mo. 423, 424.

on his part from the mere happening of the accident. These are facts which require affirmative proof, and the burden of showing them, as well as the want of contributory negligence on the part of plaintiffs, rests with the plaintiffs." [1]

Subdivision 3. — Master and Servant.

SECTION

1737. Negligence in Employing or Retaining Careless Fellow-Servants.
1738. Duty of Master to furnish Safe Appliances.
1739. Injury to Servant through Defective Machinery where Plaintiff has Knowledge thereof and Defendant has promised to Repair same.
1740. When Knowledge of Servant of Defect will preclude a Recovery.

§ 1737. NEGLIGENCE IN EMPLOYING OR RETAINING CARELESS FELLOW-SERVANTS. — "It was the duty of defendant to employ careful, reliable and competent servants to conduct and manage its trains and cars; and if the jury believe from the evidence that the defendant failed to exercise reasonable care in the employment of such servants, or if defendant failed to discharge any servant or employé that it had good reason to believe was careless, unreliable and incompetent, an injury resulted therefrom to plaintiff, without a fault on his part, and while engaged in the discharge of his duty as employé of defendant, then defendant is liable for such injury." [2] - - - - "If the jury believe from the evidence that Alfred La Brunerie was not a fit person to act as conductor of defendant's trains, and that, after defendant had notice of such unfitness, it continued him in its employ as such conductor; and the plaintiff, while engaged in his duties as a brakeman on defendant's train, and while exercising reasonable care, was precipitated between two of the cars of said train, by reason of the carelessness and unfitness of La Brunerie, as conductor of said train, in having drawn the pin coupling said cars without notifying plaintiff thereof, whereby plaintiff was injured, — then the jury will find for plaintiff and assess his damages at such sum, not exceeding $20,000, as they believe from the whole evidence will compensate him for such injury." [3]

§ 1738. DUTY OF MASTER TO FURNISH SAFE APPLIANCES. — It was the duty of the defendant to provide the brakeman, * * * with suffi-

[1] Approved in Farris *v.* Cass Avenue &c. R. Co., 8 Mo. App. 588; *s. c.* affirmed 80 Mo. 325, 329.

[2] Approved in Neilon *v.* Kansas City &c. R. Co., 85 Mo. 599.

[3] Approved in Neilon *v.* Kansas City &c. R. Co., 85 Mo. 599, 600.

cient and safe machinery and appliances to be used in the course of his employment; and if the jury believe from the evidence, that he received the injuries that resulted in his death from defects in such machinery or appliances, while using them in the regular course of his employment, and that such defects were unknown to him, but that the defendant, in the exercise of ordinary and reasonable care and diligence, could have cured them, then the defendant is liable therefor; but if they believe that such defects were latent, and not discernible by ordinary and reasonable care and diligence, and also that they were unknown, then the defendant is not liable." [1] - - - - "If the jury believe from the evi-

[1] Approved in Cooper *v.* Pittsburg &c. R. Co., 24 W. Va. 37, 42, 43. Other instructions on this subject will be found in the same case. In Riley *v.* West Virginia &c. R. Co., 27 W. Va. 150, a series of well drawn instructions will be found, applicable to a case where a railway brakeman was injured by being thrown against a stump left in dangerous proximity to the railway track, including also an instruction on the defendant's hypothesis. In Hannibal &c. R. Co. *v.* Fox, 31 Kan. 590, there is an instruction on the hypothesis that a servant cannot recover damages through an injury received from a fellow servant, unless the master was guilty of negligence in retaining the fellow-servant, knowing his incompetency. In Houston &c. R. Co. *v.* Randall, 50 Tex. 255, there is a long series of instructions applicable to the case of a railway brakeman receiving an injury in consequence of a ditch being left open on the side of the defendant's track, into which he stepped while attempting to make a coupling of the defendant's cars. In Beems *v.* Chicago &c. R. Co., 67 Iowa, 440, 441, there is a long instruction in an action brought for the death of a brakeman in coupling cars, grounded on the negligence of another servant of the defendant, the fireman upon the engine. It should be observed that in that State the rule that a master is not liable for the negligence of one servant causing injury to another servant in the same common employment, has been repealed by statute. For instructions in another case in the same State where a railway employé was injured by the alleged negligence of a co-employé, see Hatfield *v.* Chicago &c. R. Co., 61 Iowa, 438. In Hughes *v.* Winona &c. R. Co., 27 Minn. 139, there is a long instruction on the subject of the risks which a servant impliedly assumes on entering into an employment. In Maxwell *v.* Hannibal &c. R. Co., 85 Mo. 95, 100, there are some instructions grounded on the liability of a master to his servant for an injury received by the latter through the carelessness of a drunken foreman, predicated on the negligence of the master in employing or retaining such a foreman. In Neilon *v.* Kansas City &c. R. Co., 85 Mo. 599, 600, 601, there are a number of instructions, given at the request, of the defendant, excusing the act of the master in retaining an incompetent servant, from whom the plaintiff, another servant, received an injury; but, as the defendant was the appellant, these instructions cannot be regarded as having received explicit approval in the Supreme Court.

dence that there was a stump standing upon or alongside of the bank of the defendant's railroad, in dangerous proximity to the track or cars or engines and tender passing over said track, whereby the risk of injury to the plaintiff in the discharge of his duties was increased beyond the ordinary risks incident to such employment, and that said stump was allowed to remain there after the defendant knew of its situation, or might by the exercise of reasonable care and diligence have known thereof, and if they further believe that the plaintiff received the injury, complained of in consequence of such stump, having remained there, after defendant knew or might have known by the use of care and diligence of its situation, and that the plaintiff, at the time he received such injury, was exercising ordinary care and prudence, as a brakeman, and was in the discharge of his duties as such, at the time the injury occurred, and did not know of the situation of said stump, or might not have known of it by the exercise of reasonable care and prudence, then the defendant is liable for said injury." [1]

§ 1739. Injury to Servant through Defective Machinery, where Plaintiff has Knowledge thereof and Defendant has Promised to Repair Same. — "If the draw bar was defective, and the plaintiff had knowledge of it, and made objection thereto, and was induced to remain in the defendant's employment by promise or assurance of its repair, within a reasonable time before its repair, and not having waived the objection, he was injured by reason of such defect, and he did not contribute to the injury by his own fault or negligence, he will be entitled to recover; but in such case greater care will be required of him than if he had known of the defect." - - - - "If the draw-bar was defective, and the plaintiff had knowledge of such defects, and objected to its use in such condition, and still remained in the employment of the defendant and in the use of the draw-bar, under the inducement from his superior employés that it should be remedied, and it was not so remedied within a reasonable time, he will be held to have waived his objection and assumed the risk, and cannot recover, though he was thereafter injured. A reasonable time would be such as would ordinarily be required to remove the defective draw-bar and substitute a proper one." [2]

[1] Approved in Riley *v.* West Virginia &c. R. Co., 27 W. Va. 145, 150, 151; citing Baltimore &c. R. Co. *v.* Strickler, 51 Md. 47, 69

[2] Approved in Belair *v.* Chicago &c. R. Co., 43 Ia. 674, 675

§ 1740. When Knowledge of Servant of Defect will Preclude a Recovery. — "If you believe from the evidence in this case that the proximity of said coal platform to the track and to cars as they passed was plain and apparent, and the liability to injury therefrom was manifest, and that deceased knew of such proximity, or, by the exercise of care to avoid injury to himself might have known, and with such knowledge, or opportunity of knowledge, remained in defendant's employ, and continued to work in the vicinity thereof without objection or protest, and without promise of amendment, then plaintiff cannot recover in this action." [1]

Subdivision 4 — Municipal Corporations.

Section

1742. Not liable for Errors of a Judicial Nature and Exercise of Ordinary Power.
1743. Another Instruction on the Same Subject.
1744. Negligence in Respect of the Drainage of its Streets.
1745. Negligence in Grading Street, Casting Water on Adjoining Land.
1746. Defective Sewers: Liability for Flooding Private Property.
1747. Not liable for Honest Mistake of Competent Engineer.
1748. Duty of Property Owner to take Steps to protect his Property.
1749. Defective Streets: When Corporation chargeable with Notice of Defect.
1750. Care Required in the Construction and Reparation of Highways.

[1] Approved in Perigo *v.* Chicago &c. R. Co., 52 Ia. 277. The court said (p. 277): "It is now the established doctrine of this court, in harmony with the current of authority elsewhere, that an employé who knows, or by the exercise of ordinary diligence could know, of any defect or imperfection in the things about which he is employed, and continues in the service without objection, and without promise of change, is presumed to have assumed all the consequences resulting from such defects, and to have waived all rights to recover for injuries caused thereby. Muldowney *v.* Illinois Central R. Co., 39 Ia. 615; Kroy *v.* Chicago &c. R. Co., 32 Ia. 357; Way *v.* Illinois Central R. Co., 40 Ia. 341; Lumley *v.* Caswell, 47 Ia. 159. * * * The doctrine of these cases is that the negligence of the defendant, in furnishing defective or improperly constructed machinery and implements, is waived, by remaining in the employment without protest or promise of amendment. The waiver of the negligence of the defendant places the case in the same position as though the defendant had had not been negligent; and without the negligence of the defendant there can be no recovery. This waiver can not be affected by the particular situation in which the employé may be placed, or the rapidity or promptness with which he may be required to act at the time of the accident. These questions may, very properly, bear upon the question of the contributory negligence of the employé, but they can have no bearing on the question whether the defendant has been guilty of negligence, about which the employé has a legal right to complain." See *ante*, § 1695.

SECTION

1751. Not an Insurer against Accidents, but Liable for Want of Ordinary Care.
1752. What Circumstances Considered in Determining this Question.
1753. Not Liable for Ordinary Injuries Resulting from Latent Defects.
1754. Notice of Defect: Implied from Length of Time and Notoriety.
1755. Repair Subsequent to Accident not Evidence of Notice of Defect Previous to Accident.
1756. Notice of Decay in a Bridge.
1757. Continuing Duty of Inspection.
1758. Duty of Skill and Care in Adopting a Proper Plan.
1759. Duty of City to Erect Barriers to Guard Excavation in Sidewalk.
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1761. Liability to Traveler Insured by Street obstructed in Building on Adjacent Property.
1762. Instruction on the Hypothesis that the Plaintiff rashly traveled on a Road unsafe by Reason of Ice.
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1764. Care required of Traveler having Knowledge of Defect.
1765. Instruction on the Theory of the Plaintiff being Intoxicated.
1766. Comprehensive Instructions Embracing at once the Element of Care on the Part of the City and on the Part of the Traveler.
1767. Another Model applicable to the Case of a Traveler falling from a Bridge having no Railings.
1768. Stating the Issues in such an Action.

§ 1742. NOT LIABLE FOR ERRORS OF A JUDICIAL NATURE AND EXERCISE OF ORDINARY POWER. — "Municipal corporations are not liable to individuals for judicial errors, although private rights may be injured thereby. Nor are such corporations liable to individuals for the exercise of their ordinary powers, however mistaken their policy may be, and although private injury may result therefrom. - - - - If, therefore, you find that the streets, culverts and sewers complained of were made and constructed under and by order of the common council of said city, and that they were made in accordance with such order of said common council, in a skillful and careful manner, and were kept in repair by said city, then the plaintiff cannot recover in her action, although said sewer and culverts were not of a sufficient capacity to perform the work for which they were intended, and although the improvement of said streets increased the flow of water over plaintiff's lot, and caused the injury, if any were caused, complained of.

[1] Approved in Rozell *v.* Anderson, 91 Ind. 591. The proposition of the first part of the instruction is copied almost verbatim from the opinion of the court in Roll *v.* Indianapolis, 52 Ind. 547. The second part of the in-

§ 1743. ANOTHER INSTRUCTION ON THE SAME SUBJECT. — "If the plan of surface-drainage adopted and carried out by the city was as good as the topography of the ground will warrant, the city cannot be held liable for damages resulting from surface water. - - - - If the city has adopted as good a system of drainage as its finances will reasonably warrant, it cannot be held liable for not undergoing extraordinary expenses for making a better. - - - - The city cannot be held liable for an error of judgment in not constructing a sewer of sufficient capacity to carry off all the surface water that may run into it. - - - - If the sewer in Nicollet street has not increased the quantity of surface water running into plaintiff's premises, plaintiff cannot recover on account of any defect of the sewer in the matter of its capacity to discharge water.[1]

struction, the court say, is dependent upon and must be read with the first. "Thus read, the two instructions state the law fairly and correctly, as applicable to what, as we may well suppose, was shown by the evidence. If the jury found that the sewer had been constructed in a skillful and careful manner, and kept in repair, the city would not be liable because of an error in judgment, or mistake of the city authorities, in regard to the capacity of the sewer to perform the work for which it was intended. This is substantially what the jury was told in the instruction complained of, and this is the law." The court cite Weis *v.* Madison, 75 Ind. 241; *s. c.* 39 Am. Rep. 135; Cummins *v.* Seymour, 79 Ind. 491; *s. c.* 41 Am. Rep. 618; Evansville *v.* Decker, 84 Ind. 325; *s. c.* 43 Am. Rep. 86. A useful instruction under the same head, approved on appeal, will be found in Alden *v.* Minneapolis, 24 Minn. 255, 256.

[1] Approved in Alden *v.* City of Minneapolis, 24 Minn. 256, 257. The court said that the city's "clear duty to the public required, as was done in this instance, the elevation of the grades of Nicollet and Third streets, through this low place of ground, to such a height and level above its natural surface as would make them fit and suitable for public use and travel, by keeping them properly drained of such surface waters as usually collected in that locality. If, thereby, plaintiff's lot was necessarily overflowed during heavy rains, to his injury, it was the misfortune of his situation in occupying premises thus naturally low, and his loss, if any, was *damnum absque injuria*. He had no legal claim upon the city for the construction of any sewer to serve either as a drain to his premises or as an additional relief to the streets themselves, and hence the omission to build the Hennepin avenue sewer furnished him no just ground for complaint. His proper, if not sole protection, consisted in raising his own lot above the grade line of the street, or in the erection of such walls and embankments as would have effectually prevented any flow upon him from the street. This he could lawfully have done, as he possessed the common-law right of use and enjoyment, in respect to his lot, as fully and to the same extent as the city did in respect to its streets. Each had the right to use and improve, for any legitimate purpose, and in such man-

§ 1744. Negligence in respect of the Drainage of its Streets. — "While it is the duty of the city, in the constructing of water ways, to take into consideration, not only the ordinary and usual quantity of water in ordinary times, but also the liability to freshets occasionally occurring, still, if they should so provide, and an unusual and extraordinary storm, whereby the whole immediate country around should be overflowed and flooded, and which, by the exercise of ordinary prudence, could not be provided for and guarded against, and the damage occurred by reason of such disastrous storm, the city will not be liable, the law only holding the city to the exercise of ordinary care and prudence." [1]

§ 1745. Negligence in Grading Street: Casting Water on Adjoining Land. — "The city, as a public corporation, has a right to establish grades for streets, and to fill up the streets to correspond with the grade established, and if the work is done in a careful and skillful manner, the city will not be liable for injuries to property, which are the necessary result of the careful and skillful grading of the streets. On the other hand, if the city, in grading the streets, did the work in an unskillful and improper manner, by making improper or insufficient gutters, by reason of which the water was caused to flow from the street upon the premises of plaintiff, she will be entitled to recover, if you find the injuries complained of resulted from such alleged unskillful construction of the street." [2]

§ 1746. Defective Sewers: Liability for Flooding Private Property. — "A city has no more power over its streets than a private individual has over his own land; and it cannot, under the plea of

ner as would protect against the incursion or accumulation of mere surface waters. Barry *v.* City of Lowell, 8 Allen (Mass.), 127; Franklin *v.* Fisk, 13 Allen (Mass.), 211; Turner *v.* Dartmouth, *Id.* 291; Flagg *v.* Worcester, 13 Gray (Mass.), 601; Wilson *v.* Mayor of New York, 1 Denio (N. Y.), 595; Mills *v.* Brooklyn, 32 N. Y. 489; Imler *v.* Springfield, 55 Mo. 119; Hoyt *v.* City of Hudson, 27 Wis. 656."

[1] Approved in the German Theological School *v.* City of Dubuque, 64 Iowa, 739. There is, in the same case, another instruction, approved by the court, applying the principle of the above instruction to the facts of the particular case

[2] Approved in Ellis *v.* Iowa City, 29 Iowa, 230. For an instruction upon the liability of a municipal corporation for erecting an embankment in grading its street, whereby surface water was cast upon adjoining land, see Damour *v.* Lyons, 44 Iowa, 276, 280.

public convenience, be permitted to exercise that dominion to the injury of the property of any one else, in a mode that would render a private individual responsible in damages without being responsible itself. - - - - If the jury believe, from the evidence, that the city of Aurora, in Main street in said city, fixed the grade and constructed the street and caused to be constructed sewers and drains on said street to carry off the surplus water which necessarily, in case of rains, would run down said street, by reason of said grading; and that, in September, 1867, there came a rain, and said drains or sewers were stopped up, or were otherwise defective, so that they would not carry off the surplus water, and thereby the water from said rain was forced into the basement of plaintiffs' building, and the plaintiffs thereby damaged, then the jury should find for the plaintiffs to the amount which the proof shows such damage to be." [1]

§ 1747. NOT LIABLE FOR HONEST MISTAKE OF COMPETENT ENGINEER.— "In constructing the culvert the defendant was only required to use reasonable care; such care as a prudent man would use under like circumstances in reference to his own property. If you, therefore, find that the city had an engineer who was competent to take charge of such work, and that the size of the culvert was left to him and that he honestly believed, in drafting the plans for the culvert, that he was making it large enough, then, even if he were mistaken, the defendant is not responsible for his mistake, and the plaintiff cannot recover." [2]

[1] Approved in Aurora *v.* Gillett, 56 Ill. 134; citing a ruling upon Nevins *v.* Peoria, 41 Ill. 502. This case contains several other instructions, approved on error, applying the above principle to hypothetical facts. It is to be observed that this instruction goes farther against the city than most other courts are willing to go; as witness the next instruction.

[2] Approved in Van Pelt *v.* Davenport, 42 Iowa, 308, 311. The court said: "Taken together, it announces a correct rule of law, and should have been given. The city cannot be held liable, unless for some neglect, or omission of duty, or negligence in its performance. It is not claimed that the culvert was out of repair, nor that it was in any way defective in construction, except that it was too small to admit of the passage of the surface water which accumulated in the ravine in consequence of unusually heavy showers. As the city must act through the agency of the others, it was its duty to select a competent engineer. When such selection is made, the city has in that regard discharged its duty, and no direct negligence or omission is attributable to it. If a competeht engineer acts in good faith in drafting the plans of the culvert, and honestly believes that he is making it large enough to accomplish the desired purpose, then no negligence of the servant is attributable to the principals. If he is sufficiently competent, and

§ 1748. Duty of Property Owner to take Steps to Protect his Property. — "The law makes it the duty of all persons to protect their own property from damages, if they can do so by ordinary efforts, and they can charge the delinquent party for such expense and efforts only. Hence, the court instructs you that if you find that the plaintiff, at a reasonable expense, could have protected his property by building what the witnesses call a rip-rap or wall, and he has failed to do so, then all he can recover as damages will be the cost of such rip-rap or wall." [1]

§ 1749. Defective Streets: When Corporation Chargeable with Notice of Defect. — Notice of such defect may be reasonably inferred where it is of such a character, and has continued for such a length of time, as that the officers of the city, charged with the supervision of its street-crossings, might, and probably would, have discovered it, if they had used ordinary care in the discharge of their duties." [2]

§ 1750. Care Required in the Construction and Reparation of Highways. — "The defendant, as a municipal corporation, had the power, among others, to construct and maintain sidewalks along its streets; and, in exercise of this power, it was the duty of the defendant to exercise ordinary and reasonable care and diligence, to see that its sidewalks were constructed and maintained in a reasonably safe condition for public travel; and a failure on the part of defendant to exercise ordinary and reasonable care and diligence in these respects would constitute negligence for which the defendant would be liable." [3]

makes a mistake after the honest exercise of his best judgment, it is such mistake as is inseparable from human action. The making of such mistake cannot be attributed to negligence, for negligence is the failure to exercise ordinary care. If, then, the city can be held responsible for the consequences of such mistakes, it is bound at its peril to secure what is impossible, absolute perfection in its servants and agents." Distinguishing the Rochester White Lead Co. *v.* City of Rochester, 3 N. Y. 463.

[1] Approved in Van Pelt *v.* Davenport, 12 Iowa, 308, 311. Citing and relying upon Simpson *v.* City of Keokuk, 34 Iowa, 568.

[2] Approved in Indianapolis *v.* Scott, 72 Ind. 196, 199. See *ante*, § 1706.

[3] Approved in Beazan *v.* Mason City, 58 Iowa, 234. Other instructions, explaining the measure of care required by a municipal corporation in the construction and maintenance of its highways, will be found in Tritz *v.* City of Kansas, 84 Mo. 632, 644; Rosenberg *v.* Des Moines, 41 Iowa, 417; Aurora *v.* Bitner, 100 Ind. 396, 399; Rice *v.* Des Moines, 40 Iowa, 639, 640; Shartle *v.* Minneapolis, 17 Minn. 315; Oliver *v.* City of Kansas, 69 Mo. 80, 81

§ 1751. NOT AN INSURER AGAINST ACCIDENTS, BUT LIABLE FOR WANT OF ORDINARY CARE. — "The jury is instructed that the defendant city is not an insurer against accidents upon its streets, nor is it liable for every defect therein, though it might cause the injury sued for. And if you find from the evidence that the street, at the place of the alleged injury, was in a reasonably safe condition for travel in the ordinary modes, then you will find for the defendant. - - - - The jury are instructed that defendant city is only required to exercise ordinary care and prudence in keeping its streets in repair, and unless you find from the evidence that the defendant failed to exercise ordinary care and prudence in the repair of its streets, at the place of the alleged injury, then you will find for the defendant." [1]

§ 1752. WHAT CIRCUMSTANCES CONSIDERED IN DETERMINING THIS QUESTION. — "The question as to whether the highway in question, at the time and place of the accident, was insufficient or out of repair, is

[1] Approved in Lincoln *v.* Gillilan, 18 Neb. 119. In Shartle *v.* Minneapolis, 17 Minn. 315, an instruction was approved which stated to the jury, without qualification (unless in some other portion of the instructions), that it was the duty of the city to keep its bridges in a safe passable condition and reasonably secure against all danger of accident. In Rice *v.* Des Moines, 40 Iowa, 639, an instruction was approved which told the jury that it was the duty of the city to keep such of its streets and sidewalks as were constructed, open and in repair and free from nuisance; and predicated the right of recovery on the mere fact that the sidewalk upon which the plaintiff was injured was not kept in repair. These instructions do not accurately state the law, and are not recommended. Unless, in other portions of the instructions, the attention of the jury is carefully drawn to the principle that the duty is not an absolute one, but that it is discharged by the exercise of *reasonable care*,— such an instruction is misleading. A statement of the measure of the city's liability, in such an instruction as the following, is rather to be given: "It is the duty of the board of commissioners of the county to exercise ordinary care and skill in the maintenance, in a reasonable condition of repair, of all bridges connected with and forming part of the legal public highways of this county." Approved in Commissioners *v.* Bacon, 96 Ind. 31, 38. The same principle may be negatively stated thus: "The jury are instructed that the defendant is not bound to any greater degree of care and diligence than is sufficient to keep its streets and sidewalks in a reasonably safe condition, and if any accident occurs when they are in any such reasonably safe condition, the defendant is not liable for such accident." Approved in Tritz *v.* City of Kansas, 84 Mo. 632, 644. A similar instruction, embracing the statement that the city was not an insurer against accident, was given in Loewer *v.* Sedalia, 77 Mo. 431, 439, 441. See *ante*, § 1705.

one of fact for the jury; and this question of fact, whether the alleged defect constituted such an insufficiency or want of repair, ordinarily depends upon a variety of considerations, tending to furnish an answer to the inquiry, Was the highway, at the time and place, in a reasonably safe and suitable condition for the customary travel passing upon it, under all the circumstances attending the particular place? It is for the jury to determine, as a question of fact, from the evidence in the case, whether the highway in question, at the time and place of the accident, was a reasonably safe and suitable highway; and in the consideration of that question, it is the duty of the jury to bear in mind the particular location of the highway, the nature and surface of the soil, and surrounding country over and through which the road is made; for it is obvious that a way which would be deemed narrow and insufficient, and by which the traveler would be unnecessarily exposed to accident and injury in one case, might not be so deemed in another, or under different circumstances." [1]

§ 1753. Not Liable for Injuries Resulting from Latent Defects. — "If the injury complained of resulted from a latent defect in the street caused by the sudden settling of the water trench, by reason of recent rains, or from any other cause which could not be guarded against by ordinary care on the part of the city, or water company, then, and in such case, the city is not liable therefor." [2]

§ 1754. Notice of Defect: Implied from length of Time and Notoriety. — "If the jury find, from the evidence, that the plaintiff was injured by the defective sidewalk in the street of the defendant, without negligence on his part, it is not necessary, in order to entitle the plaintiff to recover, that he should prove actual notice of the defect to the city, if the same was the result of the construction by the defendant, or if the defect was notorious and had remained so for a sufficient length of time to enable defendant, by reasonable diligence, to know of its existence and repair the same.[3] - - - - When a sidewalk of a city is

[1] Approved in Kenworthy *v.* Ironton, 41 Wis. 655, 656; citing Hutchinson *v.* Chicago &c. R. Co., 41 Wis. 541.

[2] Rosenberg *v.* Des Moines, 41 Iowa, 417.

[3] Approved in Rice *v.* Des Moines, 40 Iowa, 639, in which case there is another instruction on the same theory. In Rosenberg *v.* Des Moines, 41 Iowa, 418, an instruction is found in different language, but in substance the same. See *ante*, § 1706.

out of repair, and the defect has existed for such a length of time, as, by reasonable diligence in the performance of their duty, the defect ought to have been known by the corporate authorities, then notice will be presumed, and proof of actual knowledge will not be necessary to render the corporation liable for injuries sustained by a person in consequence of the defective condition of the sidewalk. If the person injured was using reasonable care in traveling upon such sidewalk.[1] - - - - If the jury find, from the testimony, that the cross-walk or crossing, including the place where the accident is alleged to have happened, or any part of it, was defective, out of repair, or in a condition dangerous for travelers over the same, and that the same was in such defective or dangerous condition for several weeks or months before the accident, and continued so to be up to the time the accident happened, then the city and its officers are presumed to have had knowledge or notice of such defects and dangerous condition of the crossing or cross-walk, and no actual notice was necessary to make the city liable. That is to say, in such case, the city is presumed to have had notice."[2]

§ 1755. Repair Subsequent to Accident not Evidence of Notice of Defect Previous to Accident. — "The mere fact that, after this accident occurred, the city took up the walk in question, and, in connection with other contiguous walks, built a walk of other materials, cannot be considered as showing either knowledge or negligence on the part of the city prior to the accident."[3]

§ 1756. Notice of Decay in a Bridge. — "If you find from the evidence that the defendant was not negligent in the original construction of the said bridge, then the defendant would not be liable for any injury caused by the same becoming out of repair and defective, unless the defendant had notice thereof or knowledge thereof through the members of the board of supervisors, or unless the defect was so notorious that the defendant was negligent in not knowing it; or unless the bridge

[1] Approved in Tritz *v.* City of Kansas, 84 Mo. 632, 644. Other instructions on the subject of *notice*, or *knowledge* on the part of the municipality, or its superior officers, of the defect will be found in the following cases: Aurora *v.* Bitner, 100 Ind. 396, 400; Lincoln *v.* Walker, 18 Neb. 244, 259; Montgomery *v.* Des Moines, 55 Iowa, 103; Johnson *v.* Milwaukee, 46 Wis. 572, 573.

[2] Approved in Johnson *v.* Milwaukee, 46 Wis. 568, 572.

[3] Approved in City of Emporia *v.* Schmidling, 33 Kan. 488.

had been built so long that, in the exercise of ordinary care and prudence, the defendant ought to have known that it would in such time become rotten and dangerous." [1]

§ 1757. Continuing Duty of Inspection. — "The board of supervisors is charged by law with the duty of supervising and keeping the

[1] Approved in Ferguson *v.* Davis County, 57 Iowa, 609. The court said (p. 609): "It is claimed that this instruction expresses the idea that, from length of time alone, the county would be liable. The instruction is not vulnerable to this criticism. The instruction merely recognizes the doctrine that the bridge may have been built so long, and become so old, that the defendant, in the exercise of ordinary care and prudence, ought to have known that it would in such time become rotten and unsafe. The instruction does not refer to the condition of the bridge which would render the defendant liable, but the knowledge, or the means of knowledge, of the condition of the bridge. That the instruction announces a correct rule, we entertain no doubt. - - - - In a case in Indiana the following instruction was approved: "In order to render the board of commissioners chargeable with the absence of ordinary care in the keeping of the bridge in question in repair, it is necessary that it should be shown to your satisfaction that such board had notice or knowledge that the bridge needed or was out of repair. For this purpose notice or knowledge on the part of one of the board, while in office, would be equivalent to notice to the board itself; but, after receiving such notice, such reasonable time as might be required to take the necessary steps to have the bridge repaired or travel thereon stopped, would be allowed before liability would attach; and the board is chargeable with knowledge of the natural tendency of timber to rot and decay by lapse of time and exposure to the weather." Approved in Commissioners *v.* Bacon, 96 Ind. 31, 38. The court cite: Lafayette *v.* Larson, 73 Ind. 367; Indianapolis *v.* Scott, 72 Ind. 196. Although the above instruction thus met with judicial approval, it is not recommended, because it predicates the liability of the municipal corporation upon actual notice and knowledge, whereas the true rule is that, there being a continuing duty of inspection, and hence a continuing *obligation to know*; negligent ignorance will charge the municipality with liability the same as actual knowledge. The following instruction, approved in another case in the same State, expresses the correct rule: "If you believe from the evidence that the gutter crossing in question was constructed on a public street in the city of Aurora, by a private person, and not under the direction and supervision of the city, still this would not exempt the city from liability for defects in said gutter crossing, provided the jury believe from the evidence that said gutter crossing was so out of repair as to be dangerous for ordinary travel, and that the defect was known to the proper authorities of the city or that, by the exercise of ordinary care, they might have known of such defect before the injury complained of." Approved in Aurora *v.* Bitner, 100 Ind. 396, 399. See *ante*, § 1706.

county bridges in repair. If the members of the board did not possess the requisite skill to discharge the duty of inspection, then it was the duty of the board to appoint or provide some one possessing such skill; and to have all county bridges under their care examined as frequently as men of ordinary prudence and care would deem necessary for the safety of the traveling public, and as experience demonstrated the necessity of examination, and if the board failed to do this, such failure would be negligence." [1]

§ 1758. Duty of Skill and Care in Adopting a Proper Plan. — "In the erection of the county bridges it is the duty of the county to exercise ordinary and reasonable skill and care in adopting a plan, as well as in the construction of the bridge, and if you find that the defendant employed a competent and skillful engineer to prepare and draft the plan of the bridge in question, and that he did so, and recommended it as sufficient for that purpose, and the county authorities in good faith, believing it to be sufficiently strong and safe for the design, adopted it, then this would be the exercise of care and skill with reference to the plan, even though the engineer erred in his judgment with reference thereto." [2]

[1] Approved in Ferguson *v.* Davis County, 57 Iowa, 611.

[2] Approved in Ferguson *v.* Davis County, 57 Iowa, 602, 608. The court said (p. 608): "The instruction given simply holds the defendant to the exercise of reasonable skill and care in adopting a plan. The instruction given, we think, announces the correct rule. In our opinion a county cannot negligently and carelessly adopt an unsafe and insufficient plan for a bridge, on account of its cheapness, and be allowed to escape all liability for damages resulting from the insufficiency of the plan. The county should at least exercise reasonable care in the adoption of a plan. It is urged by the appellant that the adoption of a plan for a bridge is a mere judicial act, and that no liability attaches for the adoption of an insufficient or improper plan. The same point was made in Van Pelt *v.* The City of Davenport, 42 Iowa, 308, which was an action to recover damages resulting from an alleged insufficient sewer. We hold, however, that it was the duty of the city to exercise reasonable care, judgment and skill to make a culvert of sufficient capacity to carry away the accumulated water without injury to property in the vicinity. The principle decided in that case is applicable to this. See Perry *v.* City of Worcester, 6 Gray, 544; Rochester White Lead Co. *v.* City of Rochester, 3 N. Y. 473." See to the contrary, 2 Thomp. Neg. 735. The above cases express the only rule which is correct in principle. There is no sense in a rule which imputes a judicial quality to the act of a mechanical engineer in planning a bridge or a sewer, or a system of drainage; and the distinction between an insufficient

§ 1759. Duty of the City to Erect Barriers to Guard Excavation in Sidewalk. — "The jury are instructed that, while it was the duty of the city to keep its sidewalks in repair for safe passage; yet it had the right to permit the excavation to be made under the sidewalk, so long as it did not interfere with the public interest, and the city would only be liable in case of negligence in permitting the excavation to remain open and unprotected by suitable barriers. And if the jury believe from the evidence that the excavation, into which the plaintiff claims to have fallen and received the alleged injury, was surrounded by barriers sufficient to apprise a person exercising ordinary care while passing along the sidewalk, of the excavation, then you will find for the defendant." [1]

§ 1760. Acceptance of a Bridge by a Municipal Corporation. — "To show an acceptance by the public, binding upon the city, it is not necessary to show any formal action of the council to that effect. If the jury find from the evidence that the city of Minneapolis, or its predecessor, the town of Minneapolis, expended money in the repair of the bridge, and assumed and exercised control and supervision of the same, and that it was upon a public thoroughfare in the city, this is evidence tending to show an acceptance and assumption of the bridge by the city." [2] - - - - "If the jury are satisfied from the testimony, that the apron or bridge where the plaintiff fell and broke his leg has been there, and had been there a long time, say a year or six months, before the accident occurred, without any objection on the part of the city, then the city is presumed to have acquiesced in the structure and to have adopted it, and must be held liable for damages by reason of defects, just the same as if the city authorities had actually ordered it to be placed there." [3]

§ 1761. Liability to Traveler Injured by Street Obstructed in Building on Adjacent Property. — "The owners of property adjacent to a street, with the permission of the city, have a right temporarily to obstruct and use such part of a street and for such time, as is

plan, and negligence in the execution of a plan, — ascribing liability to the latter, and not to the former, is the shallowest casuistry.

[1] Approved in Lincoln *v.* Walker, 18 Neb. 250, 261.

[2] Approved in Shartle *v.* Minneapolis, 17 Minn. 308, 316.

[3] Approved in Johnson *v.* Milwaukee, 46 Wis. 572, 573.

reasonable and necessary in making improvements on such property; and the city cannot be held liable for damages that may occur on such part of a street so used, when precautions and guards have been used, sufficient to notify the public, in the exercise of ordinary prudence and care, of danger into which the injured party fell. - - - - If the jury believe from the testimony that the excavation complained of by plaintiff was made by one B. F. Stone, for the sole purpose of erecting a building and to drain his cellar, by the permission of the defendant, then the court instructs you that said Stone had a right, during the time he was so building and improving his lot, to employ and occupy the sidewalk and a reasonable portion of the street adjacent to said lot for a reasonable and necessary time, for the purpose of aiding and facilitating said work. But it was the duty of the city to see that its sidewalk, over which the public traveled, was kept in a reasonably safe condition during such use and occupancy by B. F. Stone." [1]

§ 1762. INSTRUCTION ON THE HYPOTHESIS THAT THE PLAINTIFF RASHLY TRAVELED ON A ROAD UNSAFE BY REASON OF ICE. — "If, at the time the accident happened, the defendant's road was so icy and sleek as to make it hazardous to travel over the same with a wagon loaded with saw logs, and if the plaintiff had knowledge of this icy and sleek condition of the road, from his own observation, or from warnings given by other persons to him; and if, notwithstanding such knowledge of the condition of the road, he nevertheless undertook to pass over it, and in so doing did not use such care and means as to overcome the danger resulting from its icy and sleek condition, but in any degree acted rashly or negligently, and his rashness or negligence contributed in any degree to the injury, he cannot recover." [2]

§ 1763. INSTRUCTION ON THE HYPOTHESIS THAT THE ICY CONDITION OF THE ROAD WAS THE SOLE CAUSE OF THE INJURY. — "If you find from the evidence that the defendant's road was improperly constructed or out of repair at the place where the plaintiff was injured, but that such improper construction or want of repair did not contribute directly to the injury, the plaintiff cannot recover, if the icy condition of the road alone was the cause of the injury." [3]

[1] Approved in Stephens *v.* City of Macon, 83 Mo. 345, 354.

[2] Approved in Wilson *v.* Trafalgar &c. Co., 93 Ind. 287, 290.

[3] Approved in Wilson *v.* Trafalgar &c. Co., 93 Ind. 287.

§ 1764. Care Required of Traveler having Knowledge of Defect. — "Although the plaintiff may have been familiar with the locality and condition of the bridge in question, such fact did not impose upon him the duty of exercising extraordinary care in passing over said bridge. He was only required to exercise ordinary care; and the jury will determine from the facts and circumstances in evidence, including the plaintiff's knowledge of the bridge, the facilities for reaching plaintiff's house by any other convenient route, and the darkness of the night, whether he exercised ordinary care; and if the jury believe that a railing or other guard was necessary for safety, as instructed by the court, and that plaintiff in the exercise of such care received the injury complained of, which he would not have received had defendant placed a railing or other proper protection on said bridge, then the jury will find the issues for plaintiff." [1] - - - - "If the defendant's road was in an unsafe condition for travel, and the plaintiff had notice of the dangerous character of the road, he would have been required to exercise more care in passing over the road than if he had no notice of it. But knowledge of the defective or dangerous condition of a highway is not conclusive evidence of negligence in passing over it; he is not bound to keep off the road, but may travel over it, if it is consistent with reasonable care to do so." [2] - - - - "The court instructs the jury that plaintiff, in the exercise of ordinary care, was not bound to select the sidewalk that was safest to travel upon, but that he had a right to infer and believe that the sidewalk upon which he was injured was reasonably safe; if they believe from the evidence that no guards were up at the time the injury occurred, to warn plaintiff of the danger of falling into the ditch across the sidewalk, and that the plaintiff was using ordinary care at the time he fell into the ditch and was injured, and had no knowledge at the time of the existence of said cut or excavation across the sidewalk." [3] - - - - "The duty of those who travel on sidewalks to

[1] Approved in Loewer *v.* Sedalia, 77 Mo. 431, 437. In this case the accident happened by falling off a bridge in the night time, which had no railing.

[2] Approved in Wilson *v.* Trafalgar &c. Co., 93 Ind. 287.

[3] Approved in Stephens *v.* City of Macon, 83 Mo. 345, 353. In this case the following instruction was also given at the request of the defendant, embracing, it is perceived, the conception that knowledge of the defect on the part of the traveler would preclude his recovery on the ground of contributory negligence. But as this instruction was given at the request of the defendant, and as the defendant was the unsuccessful party to the suit, it cannot be said to have met with distinctive judicial approval on appeal, though copied into the opinion: "If the jury believe from the evidence that the

use reasonable care and diligence to avoid injury, such as persons of ordinary care and diligence would, under the same or similar circumstances; and in determining whether the plaintiff used such care and diligence at the time of the alleged injury, you will consider the nature of the alleged defect, whether visible or not; the time of day, as to being light, or otherwise; the knowledge of plaintiff with regard to its condition at and previous to the time of the alleged injury; and any other fact or circumstance disclosed by the evidence which may tend to show such alleged negligence, or the absence of it; and if you find from the evidence that the plaintiff was guilty of any negligence which directly contributed to the alleged injury, then the plaintiff cannot recover, and you will find for the defendant." [1]

plaintiff knew the condition of the sidewalk (when he fell) at the time he attempted to pass over it, or might have known it by the exercise of ordinary diligence and care, then he cannot recover in this action. And in arriving at the plaintiff's knowledge of the said sidewalk, or his opportunity to know the same, they should take into consideration all the facts and circumstances shown by the testimony." The better opinion is, that the knowledge on the part of the traveler of the defect, — unless it is of such a nature that the attempt to pass it would be foolhardy, — does not raise a conclusive imputation of contributory negligence. The next instruction in the above series more nearly expresses the correct idea: "If you find from the evidence that the plaintiff, at the time that she passed over the walk, well knew that the walk was unsafe, and that it was imprudent to do so at that time in consequence of darkness, or for any other cause, and with this knowledge she still persisted in passing over it, though there was another walk which she might have taken in going in the direction which she desired to go, then her own negligence contributed to the injury, and she cannot recover." Approved in McGinty *v.* Keokuk, 66 Ia. 727; citing Parkhill *v.* Brighton, 61 Ia. 103.

[1] Approved in Emporia *v.* Schmidling, 33 Kan. 488. In a Missouri case the following instruction was given at the request of the defendant, but as the defendant appealed it cannot be said to have met with distinct approval in the Supreme Court, though it seems unobjectionable: "The court instructs the jury that, although they may believe from the evidence that defendant failed to exercise ordinary care in not keeping the sidewalk in repair, at the place where the injury to plaintiff is alleged to have happened, and but for such negligence the injury would not have occurred, yet the plaintiff cannot recover in this suit, if she was aware of the condition of the sidewalk and failed to use ordinary care to avoid the accident that caused the injury." Approved in Tritz *v.* City of Kansas, 84 Mo. 632, 645. In a case in Indiana the following instruction was approved: "Mere contribution to the injury does not necessarily preclude the right to recover for it. It was not contributory negligence for the plaintiff to drive upon the drive-way, unless he then had actual knowledge of its alleged dangerous or defective condition, or might

§ 1765. Instruction on the Theory of the Plaintiff being Intoxicated. — "Although the jury may believe from the evidence that plaintiff, on the night of and previous to the injury complained of, had been drinking intoxicating drinks, yet if they further believe from the evidence that the same had not so affected his mind and power of locomotion as to prevent him from exercising ordinary care in going to his house and passing over the bridge in question, and that he exercised such care, and would not have received the injury if defendant had placed a railing or other proper protection on said bridge, (if the jury further believe from the evidence that such railing or other protection was necessary for the reasonable safety of persons passing over the bridge), the jury will still find the issues for plaintiff. - - - - The burden of proof rests upon defendant to establish the defense that plaintiff's injury resulted from his intoxication and negligence, and unless such defense is established by a preponderance of evidence, the jury will find for the plaintiff as to such issue." [1]

have had such knowledge by the use of due care and prudence, and by the exercise of his senses and faculties. He had a right, if he was without fault contributing to the injury, to act upon the presumption that the defendants had done their duty and provided a safe and secure drive-way." This instruction was vigorously assailed in Nave *v.* Flack, 90 Ind. 205, 210, and defended, or rather apologized for, at considerable length by the court. One can more easily agree with the court that the giving of the instruction, in connection with the other instructions, was not available error, than hold it up as a model to be used in drawing instructions, in future cases. Accordingly, the author inserts it with what English journalists call "reserve." Other instructions on the theory of contributory negligence in the traveler will be found in the following cases: Wilson *v.* Trafalgar &c. Co., 93 Ind. 287; South Bend *v.* Hardy, 97 Ind. 577, 585; Lincoln *v.* Walker, 18 Neb. 260, 262; Downing *v.* Chicago &c. R. Co., 43 Ia. 99; Loewer *v.* Sedalia, 77 Mo. 439. See also Huntington *v.* Breen, 77 Ind. 29; Murphy *v.* Indianapolis, 83 Ind. 76; Henry County Turnp. Co. *v.* Jackson, 86 Ind. 111; *s. c.* 44 Am. Rep. 274.

[1] Approved in Loewer *v.* Sedalia, 77 Mo. 431, 438. This instruction is believed to have been drawn by Hon John F. Phillips, who was counsel for the plaintiff. This gentleman was subsequently a judge of the Missouri Supreme Court Commission; was afterwards the presiding judge of the Kansas City Court of Appeals; and is now the United States District Judge for the Western District of Missouri. As an offset to the above instruction, the circuit judge, in the same case, gave the following instruction, requested by the defendant, which, though believed to be correct in point of law, cannot be said to have met with distinct judicial approval in the Supreme Court; since the defendant was the appellant and could not challenge the propriety of its own instruction: "It is for the jury to determine, from all the facts and circum-

§ 1766. Comprehensive Instructions, embracing at once the Element of Care on the Part of the City and on the Part of the Traveler. — "The court instructs the jury that, if they believe from the evidence the ditch across said sidewalk rendered the same dangerous, and that no guards were up to warn plaintiff of the danger at the time he was injured, and that plaintiff was using ordinary care and prudence at the time he fell into the ditch and was injured, they must find their verdict for the plaintiff." [1] - - - - "The court instructs the jury that the defendant corporation is bound by law to use all reasonable care, caution and supervision, to keep its streets and sidewalks in a safe condition for travel, in the ordinary modes of traveling, by night as well as by day; and if it fails to do so after having notice, express or implied, of any defect, it is liable for any injuries sustained in consequence of such failure, provided the party injured exercised reasonable care and caution; and the fact that the plaintiff may in some way have contributed to the injury sustained by her, will not prevent her recovery, if, by ordinary care, she could not have avoided the consequences to herself of the defendant's negligence." [2] - - - - "They are further instructed, that, if they believe from the evidence, that the defendant did not exercise reasonable care and supervision over that portion of the sidewalk where the injury in question is alleged to have occurred, to keep it in good and safe condition, and by that means allowed it to become defective and unsafe; and if the jury further believe from the evidence, that the plaintiff, in attempting to walk along that portion of the sidewalk, by reason of such defect, was injured, and has sustained damage

stances in evidence, whether the plaintiff was intoxicated at the time he was injured. His being intoxicated would in nowise lessen his duty to have used ordinary care and prudence to have avoided his injuries. The law requires the same care and prudence from an intoxicated man that it does from a sober man; and while the fact of intoxication alone, if proved by the evidence, will not establish want of ordinary care and prudence, yet it is a circumstance which the jury may consider in determining whether the plaintiff did exercise ordinary care and prudence." In an earlier Missouri case the following instruction on this subject is found: "If the jury believe that, at the time deceased received the injuries complained of, he was so intoxicated as to be unable to exercise, and did not exercise, the care and prudence ordinarily exercised by prudent and sober men while traveling upon railroads, and that such inability and want of care on his part directly contributed to cause the injuries aforesaid, plaintiff cannot recover." Approved in Meyer *v.* Pacific R. Co., 40 Mo. 155, 156.

[1] Approved in Stephens *v.* City of Macon, 83 Mo. 345, 354.

[2] Approved in Tritz *v.* City of Kansas, 84 Mo. 632, 643.

thereby, as charged in the petition, and that she was, at the time, exercising reasonable care and caution, in walking on said sidewalk,— then the defendant is liable." [1] - - - - "It was the duty of the defendant city to keep and maintain its streets and sidewalks in good repair, for the safe use and convenience of the traveling public, walking and passing thereon; and if the city authorities, knowing that a sidewalk is defective and unsafe, or, after having had sufficient time, in the exercise of reasonable diligence or ordinary care, to discover and repair the defect or break in the walk, suffer it to remain in an unsafe condition, and if any person, while lawfully and in the exercise of ordinary care passing over the sidewalk in such unsafe condition, becomes injured by reason of any defect in the walk, the city becomes liable for damages sustained at the time of the accident." [2]

§ 1767. Another Model, Applicable to the Case of a Traveler Falling from a Bridge having no Railings. — "The court instructs the jury that it was the duty of defendant, in erecting and constructing the bridge in question, over and across a public street in a city, to so erect and construct said bridge as to make the same reasonably safe for travel and use, for all persons over the same on foot or otherwise, as well in the night as in the day time; and, if the jury believe from the evidence that railing or bannistering or other guard was necessary on the sides of the bridge, to protect foot passengers by day or by night from the danger of a fall from the bridge, then it was the duty of defendant to cause to be provided and constructed on the side of the bridge such railing or bannistering, or other sufficient guard, to give protections against such danger of falls from the bridge; and the court instructs the jury, that the question whether such railing, bannistering or other guard, were necessary, is not a question for the court to decide, but a question for the sole finding and determination of the jury; and unless the jury find from the evidence that such railing, bannistering or guard was so necessary for the reasonable safety of persons passing over the

[1] Approved in Tritz *v.* City of Kansas, 84 Mo. 632, 643.

[2] Approved in Sheel *v.* Appleton, 49 Wis. 128. *Other instructions* of like character will be found in Lincoln *v.* Walker, 18 Neb. 258; Ferguson *v.* Davis Co., 57 Iowa, 610 (rotten bridge); Montgomery *v.* Des Moines, 55 Iowa, 102 (sidewalk out of repair); Commissioners *v.* Emmerson, 95 Ind. 579 (defective bridge); Russell *v.* Columbia, 74 Mo. 487 (street excavated by gas-light company); Oliver *v.* City of Kansas, 69 Mo. 80 (defective sidewalk); Hull *v.* City of Kansas, 54 Mo. 600. See also Bassett *v.* St. Joseph, 53 Mo. 290; Winship *v.* Enfield, 42 N. H. 202; Hunt *v.* Poronall, 9 Vt 411.

bridge, and that defendant failed to provide the same, plaintiff is not entitled to recover in this action. But if the jury find from the evidence that such railing, bannistering or guard on the sides of the bridge were necessary for the reasonable safety of passengers, by night or by day, and that defendant failed and neglected to provide the same; and further find that plaintiff, on the night of the 28th of April, 1875, was passing along a public street of said city, leading to or over said bridge, observing and using ordinary and reasonable care to pass and go over said bridge safely, when, through the fault and negligence of defendant in failing to have such railing or other guard along the side of said bridge, he stepped or fell from said bridge into the ravine below, and was thus greatly hurt and injured,— in such a case the jury will find for plaintiff, and assess his damages in such sum as the jury may believe from the evidence he sustained by reason of such injury, not to exceed $5,000" (the amount sued for).[1]

§ 1768. STATING THE ISSUES IN SUCH AN ACTION. — "The principal allegations of the complaint put in issue by the evidence are: 1. That the defendant allowed its road to be out of repair. 2. That the road was improperly constructed and permitted to remain in an unsafe condition for the travel of the public. 3. That the injury occurred to the plaintiff without any fault or neglect on his part."[2]

Subdivision 5.— Carriers of Passengers.

SECTION

1772. When the Relation of Carrier and Passenger Commences.
1773. When it Ends.
1774. Carriers bound to Extraordinary Care and Liable for Slight Neglect.
1775. But not Answerable for Unavoidable Accidents.
1776. Happening of Accident *Prima Facie* Evidence of Negligence.
1777. Duty as to Roadworthy Conveyance and Competent Driver.
1778. Care required of owner of Steamboat in respect of Crew.
1779. Injury to a Passenger through the Breaking down of a Railway Bridge.
1780. Injury to Passenger caused by a Broken Rail.
1781. Injury to Passenger caused by Negligence in making up Train.

[1] Approved in Loewer *v.* Sedalia, 77 Mo. 431, 442, 443. There is in this case, several other well drawn instructions, given at the request of the defendant, but not distinctively approved in the Supreme Court, since the defendant was the appellant.

[2] Approved in Wilson *v.* Trafalgar &c. Co., 93 Ind. 287, 289.

SECTION
1782. Duty of Railroad Company to Provide safe Platforms at Stations and keep them Lighted at Night.
1783. Care required toward Passengers on Freight Trains.
1784. Wrongful Ejection of Passenger.
1785. Rightful Expulsion of Passenger, but with Unnecessary Force.
1786. Expulsion of Passenger having no Ticket, who refuses to pay Extra Fare.
1787. Obligation to keep Ticket Office open for a Reasonable Time before Departure of Train.
1788. Assaults upon Passengers: Obligation to protect Passengers from Violence.
1789. Assaults upon Passengers: Right to remove Drunken and Disorderly Passenger.
1790. Duty of Railway Company toward a Passenger Boarding its Train.
1791. Duty of a Passenger to follow the Reasonable Directions of the Defendant's Servants.
1792. Passenger Riding with Arm out of Window.
1793. Riding on Platform of Street Car.
1794. Injuries to Passengers while Alighting from Train in Motion.
1795. Liability to Passenger Carried Gratuitously.

§ 1772. WHEN THE RELATION OF CARRIER AND PASSENGER COMMENCES. — "If you believe that the plaintiff entered into an office or waiting-room provided by defendant for passengers, and informed the depot or ticket agent of her intention and desire to become a passenger; that she placed herself, in good faith, under his direction as such; and such agent directed her in getting on (attempting to get on) the car; these facts, if established to your satisfaction by the evidence, would be sufficient to justify you in finding that the relation of passenger existed, although she had not purchased a ticket, and had not entered the car."[1]

[1] Approved in Allender *v.* Chicago &c. R. Co., 37 Ia. 270. The court said: "If the actual purchase of a ticket, or the entering a car, is necessary in order to constitute the relation of a passenger, then no one taking passage on a railway at a way station, where no tickets are sold, can demand of the company the exercise of that high degree of care which a common carrier owes a passenger, until he had actually obtained admission to the car. If the doctrine of the instruction be not right, then a person taking passage at a way station, without the means of procuring a ticket, might be precipitated under the wheels and injured, from a defect in the steps, and yet could demand of the company the exercise of only ordinary care." Citing Sherm. & Red. on Neg., § 262, and cases. In Huelsenkamp *v.* Citizens' R. Co., 37 Mo. 539, there are instructions applicable to the question whether the person who goes on a platform of a street railway car is to be deemed a passen-

§ 1773. When it Ends. — "If Ormond, his wife and child, were received upon one of the trains under the control of the receiver or his servants, to be carried to some point, then they were passengers, and would continue such, at least until they had been carried to their point of destination, and had safely alighted from the train upon which they had been carried, and in addition to such length of time, if their baggage had been received on such train for carriage to the same place, and no receipt, bill of lading, check or other like evidence had been delivered to him for it; and if it was for this reason proper, under the circumstances, for him to go to the car where such baggage was stored for the purpose of identifying and claiming his property and receiving it from the employés on the train, then he had the right to do so subject to the rules hereinafter given as to the effect of any negligence of which he himself may have been guilty. And he would continue to occupy to the receiver the relation of passenger, so long as he did nothing more than just indicated, and to aid and assist the servants in identifying and removing his own baggage from the car to the platform. - - - - But if there were no such facts as just explained to continue the relations, he and his family would cease to be passengers when they had arrived at the point of their destination and had safely alighted from the cars. And if Ormond, after he had safely alighted from the train with his family, without the existence of any such facts as are above supposed to render it necessary or proper for him to do so, went into a box car to aid and assist the men there employed in getting out his goods, without the existence of any necessity or propriety therefor, and while so assisting was killed, then he made himself a fellow-servant for the time being, with the conductor, engineer and fire-

ger. In Lucas *v.* Milwaukee &c. R. Co., 33 Wis. 50, there are instructions applicable to the question under what circumstances a person who gets on a freight train at night, intending to take passage upon it, is to be deemed a passenger, the court citing Dunn *v.* Grand Trunk R. Co., 58 Me. 189; *s. c.* 10 Am. Law Reg. (N. S.) 615, and note; Murch *v.* Concord R. Co., 29 N. H. 9; Elkins *v.* Boston &c. R. Co., 23 N. H. 275. In Post *v.* Chicago &c. R. Co., 14 Neb. 112, there is a series of instructions applicable to the case where a third-class emigrant ticket, by its terms not transferable, was transferred to the plaintiff, who attempted to ride thereon, and who was ejected from its train, the ticket having been taken away from him, — holding that the company was liable for the price of the ticket with interest. In its opinion, the court referred to the following authorities: Elwood *v.* Bullock, 6 Ad. & El. (N. S.) 383; Calder &c. Co. *v.* Pilling, 14 Mees. & W. 76; 1 Redfield on Rys. 95; Day *v.* Owens, 5 Mich. 520; Jencks *v.* Coleman, 2 Sumn. (U. S.) 221; Bass *v.* Chicago &c. R. Co., 36 Wis. 450. See Thomp. Carr. 31.

man on the train; and if, under such circumstances, he was killed through the negligence of some or all of them, no recovery could be had therefor." [1]

§ 1774. Carrier Bound to Extraordinary Care and Liable for Slight Neglect. — "It is the duty of common carriers to do all that human care, vigilance and foresight can do under the circumstances, and in view of the character of the mode of conveyance adopted, reasonably to guard against accidents and consequential injuries, and if they neglected so to do, they are to be held strictly responsible for all consequences which flow from such neglect." [2] - - - - "The company is not an insurer of the absolute safety of the passenger, as it is of goods which it undertakes to carry. It does, however, in legal contemplation, undertake to exercise the highest degree of care to secure the safety of the passenger, and is responsible for the slightest neglect resulting in injury to the passenger; and this care applies alike to the safe and proper construction and equipment of the road, the employment of skillful and prudent operatives, and the faithful performance by them of their respective duties." [3]

§ 1775. But not Answerable for Unavoidable Accidents. — "If you find from the evidence that the accident was occasioned by a condition of things which the company could neither foresee nor provide against, then you should find for the defendant." [4] - - - - "A railroad company, in the conduct and management of its trains, is required to employ skillful and competent agents, and to use such means and foresight in providing for the safety of passengers, as persons of the greatest care and prudence usually exercise in similar cases; and should an injury result to a passenger from a failure to use such a degree of care

[1] Approved in International &c. R. Co. *v.* Ormond, 64 Tex. 487, 488.

[2] Approved in Tuller *v.* Talbot, 23 Ill. 358. See *ante*, § 1690 *et seq.*

[3] Approved in Ohio &c. R. Co. *v.* Dickerson, 59 Ind. 321; reviewing Indianapolis &c. R. Co. *v.* Beaver, 41 Ind. 493 and Chicago &c. R. Co. *v.* Hazzard, 26 Ill. 373. Citing St. Louis &c. R. Co. *v.* Valirius, 56 Ind. 511; Indianapolis &c. R. Co. *v.* Beaver, 41 Ind. 493; Chicago &c. R. Co. *v.* Hazzard, 26 Ill. 373; Galena &c. R. Co. *v.* Fay, 16 Ill. 558; Chicago &c. R. Co. *v.* Flagg, 43 Ill. 364; Illinois Central R. Co. *v.* Sutton, 53 Ill. 397; Dunn *v.* Grand Trunk R. Co., 58 Me. 187; Edgerton *v.* New York &c. R. Co., N. Y. 227; Hazard *v.* Chicago &c. R. Co. 1 Biss. (U. S.) 503; 2 Redf. Ry. 216–234 and notes. See Thomp. Carr. 200

[4] Approved in Bedford &c. R. Co. *v.* Rainbolt, 99 Ind. 551, 556. See Thomp. Carr. 198.

and prudence, the company will be responsible for such injury, unless it appears that the passenger so injured, by the use of ordinary care and prudence, (that is, the ordinary care and prudence usually exercised by persons of ordinary caution in his condition and circumstances,) could have avoided the injury. But a railroad company is not responsible for an injury to a passenger which is the result of a mere accident or casualty, where there is no want of care or skill on the part of the company or its agents."[1]

§ 1776. HAPPENING OF ACCIDENT PRIMA FACIE EVIDENCE OF NEGLIGENCE. — "The upsetting of the stage coach in this case (if proven to the satisfaction of the jury) *is prima facie* evidence of negligence, and the plaintiff need prove nothing more; but it devolves on the defendant to prove that his driver acted with the utmost skill, prudence and caution, and that the injury sued for was occasioned without the least negligence or want of skill or prudence on the part of the driver; and if the defendants fail to satisfy the jury that the driver exercised the utmost degree of care and skill and prudence, by reason of which failure the injury was occasioned, the defendants are liable."[2] - - - - "If the jury believe from the evidence that, on February 3rd, 1874, the defendants were engaged in the business of transporting passengers from the railroad depot in Lexington to any and all points of said city, and that on said day the plaintiff was received by them, or their agents at said depot to be carried on one of the hacks of defendants, and that while being so transported on said hack plaintiff was injured by reason of the breaking of an axle on said hack, then the burthen of proof rests upon defendants, to prove to the satisfaction of the jury, that said breakdown was caused by inevitable accident, and not from any defect, imperfection in the hack, overloading, or careless driving, and that by the exercise of the utmost human foresight, knowledge, skill and care, such injury could not have been prevented by defendants, their agents or servants, and unless the jury so believe, they will find for the plaintiff."[3]

[1] Approved in Houston &c. R. Co. *v.* Gorbett, 49 Tex. 576.

[2] Approved in Tuller *v.* Talbot, 23 Ill. 357, 359.

[3] Approved in Lemon *v.* Chanslor, 68 Mo. 342. In approving this instruction the court cited: Angel on Carr., § 569; Ingalls *v.* Bills, 9 Met. (Mass.) 1; Christie *v.* Griggs, 2 Camp. 80; 11 Pick. (Mass.) 106; Taylor *v.* Grand Trunk R. Co., 48 N. H. 304; Stokes *v.* Saltonstall, 13 Peters (U. S.), 181; Story on Bail., § 601; Higgins *v.* Hannibal &c. R. Co., 36 Mo. 432; Meier *v.* Pennsylvania R. Co., 64 Pa. St. 225; McKinney *v.* Neil, 1 McLean (U. S.), 540. Other instructions on the same theory will be found in

§ 1777. Duty as to Roadworthy Conveyance and Competent Driver. — "It was the duty of the defendants to furnish, in addition to a suitable and sufficient conveyance, a fully competent, careful and trustworthy driver, and if they neglected to do so, and by reason thereof any injury resulted to the plaintiff, the jury must find for the plaintiff." [1]

§ 1778. Care required of Owner of Steamboat in respect of Crew. — "If the jury believe, from the evidence, that the plaintiff was a passenger on the defendant's boat at the time of the alleged injury, then it was the duty of the defendant, by its officers and employés, to use the utmost practicable care and diligence to carry the plaintiff safely and securely to his destination, and said company was also bound to use all reasonably practicable care and diligence to maintain among the crew of said boat, including deck hands and roustabouts, such a degree of order and discipline as might be requisite for the personal safety and security of the plaintiff and other passengers who might be traveling on said boat; and said company was also bound to have due supervision and control over the crew of said boat by its proper officers." [2]

§ 1779. Injury to a Passenger through the Breaking Down of a Railway Bridge. — "If you find from the evidence that the immediate cause of the alleged disaster was the want of proper construction of said bridge over White river, either as to size, material, piers or the adjustment thereof, then you should find for the plaintiff, unless you should further find that the size and construction of the said bridge were right and proper for the use intended, and that the material in said bridge had been properly tested, by tests known to men skilled in such material, or could not be so tested and preserve the strength of said material, and said disaster was caused by a defect in said material which could neither be foreseen nor provided against by human foresight and care, then you should find for the plaintiff." [3]

Tuller *v.* Talbot, 23 Ill. 358, and Lemon *v.* Chanslor, 68 Mo. 342. See *ante*, § 1690.

[1] Approved in Tuller *v.* Talbot, 23 Ill. 358.

[2] Approved in Keokuk &c. Packet Co. *v.* True, 88 Ill. 609. Citing Chicago &c. R. Co. *v.* George, 19 Ill. 510; Galena &c. R. Co. *v.* Fay, 16 Ill. 558; Galena &c. R. Co. *v.* Yarwood, 15 Ill. 469; Frink *v.* Potter, 17 Ill. 406, 410.

[3] Approved in Bedford &c. R. Co. *v.* Rainbolt, 99 Ind. 551, 556, the court citing: Pittsburg &c. R. Co. *v.* Williams, 74 Ind. 462; Philadelphia &c. R. Co. *v.* Anderson, 94 Pa. St. 351; *s. c.* 39 Am. Rep. 787; Taylor *v.* Grand

§ 1780. INJURY TO PASSENGER CAUSED BY A BROKEN RAIL. — "If the jury believe from the evidence that the defendant's train of cars, in which plaintiff was being carried as a passenger, on the morning of the 27th day of December, 1872, was thrown from the track, causing the injury to plaintiff in the petition complained of, wholly because of a fresh and contemporaneous break in an iron rail or piece of an iron rail on defendant's track, and under the train on which plaintiff was a passenger, and that such fresh break was caused wholly by frost or extreme cold, and that such cause was one which the highest degree of practicable care, skill and caution, consistent with operating the road at all, could not have provided against, and that said train was not thrown from the track because of the mode of construction and repair of said track, and not because of any fault or neglect whatever of defendant, its agents or servants, then the jury shall find for defendant as to the injury to the person of plaintiff in petition complained of. - - - - But if the jury believe from the evidence that frost or extreme cold was not the sole cause of the breaking of said rail, but only contributed thereto, and that the railroad track, where said rail broke, was in an unsafe and dangerous condition, that might have been remedied or guarded against by the exercise by defendant's employés of the highest degree of care and skill then practicable and then known to track repairers, and that such unsafe and dangerous condition of said railroad track of defendant at said point also contributed to cause the breaking of said rail jointly with the said frost and extreme cold, then the law is for the plaintiff, and he is entitled to compensatory damages."[1]

§ 1781. INJURY TO PASSENGER CAUSED BY NEGLIGENCE IN MAKING UP TRAIN. — "The court instructs the jury that, if they believe, from all the evidence in this case that, on or about the 16th day of February, 1880, the defendant was controlling and operating a train of cars on a railroad in this county, and that the defendant received the plaintiff on its cars as a passenger, for hire, then the court instructs the jury that the defendant was bound to make up its train, couple its cars, and manage and control its cars and engines in such a careful, skillful and prudent manner as to carry the plaintiff with reasonable safety as such

Trunk R. Co., 48 N. H. 304; Toledo &c. R. Co. *v.* Conroy, 68 Ill. 560; Railroad Co. *v.* Aspell, 23 Pa. St. 147; Meier *v.* Pennsylvania R. Co., 64 Pa. St. 225; Galena &c. R. Co. *v.* Yarwood, 15 Ill. 468; 2 Rorer on Railroads, 955, 956, 1086, 1088. See *ante*, § 1690.

[1] Approved in Louisville &c. R. Co., *v.* Fox, 11 Bush (Ky.), 506 507.

passenger. - - - - If the jury believe from all the evidence in this case, that the plaintiff, on or about the 16th day of February, 1880, had purchased a ticket over the defendant's road, from the city of Quincy, Illinois, to Kansas City, Missouri, and, on or about that day, became a passenger on the defendant's train of cars, to be carried from said Quincy to Kansas City, then the law imposed upon the defendant the duty of using all necessary and reasonable skill, care and caution in making up and running said train, necessary for the reasonably safe conveyance of the plaintiff as such passenger. And if the jury further believe, from the evidence, that while the plaintiff was so a passenger on defendant's train of cars, she was requested by an employé or servant of the defendant to pass from the car in which she was, to the car immediately in front thereof, and that, while she was in the act of passing from one car to the other, in obedience to such request, by the carelessness and negligence of the defendant in making up its said train, and failing to sufficiently couple its said cars, or by the carelessness and negligence of the defendant in moving its engine and the cars attached thereto, without sufficiently and securely coupling its cars, and without any fault or negligence on the part of the plaintiff, the engine and a part of the train of the defendant was started forward, and the car from which the plaintiff was passing was detached and separated from the car into which she was going, and the plaintiff was thereby, without any negligence or fault of her own, precipitated and thrown between said cars to the ground, and thereby injured, then the jury should find the defendant guilty, and assess the plaintiff 's damages at such sum, not exceeding $10,000, as they may believe, from all the evidence, she has sustained." [1]

§ 1782. Duty of Railroad Company to Provide Safe Platforms at Stations and Keep Them Lighted at Night. — "It is claimed on the part of the plaintiffs, that the defendant was negligent in not having a reasonably safe platform, in not having the platform sufficiently lighted, and in not having some person stationed at the point where this accident occurred, to warn persons and prevent their walking off the platform. It will be the duty of the jury to determine, from all the testimony in the case, whether the defendant was negligent in these re-

[1] Approved in Hannibal &c. R. Co. *v.* Martin, 111 Ill. 225. In this case there are two instructions on the hypothesis of the injury being caused by the servants of another railway company while making up the defendant's train.

spects, or either of them. It is the duty of the defendant to have its platform reasonably sufficient and safe in all respects, to be used by such persons as may have lawful occasion to use it. It is not necessary that it should be perfectly and absolutely safe; so great a degree of perfection is usually impracticable; but it must be reasonably safe and sufficient for all persons using it, who are themselves in the exercise of ordinary and reasonable care. If a barrier or guard is reasonably necessary to prevent persons, who are themselves in the exercise of ordinary and reasonable care, from falling from the platform to their injury, then a barrier should be placed upon it, or a guard should be placed to warn people of danger. Such lights as are necessary to render the use of the platform and the passage over it to the cars reasonably safe, should be upon the platform at the time of the arrival of trains, and during the time the trains remain at the station."[1]

§ 1783. CARE REQUIRED TOWARD PASSENGERS ON FREIGHT TRAINS.— "A railroad company is under no legal obligation to transport passengers on its freight trains. The company confines its carriage of passengers to regular passenger trains, and its carriage of goods to freight trains. But, when the company assumes to carry passengers upon its freight trains, it is not bound to furnish to the passengers the same comforts and conveniences which are enjoyed on a regular passenger coach; but, whether a railroad company undertakes to convey its passengers on a freight or passenger train, in a caboose or well cushioned chairs, its duty is to so run and manage the train that passengers shall not, by its own carelessness, be killed or injured. On the other hand, when a person becomes a passenger on a freight train, he is presumed to know the manner in which the trains are ordinarily operated, and to assume any additional risk, aside from negligence of the company, to which he may be exposed in consequence of his riding on a freight train."[2]

§ 1784. WRONGFUL EJECTION OF PASSENGER. — "If the jury believe from the evidence, that the plaintiff paid, or offered to pay, the conductor in charge of the train, when requested, the usual fare from Calhoun to the place of destination, to wit: Windsor; and the conductor received the same, and forcibly put plaintiff out of the car without lawful provocation, then the jury will find for the plaintiff, and assess the damages at such sum as they from the evidence believe will compensate

[1] Approved in Quaife *v.* The Chicago &c R Co., 48 Wis. 516.

[2] Approved in Ohio &c. R. Co. *v.* Dickerson, 59 Ind. 321.

plaintiff for the injuries sustained. [1] - - - - If the jury believe from the evidence, that the plaintiff paid, or offered to pay to the conductor of the train the customary and usual fare from Calhoun to Windsor, the place he designed to stop at, and the conductor refused to receive the same, and refused to give plaintiff reasonable time to get the money out of his pocket, or from his friend there on said train, with intent to pay said regular and usual fare; and if the jury further believe from the evidence, that said conductor, agents or servants of said defendant, maliciously and violently put said plaintiff out of the car and off said train, then the defendant is liable and the jury should find for the plaintiff." [2]

§ 1785. Rightful Expulsion of Passenger, but with Unnecessary Force. — "The jury are further instructed that, if they believe from

[1] Approved in Perkins *v.* Missouri &c. R. Co., 55 Mo. 201, 208; citing 1 Wagn. Mo. Stat. 307, § 28; Kline *v.* Cent. Pac. R. Co., 37 Cal. 400; Moore *v.* Fitchburg R. Co., 4 Gray (Mass.), 465; Penn. R. Co. *v.* Vandiver, 42 Pa. St. 365; Weed *v.* Panama R. Co., 17 N. Y. 362; Philadelphia &c. R. Co. *v.* Derby, 14 How. (U. S.), 468; Goddard *v.* Grand Trunk R. Co. 10 Am. Law Reg. (N. S.) 57; *s. c.* 57 Me. 202.

[2] Approved in Perkins *v.* Mo. &c. R. Co., 55 Mo. 208, 10. In this case the following instructions were given for the defendant; but, although copied into the opinion of the court, they cannot be regarded as having been distinctly approved, since the defendant appealed. "The court charges the law to be, that if any passenger, on the train of any railroad in this State, shall refuse to pay his fare, or shall behave in an offensive manner, or shall repeatedly violate the rules of the company owning such railroad, it shall be lawful for the conductor of the train, and the servants of the corporation, to put him and his baggage out of the cars, using no unnecessary force, at any usual stopping place, or near any dwelling house, as the conductor shall elect on stopping the train. - - - - If the jury find from the evidence, that the plaintiff refused to pay the established fare when first requested so to do by the conductor, he from that time forfeited his right to longer remain in the cars, and any subsequent offer on his part to pay his fare would not, in law, compel the company to transport him further. - - - - If the jury find from the evidence, that a trespass or an assault was committed on the person of the plaintiff by the employés of the defendant after said plaintiff had been ejected from defendant's cars, the said employes, and not the company, are responsible for the loss and damage resulting therefrom." In Hicks *v.* Hannibal &c. R. Co., 68 Mo. 330, other instructions on a similar hypothesis will be found. In Curl *v.* Chicago &c. R. Co., 63 Iowa, 417, 423, instructions will be found on the hypothesis of the passenger having been put off before a reasonable time had elapsed after demanding his fare, to enable him to borrow the sum from a friend; the court distinguishing Stone *v.* Chicago &c. R. Co., 47 Iowa, 82, and Hoffbauer *v.* Railway Co., 52 Iowa, 342 See Thomp. Carr. 340

the testimony, that the plaintiff did not pay, or offer to pay the conductor in charge of the train, his fare from Calhoun to Windsor, or place of destination, and refused to pay the same on being requested so to do, then the conductor was justified in putting plaintiff off the train, and using only the necessary force to do so, at some regular station, or near some dwelling house, as the conductor should elect. Yet if the jury further believe from the testimony, that the conductor and others, agents and servants of the defendant, acting under orders from the conductor, forcibly put plaintiff off from the train, and in so doing used unnecessary force, and unnecessarily beat, kicked and bruised plaintiff, while he was on the train, then the jury will find for the plaintiff and assess his damages at such sum as they, from the evidence, believe a just compensation for the injuries sustained, and they may also assess such further sum as exemplary or punitive damages, as will be a warning to the defendant and his agents, and which they believe proper under the evidence, not exceeding the sum of five thousand dollars sued for in the petition."[1]

§ 1786. EXPULSION OF PASSENGER HAVING NO TICKET, WHO REFUSES TO PAY EXTRA FARE. — "If the jury shall find from the evidence that the plaintiff made known to the conductor that he was going to Minneapolis, and in good faith tendered to him fifty cents as the full fare to that point, and it was in fact the full fare when paid in advance at the ticket office of the defendant, the conductor had no right to take the money except for the specific purpose tendered, to wit, as a full payment of such fare; and after taking and, retaining the money so tendered, he had no right to eject the plaintiff from the car, and in such case the ejectment was wrongful, and the plaintiff would be entitled to recover. - - - - It was the duty of the conductor, if he intended to insist upon the payment by the plaintiff of the regular train fare, to return the money which the plaintiff paid him, and he had no right to put the plaintiff off the train without first returning such money, if it was tendered by the plaintiff as the fare from St. Paul to Minneapolis."[2]

[1] Approved in Perkins *v.* Missouri R. Co., 55 Mo. 201, 208. As to punitive damages the court cited: McKeon *v.* Citizen's R. Co., 42 Mo. 79; Buckley *v.* Knapp, 48 Mo. 152; Sedg. Meas. Dam. 520; Bawser *v.* Lane, 3 Metc. (Mass.) 311.

[2] Approved in DuLaurans *v.* First Division St. Paul &c. R. Co., 15 Minn. 51, 52. The court said: "In the absence of qualifying circumstances, the plaintiff, not having procured a ticket before entering the car, would be liable to pay the rate of car fare estab-

§ 1787. Obligation to Keep Ticket Office open for a Reasonable Time before Departure of Train. — "If the jury shall find from the evidence that fifty cents was the ordinary fare from St. Paul to Minneapolis, and the defendant by its regulation exacts the further sum of ten cents only in the case of omission to purchase a ticket in advance, then they are bound to keep their ticket office open a reasonable time in advance of the departure of trains to enable passengers to procure their tickets; and if, on the occasion in question, the ticket office was not open for such reasonable time as to enable the plaintiff to procure his ticket, they had no right to demand of him the extra ten cents, and the expulsion from the train was wrongful, and the plaintiff is entitled to recover. What is such reasonable time for the ticket office to be open in advance of the departure of the train is a question of fact for the jury under the instructions of the court." [1]

§ 1788. Assaults upon Passengers: Obligation to Protect Passengers from Violence. — "The defendant's obligation was to carry the plaintiff safely and properly; and, if the defendant entrusted this duty to servants, the law holds the defendant responsible for the manner in which they execute it. The carrier is obliged to protect the

lished by the company; otherwise his right to a seat or passage in the train would be determined, and upon his refusal to pay such fare, the company would have a right to use such reasonable force as would be necessary to eject him from the train. But this is a right which the company might waive, and the plaintiff having tendered the conductor the sum of fifty cents, believing it to be the full fare to Minneapolis, and that sum being the actual fare when a ticket is procured at the office, it was the duty of the conductor, if he did not intend to accept it as full fare for the plaintiff, to refuse the tender by declining to receive it, or by immediately returning it when advised of the purpose for which it was made; but having received and retained it with a knowledge of the purpose for which it was tendered by the plaintiff, it must be held to be an acceptance of the same as full payment of the plaintiff's fare to Minneapolis."

[1] Approved in Du Laurans *v.* St. Paul &c. R. Co., 15 Minn. 55. The court cite: Chicago &c. R. Co. *v.* Parks, 18 Ill. 464; St. Louis &c. R. Co. *v.* Dalby, 19 Ill. 353, 364; Jeffersonville R. Co. *v.* Rogers, 28 Ind. 3; 1 Redfield on Railways (3d ed.), 104. The court disapprove Crocker *v.* New London, &c. R. Co., 24 Conn. 249. Upon the proposition that what was a reasonable time for keeping the ticket office open before the departure of the train was a question for the jury, the court cite: Cochran *v.* Toher, 14 Minn. 391. See Thomp. Carr. 341. As to reasonable time, see *ante*, § 1530, *et seq.*

passenger from violence from its own servants, and from every source whatsoever."[1]

[1] Approved, under the circumstances of the case in Louisville &c. R. Co. *v.* Kelly, 92 Ind. 372, on the authority of the statement of doctrine in Goddard *v.* Grand Trunk R. Co., 57 Me. 202; *s. c.* 2 Am. Rep. 39, that "the law seems now to be well settled that the carrier is obliged to protect his passengers from violence and insults from whatsoever source arising." The court also cite: Britton *v.* Atlantic &c. R. Co., 43 Am. Rep. 749; Hutch. Car., §§ 552, 596; Thomp. Car. 364, 365; Grand Rapids &c. R. Co. *v.* Boyd, 65 Ind. 526; Terre Haute &c. R. Co. *v.* Jackson, 81 Ind. 19; Noblesville &c. R. Co. *v.* Gause, 76 Ind. 142; *s. c.* 40 Am. Rep. 224; Jeffersonville &c. R. Co. *v.* Rogers, 38 Ind. 116; *s. c.* 10 Am. Rep. 103; Stewart *v.* Brooklyn &c. R. Co., 90 N. Y. 588; *s. c.* 43 Am. Rep. 185; Lynch *v.* Metropolitan &c. R. Co., 90 N. Y. 77 *s. c.* 43 Am. Rep. 141; Christie *v.* Griggs, 2 Camp. 79; Sherlock *v.* Alling, 44 Ind. 184. The Indiana court, in approving the above instruction, says: "There rests on carriers this obligation to protect passengers from violence, and an instruction which asserts in general terms this obligation cannot, in such a case as the present, be deemed erroneous. It is no doubt true that if the violence could not have been foreseen or prevented by the highest degree of care, the carrier would be absolved from liability. This, however, does not prove that the statement of the general rule is incorrect, for the duty of protecting passengers from violence does rest on all carriers, although this duty is not an absolute one. If the care which the law requires is exercised by the carrier, then the duty is discharged and there is no liability. A carrier is responsible for injuries willfully or carelessly inflicted upon passengers by servants engaged in the performance of duties within the general scope of their employment, whether the particular act was or was not authorized by the master. The question in such cases is, whether the servant was, when he inflicted the injury, acting within the line of his duties, and not whether the particular act was authorized. The duty of the carrier is to safely carry passengers. This is a duty, but not an absolute one. It is true that carriers of passengers are not insurers of the safety of those whom they undertake to carry, against all the risks of travel, but there nevertheless rests upon them this general duty of safely carrying. The adjudged cases, and the authors of text-books, in stating the duty of carriers, state in general terms that they are under obligation to carry safely." Notwithstanding the above language, it is submitted by the writer that cases might arise in which the giving of the above instruction would be erroneous. It is not strictly true that a carrier of passengers is bound to protect his passengers from "violence from every source whatever." If a gun should be fired from without and should kill a passenger in a car of a moving train, or if a passenger, while seated in such a car were to receive any other violent injury from a source wholly beyond the carrier's control, the carrier would not be liable (Thomp. Carr. 214.) and in such a case the giving of such an instruction would be clearly erroneous.

§ 1789. Assaults upon Passengers: Right to Remove Drunken and Disorderly Passenger. — "If the jury find that the plaintiff was in the defendants' car in a state of intoxication, so as to reasonably induce the conductor to believe that the plaintiff would be an annoyance to the passengers, or if the plaintiff so conducted, or used boisterous, profane, or indecent language, naturally calculated to annoy the passengers, and persisted in so doing after being requested to be quiet, the conductor would be justified in removing him, using no more violence than was necessary to effect his removal." [1]

§ 1790. Duty of Railway Company Toward a Passenger Boarding its Train. — "It is the duty of a railroad company to use due care, not only in conveying its passengers upon the journey, but also in all preliminary matters, such as their reception into the car and their accommodation while waiting for it; and whether bound to render assistance in taking passengers aboard its cars or not, it is liable for the consequences of negligence in giving directions to passengers as to the mode of entering. - - - - Whether it was the duty of defendant's agent to have assisted plaintiff in getting on the car is a question for you to determine (from the instructions here given) from the evidence in the case; and to this end it is proper for you to consider the train and the car, their distance from the platform and depot, the facility with which access could be had, the sex, age and inexperience of the plaintiff, if these were known to defendant's agents, and all the facts and circumstances surrounding the case. - - - - When the carrier of passengers by railway does not receive passengers into the car at the platform erected for that purpose, and suffers or directs passengers to enter at out of the way places, it is its duty to use the utmost care in preventing accidents to passengers while entering. And if you find in this case that the defendant's agents were negligent, within the meaning of this instruction, and that plaintiff was injured thereby, still the question remains whether or not the plaintiff on her part contributed by her own negligence to the injury, and if you find she did so contribute, she cannot recover. If she did not contribute, she can recover.[2]

[1] In Vinton *v.* Middlesex R. Co., 11 Allen (Mass.), 304; *s. c.* Thomp. Carr. Pass. 6, exceptions were sustained to the refusal of the trial judge to give the above instruction. See also Pearson *v.* Duane, 4 Wall. (U. S.) 605; *s. c.* Thomp. Carr. Pass. 17; Tarbell *v.* Central Pacific R. Co., 34 Cal. 616, 623.

[2] Approved in Allender *v.* Chicago &c. R. Co., 43 Iowa, 277; citing and relying on Allender *v.* Chicago, &c. R. Co., 37 Iowa, 272. Other instructions, in cases of injuries to passengers while

§ 1791. Duty of the Passenger to follow the Reasonable Directions of the Defendant's Servants. — "It is the duty of a passenger to follow the reasonable directions given by the agent in charge of a railway train, in respect to passing from one car to another while the same are in motion, for the purpose of finding a seat; but if the passenger himself knows that the movement would be attended with danger, it would not, in such case, be his duty to obey the conductor. On the other hand, a passenger may rightfully assume that the agents and servants of railway carriers are familiar with the operation of the cars, and have reasonable knowledge of what is required for safety and protection while giving such directions." [1]

§ 1792. Passenger Riding with Arm out of Window. — "It was no want of ordinary care and prudence on the part of the plaintiff to have his elbow or arm on the window sill; and if the defendant, by its agents or servants, left the wrecked car or cars nearer the track than heavy objects were ordinarily permitted by the company to remain, and so near, that the passengers on the train in which plaintiff was riding were liable to have their arms caught if lying out of the windows; and if defendant, by its agents or servants, failed to give such notice to the plaintiff as to put him effectually on his guard, and plaintiff was injured by having his arm caught or struck by such

boarding railway trains, will be found in the following cases: Curtis *v.* Detroit &c. R. Co., 27 Wis. 160 (apparently a long oral charge); Chicago &c. R. Co. *v.* Scates, 90 Ill. 589, in which case the court cite Illinois Central R. Co. *v.* Slatton, 54 Ill. 133; Ohio &c. R. Co. *v.* Stratton, 78 Ill. 88; Illinois Central R. Co. *v.* Chambers, 71 Ill. 520; Phillips *v.* Rensselaer &c. R. Co., 49 N. Y. 177. The passage in the above instruction "If she did not contribute, she can recover," is proper only in a case where the pleadings and evidence justify the court in withdrawing from the jury every question except that of contributory negligence.

[1] This instruction is framed from two instructions by putting them together and departing from the form of words used in the second, which was not set out in full in the report. In Louisville &c. R. Co. *v.* Kelly, 92 Ind. 370, 374, it is held that these instructions state the law correctly. The court cite the following cases: Pool *v.* Chicago &c. R. Co., 56 Wis. 227; Filer *v.* New York &c. R. Co., 59 N. Y. 351, and 49 N. Y. 47; Pennsylvania R. Co. *v.* McCloskey, 23 Pa. St. 526; Lake Erie &c. R. Co. *v.* Fix, 88 Ind. 381; *s. c.* 45 Am. Rep. 464; Nave *v.* Flack, 90 Ind. 205; Pennsylvania Co. *v.* Hoagland, 78 Ind. 203. In Chicago &c. R. Co. *v.* Randolph, 53 Ill. 513, there is an instruction on the theory that the plaintiff was not justified in jumping from a moving train, if under all the circumstances, it was hazardous, although the conductor and brakeman told him he could do so with safety. See *ante*, § 1685.

wrecked cars, or by the same coming in collision with or scraping against the car in which the plaintiff was riding,— the jury must find for the plaintiff; yet if the jury find that plaintiff's arm or elbow projected out of the window at the time of the injury, it is a circumstance from which they may infer a want of ordinary care on his part."[1]

§ 1793. Riding on Platform of Street Car. — "If you find that deceased was, at the time of his death, the husband of plaintiff; and that defendant was a corporation and a common carrier; and that deceased was a passenger for hire in a car of defendant; and that deceased was carried as a passenger upon the steps of a car of defendant, by its agents, because there was no room elsewhere for him, in or about the car; and if, while the car upon which deceased was being carried, was passing another car of defendant, upon a turn-out in the road, the two cars came in collision, with each other, or approached each other so near as to kill deceased by jamming him or crushing him between the said cars; and such catastrophe was caused by the least negligence, want of skill, or prudence, on the part of defendant's agents, in managing said cars, or either of them; and that deceased then and there exercised ordinary care and prudence as a passenger, then the jury should find for plaintiff, and assess damages at five thousand dollars."[2]

[1] Approved in Winters *v.* Hannibal &c. R. Co., 39 Mo. 468, 469, where several other instructions of a similar nature will be found. Other instructions, in a case where a passenger met with a similar accident, will be found in Barton *v.* St. Louis &c. R. Co., 52 Mo. 255,— the theory being that, if the negligence of the defendant was the *proximate cause* of the injury, the plaintiff was not precluded from recovering damages merely because his own negligence contributed remotely to it. See *ante*, § 1689.

[2] Approved in Huelsenkamp *v.* Citizens' R. Co., 37 Mo. 539. See article on right of street car platform passengers, 20 Cent. L. J. 101. Five thousand dollars is the liquidated damages allowed for the death of a person under the Missouri Statute. - - - - In Meyer *v.* Pacific Railway, 40 Mo. 153, some instructions will be found applicable to the case where a passenger was killed by being thrown from the platform of a railway car by the sudden starting thereof; but the instructions are not authoritative, because they were given at the request of the defendant, and the defendant was the appellant. In Tibby *v.* Missouri Pacific R. Co., 82 Mo. 292, 298, an instruction will be found applicable to the unusual case of a passenger being killed while riding, under the direction of the carrier's servant, on the top of a railway car. In Huelsenkamp *v.* Citizens' R. Co., *supra*, other instructions will be found applicable to the case there in judgment. In Walter *v.* Chicago &c. R. Co., 39 Iowa, 36, there is a series of instructions given in a case where a railway passenger was injured while standing on the platform of a "caboose."

§ 1794. INJURIES TO PASSENGERS WHILE ALIGHTING FROM TRAIN IN MOTION. — "Railroads are public carriers, and the utmost care is required of them for the safety of passengers upon their trains. - - - - A passenger is entitled to a reasonable time to leave the car in which he has been riding, when a train is stopped for that purpose, and when reasonable time is not in fact allowed to get off in safety (of which juries are the judges) in attempting to do so, without fault on his part, injuries result to him, he is entitled to recover from the railroad company for such injuries. - - - - If the jury find that the plaintiff, Ruth Atkins' own negligent conduct caused, or contributed to cause, the injury received by her, they will find for the defendant. - - - - Negligence consists in a want of reasonable care which would be exercised by a person of ordinary prudence, under all existing circumstances, in view of the probable danger of injury. - - - - If the jury find from the evidence in this cause that the defendant's train did not stop at the station at Knoxville long enough to enable the plaintiff, Ruth Atkins, to leave the car and reach the platform while the train was stationary, and that she stepped off therefrom on the platform while the train was in motion, it is a question for the jury to say whether she was guilty of negligence, as above defined, and barred thereby from a recovery for the injuries received. - - - - If the jury find from the evidence in this cause that the defendant's train did not stop long enough at the platform to allow the plaintiff to leave the train while standing, and that she stepped therefrom while it was in such slow motion as not to indicate recklessness, imprudence or negligence, as heretofore defined, and that she received injuries by a fall from the motion of the train, she is entitled to recover; and if you find for the plaintiff, Ruth Atkins, you will assess her damages at a sum sufficient to compensate her for injuries sustained, the pain suffered, the effects of the injury on her health according to its degree and probable duration, the expense to her of her sickness resulting from the injury and of attempting to effect a cure."[1]

[1] Approved in Little Rock & Ft. Smith R. Co., *v.* Atkins, 46 Ark. 430, 431: The act of attempting to alight from a railway train while in motion is a frequent cause of accident. Useful instructions, applicable in actions for such injuries, will be found in Clotworthy *v.* Hannibal &c. R. Co., 80 Mo. 220; Waller *v.* Hannibal &c. R. Co., 83 Mo. 608, 613; Little Rock &c. R. Co. *v.* Atkins, *supra* (instructions given at the request of the defendant, though not necessarily approved on appeal); St. Louis &c. R. Co. *v.* Cantrell, 37 Ark. 521; Houston &c. R. Co. *v.* Gorbett, 49 Tex. 577. See also Doss *v.* Railroad Co., 59 Mo. 37; Straus *v.* Railroad Co., 75 Mo. 190; Nelson *v.*

§ 1795. Liability to Passenger Carried Gratuitously. — "The court instructed the jury that, if the plaintiff was lawfully on the road at the time of the collision, and the collision and consequent injury to him were caused by the gross negligence of one of the servants of the defendants, then and there employed on the road, he is entitled to recover, notwithstanding the circumstances given in evidence, and relied upon by defendant's counsel as forming a defense to the action, to wit: that the plaintiff was a stockholder in the company, riding by invitation of the President, paying no fare, and not in the usual passenger cars."[1] - - - - "A common carrier of passengers is bound to exercise

Atlantic &c. R. Co., 68 Mo. 595; Price *v.* Railroad Co., 72 Mo. 418; Chicago &c. R. Co. *v.* Randolph, 53 Ill. 513. Instructions applicable to an injury to passenger while landing from a steamboat will be found in Northern Line Packet Co. *v.* Binninger, 70 Ill. 576.

[1] Approved in Philadelphia &c. R. Co. *v.* Derby, 14 How. (U. S.) 468; *s. c.* Thomp. Carr. Pass. 31. See also Steamboat New World *v.* King, 16 How. (U. S.) 469; Packet Co. *v.* Clough, 20 Wall. (U. S.) 529; Todd *v.* Old Colony R. Co., 3 Allen (Mass.), 18; *s. c.* 7 Allen (Mass), 207; Rose *v.* Des Moines Valley R. Co., 39 Ia. 246; Jacobus *v.* St. Paul &c. R. Co., 20 Minn. 125; *s. c.* 1 Cent. L. J. 375; Austin *v.* Great Western R. Co., 8 Best. & S. 327; *s. c.* L. R. 2 Q. B. 442; 36 L. J. (Q. B.) 201; 15 Week. Rep. 863; 16 L. T. (N. S.) 320; Wilton *v.* Middlesex R. Co., 107 Mass. 108; *s. c.* 125 Mass. 130; Pittsburg &c. R. Co. *v.* Caldwell, 74 Pa. St. 421; Washburn *v.* Nashville &c. R. Co., 3 Head (Tenn.), 638; Great Northern R. Co. *v.* Harrison, 23 L. J. (Exch.) 308; *s. c.* 12 C. B. 576; 26 Eng. Law & Eq. 443. But see *contra*, Kinney *v.* Central R. Co., 34 N. J. L. 513. A distinction is taken between a person riding gratuitously, with the consent or license of the carrier or his authorized agent, and that of a mere *trespasser* or *stowaway*. In the former case the rule stated in the above instruction exists, founded on the relation of carrier and passenger; but in the latter case it does not, and the carrier owes no other duty than that which, on grounds of justice and humanity, a person owes to a mere trespasser on his property. A carrier is not in general liable for an injury sustained by such a trespasser in consequence of negligence in operating his means of carriage. Toledo &c. R. Co. *v.* Brooks, 81 Ill. 245. Compare Brown *v.* Missouri &c. R. Co., 64 Mo. 536; Toledo &c. R. Co. *v.* Beggs, 85 Ill. 80; Chicago &c. R. Co. *v.* Michie, 83 Ill. 427. As to what constitutes gratuitous carriage, see Railway Co. *v.* Stevens, 95 U. S. 655; Railroad Co. *v.* Lockwood, 17 Wall. (U. S.) 357; Smith *v.* New York &c. R. Co., 24 N. Y. 222; *s. c.* 29 Barb. (N. Y.) 132; Cleveland &c. R. Co. *v.* Curran, 19 Oh. St. 1; Ohio &c. R. Co. *v.* Selby, 47 Ind. 471; Flinn *v.* Phila. &c. R. Co., 1 Houst. (Del.) 469; Graham *v.* Pacific R. Co., 66 Mo. 536; Indianapolis &c. R. Co. *v.* Beaver, 41 Ind. 493; Penn. R. Co. *v.* Henderson, 51 Pa. St. 315. See also Philadelphia &c. R. Co. *v.* Derby, 14 How. (U. S.) 468; Indianapolis &c. R. Co. *v.* Horst, 93 U. S. 291; Steamboat New World *v.* King,

extraordinary care towards its passengers, and is liable for slight negligence; but it does not owe the same degree of care to a person on one of its vehicles or trains, who does not stand in the relation of a passenger. To such a person a carrier owes only the duty of ordinary care, which is that degree of care which persons of ordinary prudence would usually exercise under like circumstances." [1]

Subdivision 6.— Travelers at Railway Crossings.

SECTION

1800. Duty of Traveler and of Trainmen.
1801. A full Series of Instructions.
1802. Other Instructions based on Hypothetical Facts.
1803. Not to Employ Track as a Foot Path.

§ 1800. DUTY OF TRAVELER AND OF TRAINMEN. — "It is the duty of every person, when going upon or across a railroad track, to look in each direction to see if cars are approaching, and a failure to do so amounts to want of ordinary care." [2] - - - - "The jury are instructed as a matter of law, that both the plaintiffs and the defendant, the railway company, had an equal right to cross the street at the point where the accident happened, and that the law imposes on both parties the duty of using reasonable and prudent precaution to avoid accident and danger; and, while it was incumbent upon the railway company to run its train on the occasion referred to, and to give the required signal by ringing the bell for eighty rods before reaching the crossing, it was also the duty of the plaintiffs to look out for the approach of the train, and to observe all reasonable precautions before attempting to cross the railway track. - - - - If the evidence in this case shows that Swift, the driver, took the risk of crossing in front of the engine before it could strike him, and in this he was mistaken, that he miscalculated, and from any cause of his own, was not able to pass safely in front, the plaintiffs must bear the loss, and the jury must find for the defendant. - - - -

16 How. (U. S.) 469; McPheeters *v.* Hannibal &c. R. Co., 45 Mo. 26; Brady *v.* Steamboat Highland Mary, 17 Mo. 461; Gray *v.* Missouri River Packet Co., 64 Mo. 47; Thomp. Carr. Pass. 43–45; Leman *v.* Chanslor, 68 Mo. 340, 342.

[1] Approved in St. Joseph R. Co. *v.* Wheeler, 35 Kan. 188.

[2] Approved in Illinois Central R. Co. *v.* Goddard, 72 Ill. 569. Citing and relying upon Chicago &c. R. *v.* Gretzner, 46 Ill. 76; St. Louis &c. R. Co. *v.* Manly, 58 Ill. 300; Chicago &c. R. Co. *v.* Jacobs, 63 Ill. 178; Chicago &c. R Co. *v.* Bell, 70 Ill. 102; Illinois Central R. Co. *v.* Godfrey, 71 Ill. 500; Shearm. &. Red. on Neg., § 488.

Every person is bound to know that a railroad crossing is a dangerous place, and he is guilty of neglect unless he approaches it as if it were dangerous. If Swift, the driver of the team in question, knew that the crossing where the accident complained of occurred was a dangerous one, he was bound to know that a train might be approaching; and if he did not look or listen to ascertain if one was coming, but, on the contrary, drove directly on the track, and the accident resulted, he was guilty of such negligence as precludes the plaintiffs from recovering in this case, unless the plaintiffs have gone further and proven to the satisfaction of the jury that the railway company upon such occasion was guilty of gross negligence. - - - - It is not the exercise of ordinary care and prudence for a person to drive with a horse directly on to a railroad crossing known to him at the time to be dangerous, without making an effort, by stopping or listening, or otherwise, to ascertain whether a train is approaching, or whether it is safe to drive on the track with his team." [1]

§ 1801. A Full Series of Instructions. — "I charge you, therefore, that if you believe from the evidence that defendant's train, in crossing the road known as the Clarksville and Paris road, came in collision with plaintiff's wagon while plaintiff was attempting to cross the railroad at that point, and thereby injured the wagon and killed one horse and injured plaintiff's person, and that, as the train approached said crossing,

[1] Approved in Chicago &c. R. Co. *v.* Hatch, 79 Ill. 138, 139; citing Chicago &c. R. Co. *v.* Van Patten, 64 Ill. 510; Chicago &c. R. Co. *v.* McKean, 40 *Id.* 218; Chicago &c. R. Co. *v.* Jacobs, 63 *Id.* 178; Chicago &c. R. Co. *v.* Gretzner, 46 *Id.* 75; Toledo &c. R. Co. *v.* Riley, 47 *Id.* 514; Chicago &c. R. Co. *v.* Lee, 68 *Id.* 578. *Other instructions* in actions for damages for injuries to travelers received at railway crossings will be found in the following cases: Indianapolis &c. R. Co. *v.* Stout, 53 Ind. 150; (full series of instructions); Burham *v.* St. Louis &c. R. Co., 56 Mo. 339; Illinois &c. R. Co. *v.* Baches, 55 Ill. 381; Pittsburg &c. R. Co. *v.* Martin, 82 Ind. 482; (failure to ring bell and sound whistle at least eighty rods before reaching the crossing); Kansas City &c. R. Co. *v.* Lane, 33 Kan. 704 (well-drawn instructions as to duty of stopping train if practicable on discovery of danger); Funston *v.* Chicago &c. R. Co., 61 Ia. 458 (duty to ring bell or sound whistle on approaching crossing; citing Artz *v.* Chicago &c. R. Co., 34 Ia. 153; Jackson *v.* Chicago &c. R. Co., 36 Ia. 451); Chicago &c. R. Co. *v.* Elmore, 67 Ill. 178 (duty to ring bell or sound whistle at least eighty rods from crossing; citing and relying upon Chicago &c. R. Co. *v.* Triplett, 38 Ill. 482); Toledo &c. R. Co. *v.* Jones, 76 Ill. 316 (engineer not bound to stop train to avoid collision; citing St. Louis &c. R. Co. *v.* Manly, 58 Ill. 300, and Chicago &c. R. Co. *v.* Jacobs, 63 Ill. 178). See 1 Thomp. Neg. 124.

a bell was not rung, nor a whistle blown, as required by law, and that defendant at the time, had no sign board at the crossing as the law demanded, and, but for the neglect of the defendant in not providing said sign board, and not ringing the bell or blowing the whistle as required by law, said collision would not have occurred, you will find a verdict for the plaintiff. - - - - If, on the other hand, a collision occurred between defendant's train and plaintiff's wagon at the point above indicated, and if no sign board was put at the crossing as required by law, and if no bell was rung or whistle blown; and if plaintiff discovered the railroad track and crossing in time to have stopped his team upon the discovery of a passing train; and if, notwithstanding the failure of defendant's employés to ring the bell or blow the whistle, as it was their duty to do, plaintiff, by the use of such diligence and care as a man of ordinary prudence and foresight would exercise under such circumstances, could have discovered the approaching train in time to avoid the collision; and if, as a matter of fact, the failure to ring the bell or blow the whistle did not throw plaintiff off his guard or cause him to relax his diligence, then I charge you that plaintiff cannot recover,—unless you find that, after plaintiff got upon the track, or so near thereto that he could not extricate himself from the danger, and while the train was in a position to be stopped so as to avoid the collision, defendant's agents and servants discovered that he was in that position and failed to stop the train. - - - - If the defendant's employés rang the bell or blew the whistle eighty rods from the crossing, and continued the signal until it was passed, and if plaintiff discovered that the railroad crossing was in his front in sufficient time to have stopped his team until the train had passed, then the defendant is not liable for any damage that ensued from a collision, if any, unless the defendant's employés discovered plaintiff on the track or so near thereto that he could not avoid the collision in time to stop the train before reaching him, and failed to stop it. - - - - If defendant's employés rang the bell or blew the whistle as required by law, and plaintiff saw the railroad crossing in time to have stopped his team, and defendant's employés did not discover plaintiff in a position of danger from which he could not extricate himself before it was too late to stop the train, so as to avoid the collision, defendant is entitled to a verdict. So, also, if defendant's employés did not ring the bell, or whistle, as required by law, and such failure did not throw plaintiff off his guard, and if plaintiff by the use of care and diligence, defined above, could have discovered the train in time to have stopped his team, and also saw the crossing in such time,

and defendant's employés did not discover plaintiff in a position of danger before it was too late to stop the train, defendant is entitled to a verdict. - - - - If the conductor of the train, before reaching the crossing, saw plaintiff driving along the road sufficiently far from the crossing to stop his team before the train reached it, he had the right to conclude that plaintiff would stop before reaching the crossing, and his failure to stop the train would not be such negligence as to render the defendant liable, unless he had time to stop the train after he saw that plaintiff was on the track, or so near thereto that he could not avert the danger if the train moved on." [1]

§ 1802. Other Instructions based on Hypothetical Facts. — "It was the plaintiff's duty, in approaching and being about to cross the railroad, to exercise ordinary care and caution, not only to know of the approach of trains, but also to stop, if there was one, in time to avoid injury. Care necessarily imports the use of the senses and the adoption of means and expedients adapted to the end in view. If you find, from the evidence, that, at the time of the alleged injury, the ground was frozen, and the plaintiff's wagon, whilst in motion was more or less noisy, and that he had not a clear open view of the railroad for a sufficient distance to make the crossing reasonably safe for him, the rule, as a matter of law, required him to stop, and look and listen for approaching trains, and that, although no signals were given by the trainmen, if he failed to do so, and he was, in consequence, injured, or if, by doing so, he could have prevented his injury, — he cannot recover, and your verdict should be for defendant. - - - - But whilst the law has determined that, under the more frequent circumstances and conditions which attend like transactions, persons of common and ordinary prudence usually adopt such means and expedients for the ascertainment of the facts sought, it has not determined that they must do so always, under all conditions and circumstances. And if you should find from the evidence that the crossing, where plaintiff alleges he was injured, was in the country, where the track was single, away from depots and switches: that it was one which, under these instructions, imposed the duty of signaling upon approaching; that at the crossing, the highway approached through a cut four to six rods long; that upon coming into this cut the plaintiff found there Noble waiting to cross, and the regular passenger train just going by at from thirty to thirty-five miles per hour; that the usual distance between trains follow-

[1] Approved in Texas &c. R. Co. v. Chapman, 57 Texas, 78, 79.

ing each other on the defendant's road at that time was not less than one mile; that, at the point of time when the plaintiff came up to Noble's wagon and was about to stop, or had but barely done so, Noble, immediately after the passenger train, drove over the crossing in safety; that plaintiff 's attention was upon the movements of Noble and the passenger train, and that, from all these circumstances and facts, his belief was that no other train was approaching; that thereupon he was following Noble over the crossing, in the same time and distance from him and behind the passenger train that an ordinarily prudent man would have done, who had stopped and been waiting with Noble; and that the approaching wild train did not signal for the crossing in due time, and plaintiff had no knowledge or suspicion of its approach, — he was not bound to have stopped and looked and listened for it, and his failure so to do, if he did fail, will not defeat his recovery. - - - - But if you fail to find any of these facts, from the preponderance of the evidence, or if you find that Noble had started, and the passenger train had left the crossing before the plaintiff had reached the cut; that he was thoughtlessly watching the retreating passenger train, and giving no heed to his duty to know that the crossing was clear and safe, and there had been time, as the trains were usually run, for the wild train to come into the hearing or sight of the plaintiff after the passenger train had passed the crossing, the plaintiff was bound to the observance of the rule, and if he failed to stop and listen for the wild train, and his failure contributed to his injury, he cannot recover, and your verdict should be for the defendant." [1]

[1] Approved in Funston *v.* Chicago &c. R. Co., 61 Iowa, 460, 461. The court said: "As a hypothetical statement of facts which the evidence tended to establish, the instruction was carefully and fairly drawn. It may be conceded that, ordinarily, a traveler on a highway should look and listen before attempting to cross a railroad, but to this rule there are exceptions. In the case at bar, the jury were warranted in finding the facts named in the instruction to be true. We may, then, assume that the plaintiff saw the passenger train when it passed, and saw Noble waiting for it to pass, and that he saw Noble move forward and cross the track in safety. The plaintiff was but a short distance behind Noble, and he would naturally and he could reasonably conclude that he could, with safety, follow Noble. The jury could well conclude, under the circumstances, that a reasonably careful and prudent person would do so, and that he was not guilty of negligence, in the absence of signals given by the approaching train, and we think the authorities so hold." See French *v.* Taunton Branch Ry., 116 Mass. 537; McGovern *v.* New York &c. R. Co., 67 N. Y. 417; Spencer *v.* Illinois Central R. Co., 29 Iowa, 55, 60; Bonnell *v.* Delaware &c. R. Co.,

§ 1803. Not to Employ Track as a Foot Path. — "Every person of ordinary intelligence is bound to know that a crossing of a railroad track over a public highway, when cars are frequently passing, is a place of more than ordinary danger, and it becomes his legal duty at such place to use corresponding care and caution to avoid injury; and while it is true that the public have a right to be upon a railroad track, at the crossing of a public highway, for the purpose of crossing over such track, it is the duty of all persons crossing over such track, to do so with all convenient dispatch; and if the jury believe, from the evidence, that in this case the deceased, Jacob Baches, was upon the track of the defendant's railroad, not for the purpose of crossing over the same, but for the purpose of employing the same as a foot path from his place of labor to his residence, it was negligence on his part to employ such railroad track for such a purpose, even though the jury should believe from the evidence, that, at the time he was so injured by defendant's cars, he had actually proceeded to, and arrived at, a point within the boundaries of a public highway." [1]

Subdivision 7.— Trespassers on Railway Tracks.

Section

1805. Trespassers on Railway Track.
1806. Hypothesis that the Driver of a Street Car saw the Deceased Lying on the Track in Time to Avoid Running over him.
1807. Instruction on the same Hypothesis from the Defendant's Standpoint.
1808. Another Instruction on the Same Hypothesis from the Defendant's Standpoint, including the Element of the Deceased being Drunk.

§ 1805. Trespassers on Railway Track. — "The defendant's servants in charge of the engine which struck the deceased had the right to assume that he was rational, and would exercise care and caution to keep himself out of danger, until they saw something in his conduct which was inconsistent with such assumption. If he was walking on a line parallel with the track, and so far removed therefrom as to be free from danger of collision, they had the right to assume that he would

39 N. J. Law, 189; Cleveland &c. R. Co. *v.* Crawford, 24 Oh. St. 631; Salter *v.* Utica &c. R. Co., 88 N. Y. 42; Continental Improvement Co. *v.* Stead, 95 U. S. 161; Pennsylvania R. Co. *v.* Ogier, 35 Pa. St. 60.

[1] Approved in Illinois Central R. Co. *v.* Baches, 55 Ill. 386.

remain at such safe distance, until he manifested a purpose to place himself in dangerous proximity to it." [1]

§ 1806. Hypothesis that the Driver of a Street Car Saw the Deceased Lying on the Track in Time to Avoid Running over Him. — "If you believe from the evidence that the driver of defendant's car, by the exercise of ordinary care and prudence, might have ascertained that the object he saw lying in the track was a human being before he ran over it, and might then have stopped the car and avoided running over the deceased, then you will find for the plaintiff in the sum of $5,000." - - - - "In case you believe that the driver of the car which did the injury, by the exercise of ordinary care and prudence might have ascertained that the object he saw lying in the track was a human being before he ran over it, and might then have stopped the car before injuring the deceased, and that the driver failed to exercise such ordinary care and prudence, then the plaintiff will be entitled to a verdict, even though you may further believe that the deceased became drunk, and laid down on the track intentionally or in a state of intoxication." [2]

[1] Approved in Chicago &c. R. Co. *v.* Austin, 69 Ill. 429. In Yarnall *v.* St. Louis &c. R. Co., 75 Mo. 581, a series of instructions will be found applicable to a similar state of facts, given at the request of the defendant.

[2] Approved in Werner *v.* Citizens' R. Co., 81 Mo. 368, 370; affirmed *s. c.* 11 Mo. App. 601. The facts of this case are indicated in the foregoing instructions that the deceased laid down upon the track of the defendant's street railway in the night time, being probably in a state of intoxication, the driver of the car approached him and saw him lying on the track, but testified that he thought the object was a sack of oats or bran which had fallen from some wagon. The court, in affirming this and the other instructions above and below set out, which were given in the same case, proceeded on the doctrine that the negligence of the plaintiff or of the person injured, in exposing his property or his person to an injury, will not excuse the *subsequent* negligence of the defendant in injuring his person or property, provided the exposed situation of the person or property injured was seen by the defendant or by his servants in time to have avoided the injury by the exercise of ordinary care and prudence. The court say that such is the well established doctrine of that court. Isabel *v.* Railroad Co., 60 Mo. 475; Harlan *v.* Railroad Co., 65 Mo. 26; Zimmerman *v.* Railroad Co., 71 Mo. 484; Frick *v.* Railroad Co., 75 Mo. 542; Kelley *v.* Railroad Co., 75 Mo. 140. And see also as affirming the same doctrine, 2 Thomp. Neg. 1157; Davies *v.* Mann, 10 Mees. & W. 546; *s. c.* 2 Thomp. Neg. 1105; Barker *v.* Savage, 45 N. Y. 191, 194; Brown *v.* Lynn, 31 Pa. St. 510; Northern &c. R. Co. *v.* State, 29 Md. 420; Locke *v.* First Division &c. R. Co., 15 Minn. 350; Nelson *v.* Atlantic &c. R. Co., 68 Mo. 593; O'Keefe *v.*

§ 1807. Instruction on the Same Hypothesis from the Defendant's Standpoint. — "On the other hand, if you believe and find that the driver of the defendant's car, after he discovered an object lying on the track, exercised such care and prudence as an ordinarily prudent and careful driver would have exercised under the same or similar circumstances, and was not able, in the exercise of such care, to discover that the object he saw was a human being before he ran over it, but in fact believed the object to be something else, then your verdict should be for the defendant." [1]

§ 1808. Another Instruction on the Same Hypothesis from the Defendant's Standpoint, Including the Element of the Deceased Being Drunk. — "If you believe that the deceased became drunk and laid down on the track in a state of intoxication, then he took the risk of being run over, and the plaintiff cannot recover, unless he proves that the driver of the car, after he saw the deceased lying on the track, failed to exercise ordinary care and prudence in discovering or ascertaining what the object was before running over it." [2]

Subdivision 8. — Railway Injuries to Domestic Animals.

Section

1808. Killing Domestic Animal by Train running at Prohibited Rate of Speed.
1809. Cattle Killed Through Failure to ring Bell and sound Whistle on Approaching Highway Crossing.
1810. Killing Cattle when Railway not Fenced.
1811. Instruction on the Hypothesis that the Cattle got upon the Track through Insufficient Cattle Guards.
1812. What Care required of the Engineer to Avoid Killing Cattle on the Track.

§ 1808. Killing Domestic Animal by Train running at Prohibited Rate of Speed. — "The court instructs the jury that, if they believe from the evidence that there was an ordinance in force in the city of

Chicago &c. R. Co., 32 Ia. 467; Morris *v.* Chicago &c. R. Co., 45 Ia. 29; compare Lannen *v.* Albany Gaslight Co., 41 N. Y. 459 (affirming 46 Barb. (N. Y.) 264). Instructions in an action by a widow for the death of her husband, who was killed by being run over by a street car, will be found in Liddy *v.* St. Louis R. Co., 40 Mo. 511. See 1 Thomp. Neg. 432, *et seq.*

[1] Given by the court of its own motion in Werner *v.* Citizens' R. Co., 81 Mo. 368, 370. See *ante*, § 1689.

[2] Given by the court of its own motion in Werner *v.* Citizens' R. Co., 81 Mo. 368, 371.

Louisiana prohibiting railroads from running their engines and trains of cars at a greater rate of speed than six miles per hour, in the city limits, and that defendant, by its agents and employés, did on the 1st day of June, 1882, negligently run its engine and cars on the hog of plaintiff, by running said engine and train of cars at a greater rate of speed than six miles per hour, and that, by reason of said running said hog was killed, then defendant is liable and the verdict should be for the plaintiff." [1]

§ 1809. CATTLE KILLED THROUGH FAILURE TO RING BELL AND SOUND WHISTLE ON APPROACHING HIGHWAY CROSSING. — "If the jury believe from the evidence that the killing and crippling of plaintiff's cattle was done by defendant's locomotive and cars, on the crossing of a public traveled road, and that the whistle was not sounded at least eighty rods from the road, and sounded at intervals until the train crossed the railroad; and they further believe from the evidence, and all the facts and circumstances in the case, that the killing and crippling of plaintiff's cattle resulted from the neglect to sound the whistle or ring the bell, they must find for plaintiff, unless the jury should further find that plaintiff, by his own negligence directly contributed to the injury." [2]

§ 1810. KILLING CATTLE WHERE RAILWAY NOT FENCED. — "The jury are instructed that, if they find from the evidence, that the cow or heifer was killed or so injured that it died, or was rendered worthless, by the engine and cars of the said defendants, running on their said road in this county, and that the railroad had been open for use for six months or more preceding the injury or killing, and that no fences, suitable and sufficient to prevent cattle, horses, sheep and hogs from getting on to the railroad, had been, or was at the time of the injury or killing, erected on the sides of the railroad, and that such fences were necessary at the place of the injury or killing, to keep horses and cattle from getting on to the track of the railroad, from the adjoining lands, and that the in-

[1] Approved in Bowman *v.* Chicago &c. R. Co., 85 Mo. 533, 537, on the authority of Karle *v.* Kansas City &c. R. Co., 55 Mo. 476, and Kelley *v.* Hannibal &c. R. Co., 75 Mo. 138.

[2] Approved in Lynn *v.* Chicago &c. R. Co., 75 Mo. 167, 169. *Other models of instructions* on this hypothesis will be found in Howenstein *v.* Missouri Pacific R. Co., 55 Mo. 33, 36; Edwards *v.* Chicago &c. R. Co., 76 Mo. 399, 401; Owens *v.* Hannibal &c. R. Co., 58 Mo. 386, 389; Halferty *v.* Wabash &c. R. Co., 82 Mo. 90, 95 (distinguishing Turner *v.* Kansas City &c. R. Co., 78 Mo. 578; Missouri Pacific R. Co. *v.* Stevens, 35 Kan. 625. Cattle driven upon the crossing by the plaintiff).

jury or killing did not occur at the crossing of any public road or highway, nor within the limits of any town, city or village, nor at a greater distance than five miles from any settlement, — then they will find for the plaintiff, and assess the damages in such amount as they, from the evidence, shall find the cow or heifer worth at the time of the injury or killing." [1]

§ 1811. Instruction on the Hypothesis that the Cattle got upon the Track through Insufficient Cattle-guards. — "It is the duty of all railroads in this State to maintain cattle-guards at crossings of all highways; and if an animal comes upon the track of a railroad from a highway because of insufficient cattle-guards, the railroad is liable for all injuries to such animals received from its locomotive or cars while so on the track." [2]

§ 1812. What Care required of the Engineer to avoid Killing Cattle on the Track. — "Defendant is bound to make such efforts to stop the train when cattle are upon the track, as they can ordinarily do, with safety to its train and passengers. The servants of a railroad company cannot wantonly or through gross negligence run over stock

[1] Approved in Peoria &c. R. Co. *v.* McIntire, 39 Ill. 299. *Other instructions*, on the hypothesis of the killing of domestic animals through the failure of railway companies to fence their tracks, will be found in Wood *v.* St. Louis &c. R. Co., 58 Mo. 109, 111; Edwards *v.* Kansas City &c. R. Co., 74 Mo. 119; Coryell *v.* Hannibal &c. R. Co., 82 Mo. 401; Hudson *v.* St. Louis &c. R. Co., 53 Mo. 532; Sandusky &c. R. Co. *v.* Sloan, 27 Oh. St. 342, 343; Lande *v.* Chicago &c. R. Co., 33 Wis. 640, 644; Antisdel *v.* Chicago &c. R. Co., 26 Wis. 145; Evansville &c. R. Co. *v.* Barbee, 74 Ind. 169, 173. In Howenstein *v.* Missouri Pacific R. Co., 55 Mo. 33, 36, there are several instructions in an action against a railway company for killing cattle within the corporate limits of a town under the Missouri statute.

[2] Approved in Whitewater R. Co. *v.* Bridgette, 94 Ind. 216, as being in accordance with the law, in the following cases: New Albany &c. R. Co. *v.* Pace, 13 Ind. 411; Indianapolis &c. R. Co. *v.* Irish, 26 Ind. 268; Indianapolis &c. R. Co. *v.* Kibby, 28 Ind. 479; Pittsburg &c. R. Co. *v.* Ehrhart, 36 Ind. 118; Indianapolis &c. R. Co. *v.* Bonnell, 42 Ind. 539; Pittsburg &c. R. Co. *v.* Eby, 55 Ind. 567; Evansville &c. R. Co. *v.* Barbee, 74 Ind. 169; Grand Rapids &c. R. Co. *v.* Jones, 81 Ind. 523. Models of instructions on a similar hypothesis will be found in Missouri Pacific R. Co. *v.* Manson, 31 Kan. 339; in Downing *v.* Chicago &c. R. Co., 43 Iowa, 99, and in St. Louis &c. R. Co. *v.* Edwards, 26 Kan. 74, 75. See, on the subject of railway injuries to domestic animals, 1 Thomp. Neg. 463, *et seq.*

on the road, and, on the other hand, they are not held to the greatest care and diligence, to avoid injury. - - - - If you find from the evidence that the engineer saw the cattle, as soon as he, using ordinary caution, could do so, and that they were not then on the track, that is, in a position to be struck by the engine, he was not bound to stop his train, on the supposition that they might come upon the track. In other words, if you find that the cattle were not on the track, and the engineer, in the exercise of ordinary caution, believed they would not come on the track, he was not bound to come to a full stop, even if he could have done so, before reaching the place where the cattle were. He was not bound to reverse his engine as soon as he saw the cattle on or near the track, unless it appears that a person using ordinary care, and situated as he was, would believe that the cattle would be injured, and act accordingly. - - - - If, however, the cattle were seen by the engineer, as soon as he could reasonably do so, if they were then on the track, and if the engineer, without injury to the train or danger to the passengers, could, in the exercise of ordinary care have stopped his train, or frightened the cattle away with the whistle, and he carelessly neglected to do either, by reason of which negligence the accident occurred, the defendant is liable for such of the cattle as were killed, and for the damages of such as were injured; and if the cattle came on the track after they were seen by the engineer, and he might have safely stopped the train before reaching them, and neglected to do so, then defendant is liable." [1]

[1] Approved in Parker *v.* Dubuque &c. R. Co., 34 Iowa, 400, 401. *Other instructions* on this hypothesis will be found in Edson *v.* Central R. Co., 40 Iowa, 48; Illinois Central R. Co. *v.* Middlesworth, 46 Ill. 494, 498; Toledo &c. R. Co. *v.* Bray, 57 Ill. 515, and Little Rock &c. R. Co. *v.* Finley, 37 Ark. 562, 566 (the court citing and relying upon Little Rock &c. R. Co. *v.* Payne, 33 Ark. 816). The instruction in the former Arkansas case is founded on a statute casting the burden of proof on the defendant. In Kraus *v* Burlington &c. R. Co., 55 Iowa, 338, there is a long instruction as to the circumstances which the jury are to consider in determining what is the *proximate cause* of the injury. In Henderson *v.* Chicago &c. R. Co., 48 Iowa, 220, there is an instruction on the obligation of a railroad company, under the Iowa statute, to erect and maintain a suitable farm crossing, the court citing Spinner *v.* New York &c. R. Co., 67 N. Y. 153. In Bowan *v.* Chicago &c. R. Co., 85 Mo. 533, 538, the following instruction is found, on the obligation to stop a railway train to avoid killing a hog: "If defendant's employés could, by the exercise of ordinary care, have stopped the train so as to have prevented the killing of the hog, the verdict should be for plaintiff."

Subdivision 9. — Railway Fires.

SECTION

1815. Fact of Communication of Fire *Prima Facie* Evidence of Negligence.
1816. What Facts will rebut this Presumption.
1817. A More Specific Direction on the Same Subject.
1818. Hypothesis of Improved Appliances but Negligent Employés.

§ 1815. FACT OF COMMUNICATION OF FIRE *Prima Facie* EVIDENCE OF NEGLIGENCE. — "If you believe from the evidence, that fire was communicated from a locomotive engine used by the defendant upon its railway, to the depot at Normal, on the night in controversy, and if you further believe, from the evidence, that, by reason of such fire, so communicated, the said depot burned up, and that the depot fire directly caused a hotel, then owned by the plaintiff, to take fire, and thereby to burn up, — then the fact that such fire was so communicated should be taken by the jury as full *prima facie* evidence to charge the corporation using the road and the engine, with negligence, unless it further appears from the evidence, that said engine was in good order, and was carefully managed, at the time of the alleged communication of fire, and provided the plaintiff was not guilty of negligence in relation to said fire, and used reasonable efforts to put it out, and save his property." [1]

§ 1816. WHAT FACTS WILL REBUT THIS PRESUMPTION. — "The inference that, because fire escaped from defendant's engine, which damaged the plaintiff, the defendant was guilty of negligence, is fully rebutted, that is, overcome, by the defendant showing to the satisfaction of the jury that it used the best machinery and contrivances to prevent the escape of fire, and that careful and competent servants were employed by defendants; and if such inference of negligence is overcome by evidence of defendant that it had the best machinery and appliances and careful and skillful servants, as aforesaid, then the plaintiff cannot recover, unless the plaintiff has proved, to the satisfaction of the jury, other acts of negligence of defendant which caused the escape of the fire." [2]

§ 1817. A MORE SPECIFIC DIRECTION ON THE SAME SUBJECT. — "The court instructs the jury that, to entitle the plaintiff to recover, he must

[1] Approved in Chicago &c. R. Co. *v.* Pennell, 110 Ill. 437. See 1 Thomp. Neg. 155.

[2] Approved in Wise *v.* Joplin R. Co., 85 Mo. 178, 185.

prove to the satisfaction of the jury: first, that the fire which caused the damage to plaintiff's property was set out and caused by the escape of fire from the fire-box or ash-pan of defendant's engine; and, second, that the escape of such fire was caused by or was the result of the negligence of defendant's agents; and if the jury believe from the evidence that defendant's engine was provided with the best appliances in common use to prevent the escape of fire and was managed and run by a careful and competent engineer and fireman, who exercised due and careful precaution to prevent the escape of fire, then the plaintiff cannot recover, unless the jury believe the defendant or its employés were guilty of actual negligence." [1]

§ 1818. — Hypothesis of Improved Appliances but Negligent Employés. — "Though the jury believe from the evidence that the engines of defendant were supplied with a 'spark arrester' and other contrivances, to prevent the escape of fire from the engine, of the most approved pattern and style; yet if the jury believe from the evidence that the employés or servants of defendant, operating its locomotives and train of cars at the time of the fire mentioned in the petition, failed or neglected to exercise due care or caution in so operating and running said locomotive and train of cars, and that from such want of due care and caution, the said fire was communicated by said locomotive or train to the hay and fence of the plaintiff, described in the petition, then they will find for the plaintiffs." [2]

[1] Approved in Wise *v.* Joplin R. Co., 85 Mo. 178, 185. In approving the foregoing instructions the Supreme Court of Missouri deny the intimation of a contrary doctrine in Smith *v.* Railroad Co., 37 Mo. 287, and cite and rely on the following cases: Fitch *v.* Railroad Co., 45 Mo. 322; Bedford *v.* Railroad Co., 46 Mo. 457; Coates *v.* Railroad Co., 61 Mo. 38; Haley *v.* Railroad Co., 69 Mo. 614; Peppers *v.* Railroad Co., 67 Mo. 716; Kenney *v.* Railroad Co., 70 Mo. 244; Palmer *v.* Railroad Co., 76 Mo. 217; Redmond *v.* Railroad Co., 76 Mo. 550.

[2] Coale *v.* Hannibal &c. R. Co., 60 Mo. 230. *Other useful instructions* in cases for injuries from railway fires will be found in the following cases: Chicago &c. R. Co. *v.* Pennell, 110 Ill. 439, 440; Atchison &c. R. Co. *v.* Stanford, 12 Kan. 356; Wise *v.* Joplin R. Co., 85 Mo. 178, 184; Coale *v.* Hannibal &c. R. Co., *supra*. As to the liability of railway companies for fires set by sparks from their locomotives, see generally, Lowney *v.* New Brunswick R. Co., 78 Me. 479; *s. c.* 7 Atl. Rep. 381; Balsley *v.* St. Louis &c. R. Co., 119 Ill. 68; *s. c.* 8 N. East. Rep. 859; Indiana &c. R. Co. *v.* Foster, 107 Ind. 432; *s. c.* 8 N. East. Rep. 264; Seeley *v.* New York &c. R. Co., 102 N. Y. 719; *s. c.* 7 N. East. Rep. 734; Adams *v.* Young, 44 Oh. St. 80; *s. c.* 4 N. East. Rep. 599, and note; Mahoney *v.*

Subdivision 10. — Miscellaneous.

SECTION

1820. Care Required of the Owners of Fixed Property.
1821. Obstruction of Water by Railway Embankment and Insufficient Culvert.
1822. Collisions on Highway.
1823. A Full Series of Instructions on this Subject.
1824. Effect of the Crowd trying to stop a Runaway Team.
1825. Other Instructions Applicable to Various Situations.

§ 1820. CARE REQUIRED OF THE OWNERS OF FIXED PROPERTY. — "The jury are to determine, as questions of fact, whether the place where the injury occurred was or was not dangerous, and whether the defendants had or had not notice of the dangerous condition of the place; and the fact that others had passed it in safety, prior to the happening of the accident, does not tend to disprove the fact that the place was dangerous, should the evidence show that such was the fact."[1]

St. Paul &c. R. Co., 35 Minn. 361; *s. c.* 29 N. W. Rep. 6; Babcock *v.* Chicago &c. R. Co., 72 Iowa, 197; *s. c.* 28 N. W. Rep. 644; Gibbons *v.* Wisconsin &c. R. Co., 66 Wis. 161; *s. c.* 28 N. W. Rep. 170; Lanning *v.* Chicago &c. R. Co., 68 Iowa, 502; *s. c.* 27 N. W. Rep. 478 and note; Jones *v.* Michigan &c. R. Co., 59 Mich. 437; *s. c.* 26 N. W. Rep. 662; Wolff *v.* Chicago &c. R. Co., 34 Minn. 215; *s. c.* 25 N. W. Rep. 63, and note; Union Pac. R. Co. *v.* Jones, 9 Colo. 379; *s. c.* 12 Pac. Rep. 516; Butcher *v.* Vaca Val. R. Co., 67 Cal. 518; *s. c.* 8 Pac. Rep. 174, and note; International &c. R. Co. *v.* Ragsdale, 67 Tex. 24; *s. c.* 2 S. W. Rep. 515.

[1] This instruction is drawn by the author from the description by Elliott, J., of an instruction given to the jury in Nave *v.* Flack, 90 Ind. 205, 209, upon the question of the liability of the owners or occupiers of fixed property for injuries to customers or other persons coming upon the premises by their implied invitation, through man-traps or through the negligent condition of the premises. The court cite: 1 Thomp. Neg. 307; Lary *v.* Cleveland &c. R. Co., 78 Ind. 323; *s. c.* 41 Am. Rep. 572; Everhart *v.* Terre Haute &c. R. Co., 78 Ind. 292; *s. c.* 41 Am. Rep. 567; Lake Erie &c. R. Co. *v.* Fix, 88 Ind. 381; Sweeny *v.* Old Colony &c. R. Co., 10 Allen (Mass), 368; Bennett *v.* Railroad Co., 102 U. S. 577; Shearm. & Redf. Neg., § 499*a*; 1 Thomp. Neg. 283; Whart. Neg., §§ 824, 826. The above instruction was challenged principally upon the ground that it told the jury that the fact that *others had passed in safety* did not tend to disprove the fact that the place was actually dangerous. In this connection the court also held that the trial court did right in refusing the following instruction: "If the jury find from the evidence that the place where the plaintiff received the injury he complains of, had been used by the defendants for many years as a drive-way, to receive wagon loads of corn containing as large and larger quantities of corn than the load on which the plaintiff was hurt, and that

§ 1821. Obstruction of Water by Railway Embankment and insufficient Culvert. — "Railroad companies, in the construction of their roads over water-courses, are required to leave such water-ways or openings as are sufficient to afford an outlet for all water that may reasonably be expected to flow through such water-course. And this must be with reference to such unusual and extraordinary freshets as might reasonably have been expected, after careful inspection of the size of the stream, the width of its bottom, the height of its banks, its capacity for carrying water, and the surface of the country contributing to its flow; and if they fail to do so, they are liable in damages to the full injury occasioned thereby. A railroad company, however, is not bound to anticipate extraordinary changes of seasons, nor such unusual freshets, or heavy falls of water as could not be detected by a skillful engineer after carefully taking the observation to which I have just referred, nor to guard against every possible contingency. So that, if you find that the damage sustained by plaintiff was the result of such extraordinary rainfalls or freshets, or inundations, as could not be apprehended in the manner referred to, and if you also find that the defendants were not otherwise in fault, the plaintiff cannot recover, and your verdict should be for the defendants." [1]

§ 1822. Collisions on Highway. — "If the jury believe, from the evidence, that the injuries complained of were caused by the negligence or

several hundreds of thousands of bushels of corn had been hauled into the defendants' warehouse through said drive-way and nobody was injured, and that no complaint had ever been made to defendants, or either of them, nor had they or either of them ever heard said drive-way called of not sufficient height by anybody, nor had notice thereof, and plaintiff was hurt in said drive-way in the manner he complains of in his complaint, by accident, then the plaintiff cannot recover." Elliott, J., said: "The court did right in refusing this instruction. If the place was in reality dangerous, and the appellants were negligent, they are liable, although the dangerous place may have been much used. The instruction makes the case turn upon the safe use by others, not upon the actual condition, and in this is erroneous." - - - - In Beach *v.* Frankenberger, 4 W. Va. 718, there is an instruction on the subject of the liability of an owner of real property for an injury to the plaintiff by falling into a cellar thereon, made accessible by the fact of the street having been widened by the municipal authority.

[1] Approved in Union Trust Co. *v.* Cuppy, 26 Kan. 762, 763. In Galena &c. R. Co. *v.* Welch, 24 Ill. 32, a series of instructions will be found applicable to a case where the waters, accummulating against a railway embankment, caused the embankment to burst, whereby the water did damage to the plaintiff.

carelessness of the servant of the defendant, in the course of his employment as such servant, either without any negligence or fault on the part of plaintiff's servant; or without any such fault or negligence on his part as contributed to the injuries complained of; or with no want of such care and skill on his part as could reasonably be expected of a man of ordinary prudence and skill in such a situation, then they will find for the plaintiff. - - - - The jury are instructed that, in determining the question of negligence, they are to take into consideration the situation of both parties, and that if they believe from the evidence that the injury was caused by the negligence or fault of defendant's driver without any greater want of skill or care on the part of plaintiff's driver than could reasonably be expected of a person of ordinary prudence and skill, in such a situation as he was, — the plaintiff is entitled to recover." [1]

§ 1823. A Full Series of Instructions on This Subject. — "The court instructs the jury that the gist of plaintiff's action in this case is negligence, and the plaintiff cannot recover unless the evidence shows a case of negligence on the part of the defendant; and if the jury find from evidence that both parties by their negligence, immediately contributed to produce the injury, the plaintiff cannot recover, and the verdict should be for the defendant. - - - - The court instructs the jury that if they find, from the evidence, that, at the time of the collision between the wagons of plaintiff and defendant, the team of defendant was moving on a walk, and near the east side of Fourteenth street, and that there was a wide space open to the west of the defendant's wagon, and that the street was clear and unobstructed on that side, so that plaintiff, before the collision, by reasonable care and diligence could have reined his horse to the left, and thus avoided the accident, and that it was owing in part to plaintiff's carelessness and negligence in not so reining his horse that the accident was caused, they should find for the defendant. - - - - The court instructs the jury that, if they find from the evidence that the immediate cause of the plaintiff being thrown from his wagon and receiving the injuries complained of, in his second cause of action, was his holding to the lines after his horse broke loose from his wagon, the verdict should be for the defendant on said count, even though the jury should find for plaintiff on his first cause of action.

[1] Approved in Coursen *v.* Ely, 37 Ill. 340. Citing Aurora Branch R. Co. *v.* Grimes, 13 Ill. 588; Dyer *v.* Talcott, 16 Ill. 300; Galena &c. R. Co. *v.* Fay, 16 *Ib.* 588; Same *v.* Jacobs, 20 *Ib.* 496. See 1 Thomp. Neg. 380, *et seq.*

Though the jury believe, from the evidence, that the wagon of the defendant was on the wrong side of the road, yet if there was plenty of room for plaintiff to pass it, without a collision, by reining his horse a little to the other side, and that plaintiff was careless and negligent in not so reining his horse, he cannot recover, and the verdict should be for the defendant. - - - - The jury are instructed that the plaintiff is entitled to recover against the defendant in this case, if, from the evidence adduced before them, they believe that the plaintiff was the owner of the horse and wagon which he was driving, at the time of the collision with defendant's team; that he was driving the same with proper care and caution upon the public streets of the city of St. Louis; that the defendant's driver, through carelessness or unskillfulness drove the defendant's team against the plaintiff's wagon, and that plaintiff in direct consequence of such collision was injured in his person or property as alleged in the petition." [1]

§ 1824. Effect of the Crowd Trying to Stop a Runaway Team. — "That the right of the plaintiff to recover in this action is not affected by the action of the crowd in trying to stop the defendant's team, whether said crowd did or did not, by their action, cause the team to swerve from the course it otherwise would have taken. - - - - That, if the jury should find that the action of the crowd swayed the horses of the defendant from the course they would have taken but for said action, and that the collisions would not have taken place or the damage been done had the crowd not interfered, yet the defendant is equally responsible as if no such interference had occurred." [2]

§ 1825. Other Instructions Applicable to various Situations. — Other instructions will be found in the cases cited below, applicable to the following situations: Injury from the breaking of a rail in cold weather; [3] action against a manufacturing corporation for injuries received from the explosion of a steam boiler; [4] in the same case, upon the subject of reasonable care and skill in the person in charge of the boiler; [5] in the case of an injury received by a person standing upon a railway platform and struck by a piece of timber thrown out of a box

[1] Approved in Schools *v.* Woodburn, Sarven Wheel Co., 56 Mo. 174.

[2] Approved in Griggs *v.* Fleckenstein, 14 Minn. 82, 83.

[3] Devlin *v.* Wabash &c. R. Co., 87 Mo. 545, 552 (erroneously refused though not well drawn).

[4] Smith *v.* Warden, 86 Mo. 382, 395.

[5] Smith *v.* Warden, *supra*.

car;[1] in an action against a contractor for personal injuries received through the falling of a building;[2] in an action for damages alleged to have resulted from fire communicated from the defendant's premises (a brewery);[3] in an action for damages for the destruction of the plaintiff's house by fire alleged to have been communicated by sparks from the flues of the defendant's mill;[4] in an action by a father for the death of his child, caused by falling into an unguarded excavation on defendant's premises;[5] in an action for an injury sustained from a blast in a stone quarry;[6] in an action by a widow against an architect and superintendent of the erection of a building, to recover damages for the death of her husband, caused by the falling of the building.[7]

[1] Toledo &c. R. Co. *v.* Maine, 67 Ill. 299.

[2] Horner *v.* Nicholson, 56 Mo. 222.

[3] Gagg *v.* Vetter, 41 Ind. 231.

[4] Hoyt *v.* Jeffers, 30 Mich. 194 (very full and explicit charge).

[5] Mayhew *v.* Burns, 103 Ind. 328, 343 (the court holding that the instruction was erroneously refused, and citing 1 Thomp. Neg. 169).

[6] Wright *v.* Compton, 53 Ind. 340; citing Hay *v.* Cohoes Co., 2 N. Y. 159; Queen *v.* Mutters, 34 L. J. (Mag. Cases) 22; Driscoll *v.* Newark &c. Co., 37 N. Y. 367.

[7] Lottman *v.* Barnett, 62 Mo. 165.

CHAPTER LV.

CARRIERS OF GOODS AND OTHER BAILEES.

ARTICLE I.—BURDEN OF PROOF AND DOCTRINE OF *Prima Facie* CASE IN ACTIONS AGAINST CARRIERS AND OTHER BAILEES.
ARTICLE II.— PRECEDENTS OF INSTRUCTIONS IN SUCH ACTIONS.

ARTICLE I.— BURDEN OF PROOF AND DOCTRINE OF *Prima Facie* CASE IN ACTIONS AGAINST CARRIERS AND OTHER BAILEES.

SECTION

1830. An Apology.
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1864. Where there is a Special Exemption and then a Deviation.
1865. Strength of the Evidence to Excuse.
1866. Effect of Recital in Bill of Lading that Goods were received in Good Condition.
1867. Burden to show Compliance with Engagement to Present Claim within a Limited Time.

§ 1830. An Apology. — The writer may offer, as an apology for troubling the profession with a discussion of this question, that in his researches he has discovered no subject in respect of which the decisions are in a greater state of confusion. Decisions in the same State upon this question contradict each other in such a manner, that the same court occupies the spectacle of swinging back and forth like the oscillations of a pendulum.[1] The same cases even contradict themselves. As great a writer as Dr. Greenleaf stated one doctrine in one section of his work on evidence, and the contrary doctrine in the very next section. Thus, after stating the effect of a notice brought home to the shipper limiting the common-law liability of the carrier, he says: "But in all such cases of notice, the burden of proof of negli-

[1] Compare with each other the following cases in New York: Read *v.* Spaulding, 30 N. Y. 630, 645, Michaels *v.* New York &c. R. Co., 30 N. Y. 564, 578, and Collins *v.* Bennett, 46 N. Y. 490, with Lamb *v.* Camden &c. R. Co., 46 N. Y. 271, and Whitworth *v.* Erie R. Co., 87 N. Y. 413. In Pennsylvania: Hays *v.* Kennedy, 41 Pa. St. 378, 384, with Farnham *v.* Camden &c. R. Co., 55 Pa. St. 53. And make what sense you can out of the following jumble in Missouri: Ketchum *v.* Express Co., 52 Mo. 390; Wolf *v.* American Exp. Co., 43 Mo. 421; Read *v.* Railway Co., 60 Mo. 199; Davis *v.* Wabash &c. R. Co., 89 Mo. 349, 352; Levering *v.* Railway Co., 42 Mo. 88; Drew *v.* Red Line Transit Co., 3 Mo. App. 495.

gence, malfeasance, or misfeasance, or of the waiver, is on the party who sent the goods." [1] Towards the close of the next section of his text he says: "And if the acceptance of the goods was special, the burden of proof is still on the carrier, to show, not only that the cause of the loss was within the terms of the exception, but also that there was on his part no negligence or want of due care." [2] Confusion has been added to this subject by the fact that some courts have quoted and relied upon the statement of the law made by Dr. Greenleaf in section 218, while other courts have quoted and relied upon the same doctrine made by him in section 219.

§ 1831. **Distinctions concerning the Burden of Proof.** — Much of the confusion among the adjudications upon the subject which it is proposed to consider, grows out of loose and unscientific conceptions concerning what is called the burden of proof. Many judges seem to use the term as a sort of jargon, without any definite conception of its real meaning. Those who have some definite conception of its meaning are unfortunately divided in opinion upon the two following propositions: 1. The first is that so long as the evidence is directed to a single issue, or, more properly speaking, to a single proposition of fact, the burden of proof never shifts, no matter how little evidence is adduced by the party sustaining the burden, or how much is adduced by the opposing party.[3] 2. The other is that, although the evidence may

[1] 2 Greenl. Ev., § 218. To this statement he cites Harris *v.* Packwood, 3 Taunt. 264, and Marsh *v.* Horne, 5 Barn. & C. 322, both of which are generally regarded as authority for the doctrine of his text.

[2] 2 Greenl. Ev., § 219. To this he cites Swindler *v.* Hillard, 2 Rich. L. (S. C.) 286, — a decision which introduces us to a class of American cases which distinctly deny the doctrine of the English cases cited in support of the preceding *dictum* of the learned author.

[3] See the following cases, where the distinction between the shifting of the *burden of proof* and the shifting of the *weight of evidence*, is stated and illustrated: Powers *v.* Russell, 13 Pick. (Mass.) 69, 76 (the leading case on this subject), opinion by Chief Justice Shaw; Tourtellot *v.* Rosebrook, 11 Metc. (Mass.) 460; Morrison *v.* Clark, 7 Cush. (Mass.) 213; Tarbox *v.* Eastern Steamboat Co., 50 Me. 345; Central Bridge Corp. *v.* Butler, 2 Gray (Mass.), 130, 132; Speery *v.* Wilcox, 1 Metc. (Mass.) 270; State *v.* Flye, 26 Me. 312; Broomfield *v.* Smith, 1 Mees. & W. 542.

be directed to the same issue or proposition of fact, yet when the party who in the beginning sustains the burden in respect of such issue or proposition of fact, introduces such evidence as, if believed, makes out what is frequently called a *prima facie* case, that is, shows that the proposition which he affirms is true, — the burden of proof *shifts* upon the other party to rebut or to avoid the so-called *prima facie* case thus made.[1] This conception of the burden of proof, as it loosely floats in the minds of many judges, is, that the burden of proof shifts from side to side, in the course of a trial, in respect of a single proposition of fact, accordingly as the evidence adduced by either party, in support of or in opposition to the proposition, preponderates over that adduced by the other, — more briefly, that the burden of proof shifts with the shifting of the weight of evidence. This conception might possibly not be entirely inaccurate and destitute of practical value in cases in equity or admiralty, where the judge sits as the trier of the fact, as well as the exponent of the law. In such a case, he could notify the defendant whether the plaintiff, in his opinion, had made out what is called a *prima facie* case; and, having heard the defendant's countervailing evidence, he could notify the plaintiff whether, in his opinion, it preponderated over the plaintiff's evidence, and whether the plaintiff, in order to a recovery, must assume the burden of rebutting it. But in jury trials, where, except when it comes to the question of granting a nonsuit or directing a verdict, the judge has nothing to do with the probative force of the evidence, but it is matter to be dealt with exclusively by the jury, this conception of the shifting of the burden of proof is at once destitute of practical value and of juridical sense. But whether we adopt the conception of Chief Justice Shaw and other New England judges, that the burden of proof never shifts with the shifting of the weight of evidence, so long as the evidence is directed to the same proposition of fact, or whether we adopt the more prevalent conception that it does shift whenever the party having the

[1] Many cases, involving this conception of the nature of the burden of proof and applying it to the subject under discussion, are hereafter considered. *Post*, § 1850, *et seq.*

affirmative of the issue makes out what is called a *prima facie* case, — our first inquiry must be, What evidence is of sufficient probative value to make out the so-called *prima facie* case and entitle the plaintiff to recover unless it is rebutted?

§ 1832. Proof of Delivery by the Bailor and Non-Delivery, or Re-Delivery in a Damaged Condition, Casts upon the Bailee the Burden of Explaining. — The broadest proposition which can be stated in respect of the question under discussion is, that proof of delivery of the goods to the bailee and of non-delivery by him,[1] or of delivery to the bailee in good condition and of re-

[1] Boies *v.* Hartford &c. R. Co., 37 Conn. 272; Cass *v.* Boston &c. R. Co., 14 Allen (Mass.), 448 (Bigelow, C. J., dissenting); Safe Deposit Co. *v.* Pollock, 85 Pa. St. 391; Brown *v.* Waterman, 10 Cush. (Mass.) 117; Goodfellow *v.* Meegan, 32 Mo. 280; McDaniels *v.* Robinson, 26 Vt. 317, 339; Fairfax *v.* New York &c. R. Co., 67 N. Y. 11 (reversing *s. c.* 5 Jones & Sp. 516); Steers *v.* Liverpool &c. Steamship Co., 7 N. Y. 51; Burnell *v.* New York &c. R. Co., 45 N. Y. 184; Claflin *v.* Meyer, 75 N. Y. 260; Wilson *v.* Southern Pacific R. Co., 62 Cal. 164; Beardslee *v.* Richardson, 11 Wend. (N. Y.) 25; Willard *v.* Bridge, 4 Barb. (N. Y.) 361, 367; Lockwood *v.* Bull, 1 Cow. (N. Y.) 322; Bush *v.* Miller, 13 Barb. (N. Y.) 481; Riley *v.* Horne, 5 Bing. 217, 226; Magnin *v.* Dinsmore, 56 N. Y. 168; Cumins *v.* Wood, 44 Ill. 416, 421; Lichtenheim *v.* Boston &c. R. Co., 11 Cush. (Mass.) 70; Stuart *v.* Bigler, 98 Pa. St. 80; Platt *v.* Hibbard, 7 Cow. (N. Y.) 501; Golden *v.* Romer, 20 Hun (N. Y.), 438; Pennsylvania R. Co. *v.* Miller, 87 Pa. St. 395, 398; Runyan *v.* Caldwell, 7 Humph. (Tenn.) 134; Southern Exp. Co. *v.* Hess, 53 Ala. 19; Tarbox *v.* Eastern Steamboat Co., 50 Me. 339, 343, Beckman *v.* Shouse, 5 Rawle (Pa.), 179, 189; Hawkes *v.* Smith, 1 Car. & M. 72; Tucker *v.* Cracklin, 2 Stark. 385; Day *v.* Ridley, 16 Vt. 48; Van Winkle *v.* South Carolina R. Co., 38 Ga. 32; Little *v.* Boston &c. Railroad, 66 Me. 239; Adams Exp. Co. *v.* Stettauers, 61 Ill. 184, 187; Fairfax *v.* New York, &c. R. Co , 73 N. Y. 167, 170; Turnbull *v.* Citizens' Bank, 16 Fed. Rep. 145, 148; United States *v.* Pacific Express Co., 15 Fed. Rep. 867; Turney *v.* Wilson, 7 Yerg. (Tenn.) 340; Camden &c. R. Co. *v.* Baldauf, 16 Pa. St. 67, 77; Clark *v.* Spence, 10 Watts (Pa.) 335; Verner *v.* Sweitzer, 32 Pa. St. 208, 214; South. &c. R. Co. *v.* Henlein, 52 Ala. 606, 612; Swindler *v.* Hilliard, 2 Rich. L. (S. C.) 286, 305; United States Exp. Co. *v.* Backman, 28 Oh. St. 144; Berry *v.* Cooper, 28 Ga. 543; Hill *v.* Sturgeon, 28 Mo. 223; Grogan *v.* Adams Exp. Co., 5 Cent. Rep. 298; Davidson *v.* Graham, 2 Oh. St. 131, 141; Whitesides *v.* Russell, 8 Watts & S. (Pa.) 44, 49; Alden *v.* Pearson, 3 Gray (Mass.), 342; Clark *v.* Barnwell, 12 How. (U. S.) 272; King *v.* Shepherd, 3 Story (U. S.), 349; Gray *v.* Mobile Trade Co., 55 Ala. 387, 399; Shaw *v.* Gardner, 12 Gray (Mass.), 488; Celton *v.* Cleveland &c. R. Co., 67

delivery of them by him in a broken, deficient or damaged condition,[1] or of a delivery of them to him for carriage and of his failure to re-deliver them according to his undertaking within a reasonable time,[2] without more,— casts upon him the burden of showing that the loss happened notwithstanding the exercise of due care on his part to prevent the same.

Pa. St. 211; Wertheimer *v.* Pennsylvania R. Co., 17 Blatchf. (U. S.) 421; Graham *v.* Davis, 4 Ohio St. 362; Chicago &c. R. Co. *v.* Moss, 60 Miss. 1003; *s. c.* 45 Am. Rep. 428; Chicago &c. R. Co. *v.* Abels, 60 Miss. 1017, 1023; Patterson *v.* Clyde, 67 Pa. St. 500, 506; Little Rock &c. R. Co. *v.* Talbot, 39 Ark. 523, 529; Hunt *v.* Propeller Cleveland, 6 McLean (U. S.), 76; Brown *v.* Adams Exp. Co., 15 W. Va. 812, 818; Dunseth *v.* Wade, 3 Ill. 285, 288; Smyrl *v.* Niolon, 2 Bailey (S. C.), 421; Dale *v.* Hall, 1 Wils. 281; Mitchell *v.* United States Exp. Co., 46 Ia. 214; Hays *v.* Kennedy, 41 Pa. St. 378, 384; Humphreys *v.* Reed, 6 Whart. (Pa.) 435, 444; Kirk *v.* Folsom, 23 La. Ann. 584; Price *v.* Ship Uriel, 10 La. Ann. 413; First Nat. Bank *v.* Graham, 85 Pa. St. 91; Hussey *v.* Saragossa, 3 Woods (U. S.), 380; Choate *v.* Crowninshield, 3 Cliff. (U. S.) 184; Rich *v.* Lambert, 12 How. (U. S.) 347; Propeller Niagara *v.* Cordes, 21 How. (U. S.) 26; Chonteaux *v.* Leech, 18 Pa. St. 224; Hooper *v.* Rathbone, Taney (U. S.), 519; Bell *v.* Reed, 4 Binn. (Pa.) 127, 135; The Mohler, 21 Wall. (U. S.) 230; The Ocean Wave, 3 Biss. (U. S.) 317; Levering *v.* Union &c. Co., 42 Mo. 88, 95; Ang. Carr., § 202; Story Bailm., § 529; 2 Kent Com. 587. *Contra*, Lamb *v.* Camden &c. R. Co., 46 N. Y. 271 (two of the five judges dissenting).

[1] Collins *v.* Bennett, 46 N. Y. 490; Logan *v.* Mathews, 6 Pa. St. 417; Funkhouser *v.* Wagner, 62 Ill. 59; Bennett *v.* O'Brien, 37 Ill. 250; Merriman *v.* Brig May Queen, 1 Newb. (U. S.) 464, 474; Montgomery &c. R. Co. *v.* Moore, 51 Ala. 396; Hall *v.* Cheney, 36 N. H. 26, 30; American Exp. Co. *v.* Sands, 55 Pa. St. 140; Hastings *v.* Pepper 11 Pick. (Mass.) 41, 44; Steele *v.* Townsend, 37 Ala. 241, 253; Shriver *v.* Sioux City &c. R. Co., 24 Minn. 506; Tardos *v.* Ship Toulon, 14 La. Ann. 429; Rochereau *v.* Bark Hansa, 14 La. Ann. 431; Hussey *v.* Saragossa, 3 Woods (U. S.), 380; Murphy *v.* Staton, 3 Munf. (Va.) 239; Tarbox *v.* Eastern Steamboat Co., 50 Me. 339, 343; Davis *v.* Wabash &c. R. Co., 89 Mo. 340; *s. c.* 1 S. W. Rep. 327; Buddy *v.* Wabash &c. R. Co., 20 Mo. App. 206; Baker *v.* Brinson, 9 Rich. L. (S. C.) 201; Union Exp. Co. *v.* Graham, 26 Oh. St. 595; Singleton *v.* Hilliard, 1 Strobh. L. (S. C.) 203, 218; Farnham *v.* Camden &c. R. Co., 55 Pa. St. 53; Clark *v.* Barnwell, 12 How. (U. S.) 272; Spyer *v.* The Mary Belle Roberts, 2 Sawy. (U. S.) 1; Hunt *v.* The Cleveland, 6 McLean (U. S.), 76, 79; Roberts *v.* Riley, 15 La. Ann. 103; Turney *v.* Wilson, 7 Yerg. (Tenn.) 340, 343; Ewart *v.* Street, 2 Bailey (S. C.), 157, 161; Schooner Emma Johnson, 1 Sprague (U. S.), 527; Bearse *v.* Ropes, 1 Sprague (U. S.), 331; Letchford *v.* Golden Eagle, 17 La. Ann. 9.

[2] Nettles *v.* South Carolina R. Co., 7 Rich. L. (S. C.) 190; Mann *v.* Birchard, 40 Vt. 326, 338.

§ **1833. Reason of the Rule.** — The reason of the rule has been restated and dilated upon in many judicial opinions. It is briefly this: that, the bailee being in possession of the goods, the circumstances under which they were lost or damaged are peculiarly within his knowledge or the knowledge of his servants, and not within the knowledge of the bailor; or at least, more probably within the knowledge of the bailee and his servants than within that of the bailor; or, if not within his knowledge, or that of his servants, his or their want of knowledge is blameworthy, because, from the nature of his undertaking, he has assumed the duty of care and supervision, the performance of which would enable him to know the circumstances attending any accidental or inevitable loss or damage; — upon either of which views he ought to be required to disclose to the bailor the circumstances attending the loss or damage, and to establish them in a court of justice; because (1) good faith demands that he make such a disclosure; and (2) because the law, on grounds of sound policy and necessity, ordinarily requires that party to produce evidence who, from his situation and the nature of the case, can more easily produce it than the other can.

In a case very much cited, which was held over for consideration during the Long Vacation, and which must therefore be regarded as a well-considered case, the reason for the rule, as applicable to the case of a *common carrier*, was thus stated by Best, C. J.: "When goods are delivered to a carrier, they are usually no longer under the eye of the owner; he seldom follows or sends any servant with them to the place of their destination. If they should be lost or injured by the grossest negligence of the carrier or his servants, or stolen by them, or by thieves in collusion with them, the owner would be unable to prove either of these causes of loss; his witnesses must be the carrier's servants, and they, knowing that they could not be contradicted, would excuse their masters and themselves." [1]

[1] Riley *v.* Horne, 5 Bing. 217, 220. In this case the court laid down the rule, as applicable to a case where the plaintiff alleges a loss by negligence, that "a *loss*, the cause of which is not shown, is sufficient evidence of *simple negligence*, although not of *gross negligence*."

A similar reason was given by Lawrence, J., speaking for the court, with reference to the liability of a *warehouseman* to whom goods had been intrusted for storage, some of which had been returned in a broken condition and others not returned at all: "In cases of this sort it would be very difficult for the plaintiff to show in what way the injury or loss had occurred, or that they had occurred by the actual negligence of the defendants, or their employés. The plaintiff would not know what persons had been engaged in the defendant's warehouse, nor where to find the testimony necessary to support his action. On the other hand, the defendants would know, or ought to know, what persons had had access to the goods, and could easily show that proper care had been exercised in regard to them, if such was the fact. For this reason we hold it the more reasonable rule, when the bailor has shown he stored the goods in good condition, and they were returned to him in a damaged state, or not returned at all, that the law will presume negligence on the part of the bailee and impose on him the burden of showing he has exercised such care as was required by the nature of the bailment." [1]

"All persons," said Coulter, J., speaking with reference to a case of *hiring*, "who stand in fiduciary relations to others, are bound by the observance of good faith and candor. The bailor commits his property to the bailee, for reward, in the case of hiring, it is true; but upon the implied undertaking that he will observe due care in its use. The property is in the possession and under the oversight of the bailee, whilst the bailor is at a distance. Under these circumstances, good faith requires that, if the property is returned in a damaged condition, some account should be given of the time, place and manner of the occurrence of the injury, so that the bailor may be enabled to test the accuracy of the bailee's report, by suitable inquiries in the neighborhood and locality of the injury. If the bailee returns the buggy (which was the property hired in this case), and merely says, 'Here is your property broken to pieces,' what would be the legal and just presumption? If stolen property is found in the posses-

[1] Cummins *v.* Wood, 44 Ill. 416, 421; reaffirming Bennett *v.* O'Brien, 37 Ill. 250.

sion of an individual, and he will give no manner of account as to the means by which he became possessed of it, the presumption is that he stole it himself. This is a much harsher presumption than the one indicated by the court in this case. The bearing of the law is always against him who remains silent when justice and honesty require him to speak. It has been ruled that negligence is not to be inferred unless the state of facts cannot otherwise be explained; but how can they be explained, if he in whose knowledge they rest will not disclose them? And does not the refusal to disclose them justify the inference of negligence." [1]

The rule was thus aptly stated by Peckham, J., in a case in New York, where the owner of a *horse hired* it to another, received it back foundered, and brought an action against the bailee for its conversion: "Here, it will be observed, this horse was in the exclusive possession of the defendant. He had charge and care of him for hire. During that charge he is injured in a way that ordinarily does not occur without negligence; usually not without the horse has been used and then neglected. This may be safely said on the evidence and upon human experience. In such case the burden rests with the custodian, to show how the injury occurred, and that he was not guilty of the negligence that caused it. This rests upon the defendant for two reasons. First, because the facts are within the defendant's peculiar knowledge, and he should, therefore, prove them. Second, such an injury does not usually occur without negligence on the part of the custodian of the animal." [2]

§ 1834. A Middle Rule adopted by the English Judges. — The decision last cited in the preceding section leads me to the statement of the principle now acted upon by the English judges, which principle, the reader must already have perceived, is very sparingly admitted, and often denied, in American jurisdictions. This principle has been often quoted, in the language of Erle,

[1] Logan *v.* Mathews, 6 Pa. St. 417, 419.

[2] Collins *v.* Bennett, 46 N. Y. 490, 494.

C. J., in delivering the opinion of the Court of Exchequer Chamber, in an action for damages for a personal injury grounded upon an allegation of negligence: "There must be reasonable evidence of negligence. But where the thing is shown to be under the management of the defendant or his servants, and the accident is such as, in the ordinary course of things, does not happen if those who have the management used proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care."[1] In view of this principle, the English judges have concluded that the question whether the mere fact that the goods were damaged in transit will be evidence of negligence to charge a carrier, whose liability is limited by contract, unless he explains the damage in a manner consistent with the exercise of reasonable care on his part, will depend upon the nature of the damage in reference to the circumstances of the case. Those judges seem to agree that it is not sufficient, as a general rule, to charge the carrier, for the plaintiff merely to prove damage.[2] In such a case Willes, J., explained his view by the following illustration: "If a shipment of sugar took place under a bill of lading, such as the present one [exempting the carrier from liability for 'breakage, leakage or damage'], and it was proved that the sugar was sound when put on board, and had become converted into syrup before the end of the voyage, — if that was put as an abstract case, I think the ship owner would not be liable, because there may have been storms which occasioned the injury, without any want of care on the part of the captain or crew; the injury alone, therefore, would be no evidence of negligence on their part. But if it was proved that the sugar was damaged by fresh water, then there would be a strong probability that the hatches had been negligently left open, and the rain had so come in and done the injury; and, though it would be possible that some one had willfully poured fresh water down into the hold, this would be so improbable that a jury would be justified in finding that

[1] Scott *v.* London &c. Docks Co., 3 Hurl. & Colt. 596, 601.

[2] Bovill, C. J., in Czech *v.* General Steam Nav. Co., L. R. 3 C. P. 14, 18.

the injury had been occasioned by negligence in the management of the ship."[1] The English view is also well illustrated by what was decided and said by the judges in a case where goods were shipped on board a steamer, under a bill of lading which contained an exemption from liability for "breakage, leakage, or damage," and were found, at the end of the voyage, to be injured by oil. It was proved that there was no oil in the cargo, but that there were two donkey engines on deck, near the place where the goods were stored, in lubricating which, oil was used; but there was no direct evidence to show the manner in which the injury occurred. It was held that these facts constituted evidence of negligence to go to the jury. Boville, C. J., said: "The evidence, in every case, must vary according to its peculiar circumstances; but if the goods are damaged, and no reasonable explanation of the damage can be given except the negligence of the defendants, the jury are justified in finding that such negligence is proved." Byles, J., also said: "It might not have been sufficient to prove that the injury occurred on board the vessel; but it was shown that the goods were injured by oil, and that they were in close proximity to engines, in lubricating which, oil must have been used, and that no other oil was near them. It was also shown that there was no defect in the engines, and no accident on the voyage. If all this did not amount to conclusive evidence, it certainly was strong *prima facie* evidence, that the injury occurred through the negligence of the defendants."[2]

§ 1835. **American Decisions Approving the English Rule.**— The principle affirmed by Erle, C. J., in the language above quoted, was quoted with approval by Mr. Justice Field, in giving the opinion of the Supreme Court of the United States upon the question of what is sufficient evidence of negligence to charge a carrier, and the learned justice added the following observation: "A presumption of negligence from the simple occurrence of an

[1] Czech *v.* General Steam Nav. Co., L. R. 3 C. P. 14, 19.

[2] Czech *v.* General Steam Nav. Co., L. R. 3 C. P. 14, 18, 20.

accident seldom arises, except where the accident proceeds from an act of such a character that, when due care is taken in its performance, no injury ordinarily ensues from it in similar cases, or where it is caused by the mismanagement or misconstruction of a thing over which the defendant has immediate control, and for the management or construction of which he is responsible."[1] A case in the Supreme Court of New York proceeded upon a similar conception of the law. The plaintiff brought an action on the case against one who had hired his horse, for negligently taking care of the horse, so that it became of no value. It was ruled that the burden of proof lay upon the plaintiff; that it was not enough for him to show that the horse became disabled, but that it was incumbent upon him to show that it became disabled by the fault of the defendant.[2] While it may be doubted whether the rule thus stated is the law in New York at the present time, — it should be stated that an early English *nisi prius* case supports the same view. The action was assumpsit for not taking care of a horse hired by the defendant of the plaintiff. The plaintiff proved the hiring of the horse; that it was returned to him with its knees broken in consequence of a fall whilst used by the defendant; and that it had, before that time, been let out to hire, and had never fallen down. It was said by Le Blanc, J.: "The plaintiff must give *some* evidence of negligence, and as he had given none in this case, the plaintiff must be nonsuited."[3] The same view was taken by the Supreme Court of Michigan, in a case where the circumstances of the injury were furnished by the evidence adduced to prove the bailment. A man loaned a *flag* to his employer, helped him hoist it, left it flying, and then went away. It was afterwards damaged by a hailstorm. It was held that the employer was not liable for the damage, without proof that he had failed to take due care of it.[4] If the flag had been redelivered in an injured condition, and there had been no evi-

[1] Transportation Co. *v.* Downer, 11 Wall. (U. S.) 129, 134.

[2] Harrington *v.* Snyder, 3 Barb. (N. Y.) 380; citing Newton *v.* Pope, 1 Cow. (N. Y.) 109.

[3] Cooper *v.* Barton, 3 Camp. 5, note.

[4] Beller *v.* Schultz, 44 Mich. 529; *s. c.* 38 Am. Rep. 280.

dence as to how it had become injured, it is conceived by the writer that the case might have been different. The same view has been taken in two American courts in respect of the liability of a *livery-stable keeper* for an injury to a horse committed to his care. Such a bailee, it need scarcely be said, is not an insurer, but is liable only for the failure to use ordinary care; but these courts have gone further and have held that, in such a case, the burden of proving the absence of this ordinary care, and the presence of that negligence which makes the bailee liable, is ordinarily upon the bailor.[1]

§ 1836. **As to Non-delivery: Demand and Refusal a Conversion.** — It is merely another way of stating the proposition embodied in a preceding section, to say that, as a general rule, a demand by the bailor or owner, upon the bailee, for the redelivery of the thing bailed, after the arrival of the time when, by the terms of the bailment, the latter is required to redeliver it, and a refusal by the bailee to redeliver it, is, without more, evidence of a tortious conversion of it, unless the circumstances of the case in themselves negative such a conclusion.[2] Mr. Justice Story states this to be the rule of the *civil law* in the case of a *pledge* or *pawn*, and he conceives it to be also the rule of the common law, but with this qualification, —

[1] Carrier *v.* Dorrance, 19 S. C. 30; Dennis *v.* Huyck, 48 Mich. 620; *s. c.* 42 Am. Rep. 479. In the Michigan case the plaintiff himself tied the horse in the stall, and it got loose and was injured through eating from a bag of corn on the barn floor; and a judgment for the plaintiff was reversed because the court refused to give a series of instructions to the effect that the plaintiff must show negligence on the part of the defendant and a freedom from negligence on his own part, and that "the negligence of the defendant must be made out and established by proof, and not left to be inferred from circumstances." The decision on its facts is unquestionably right, since a reasonable inference of negligence could not be predicated upon the fact that the plaintiff's horse got loose after being tied by himself, unless it should be held negligence to leave a bag of corn in a stable in such a place that a horse, getting loose, could eat from it, — which, upon ordinary experience, could hardly be affirmed.

[2] Philpott *v.* Kelley, 3 Ad. & El. 106; Cranch *v.* White, 1 Bing. (New Cas.) 414; Ang. Carr., § 38; Story Bailm., § 339; Vaughan *v.* Webster, 5 Harr. (Del.) 256; Lockwood *v.* Bull, 1 Cow. (N. Y.) 322; *ante*, § 1832.

that "if a suit should be brought against the pawnee for a negligent loss of the pawn, there it would be incumbent on the plaintiff to support the allegations of his declaration by the proper proofs, and the *onus probandi*, in respect to negligence, would be thrown on him." [1]

§ 1837. Delivery to the Wrong Person a Conversion. — Delivery of the property by the bailee to a person not entitled thereto, is in law a conversion of the property, and renders the bailee liable, irrespective of the question of negligence or bad faith in making such delivery.[2] This is especially true in respect of carriers. "No obligation of the carrier," says Peckham, J., "is more rigorously enforced than that which requires delivery to the proper person; and the law will allow, in fact, of no excuse for a wrong delivery, except the fault of the shipper himself; and when there is any doubt, and it can be determined by documentary evidence, its production should be required." [3]

§ 1838. Some Evidence of Non-delivery Necessary to Shift Burden of Proof. — It is a general, though not an universal

[1] Story Bailm., § 339. This is probably the meaning of the decision in an old *nisi prius* case before Trevor, C. J., in the third year of Ann, wherein it was ruled that "trover lies not against a carrier for negligence, as for losing a box, but it does for an actual wrong, as if he break it to take out goods or sell it. And therefore denial is no evidence of a conversion, if the thing appears to have been really lost by negligence; but if that does not appear, or if the carrier had it in custody when he denied to deliver it, it is good evidence of a conversion." Anon., 2 Salk. 655. In another old case it was ruled that trover would not lie against a wharfinger from whose possession goods had been stolen or lost. Ross *v.* Johnson, 5 Burr. 2825. Though it was held that it would lie against the captain of a ship for delivering goods, against an express direction, to a wharfinger, on account of a claim for wharfage which was not made out. Syeds *v.* Hay, 4 T. R. 260. For a precedent of an instruction submitting the case to the jury on the theory of conversion, where the plaintiff's trunk was lost in the hands of an omnibus line, see Verner *v.* Sweitzer, 32 Pa. St. 208, 209.

[2] Willard *v.* Bridge, 4 Barb. (N. Y.) 361, 367; Hawkins *v.* Hoffman, 6 Hill (N. Y.), 588; Lubbock *v.* Inglis, 1 Stark. R. 104; Clark *v.* Spence, 10 Watts (Pa.), 335, 337, *per* Rogers, J.

[3] Furman *v.* Union Pacific R Co. 106 N. Y. 579, 585, *s. c* 9 Cent. Rep. 285; citing Hutch. Carr., § 130; Ang. Carr., § 324.

rule, that, where the *law presumes* the affirmative of any matter in issue, it is incumbent on the party who avers the contrary in his pleading, to prove it, although this may require him to prove a negative. Thus, where any act is required to be done by a person, the omission of which would make him guilty of a criminal neglect of duty, the law, it has been held, presumes the affirmative, and throws the burden of proving the negative upon the party who insists upon it. Therefore, where the plaintiff declared that the defendants, who had chartered his ship, put on board a dangerous commodity, by which a loss happened, without due notice to the captain, or to any other person employed in the navigation, it lay upon him to prove such negative averment.[1] So, in a suit for tithes in a spiritual court, the defendant pleaded that the plaintiff had not read the Thirty-Nine Articles, and the court put the defendant to prove it, though a negative; whereupon he moved the King's Bench for a prohibition, which was denied, on the ground that in such a case the law will presume that a parson has read the Articles; for otherwise he would lose his benefice. "And when the law presumes the affirmative, then the negative is to be proved."[2] So, upon an information against Lord Halifax for refusing to deliver up the rolls of the auditor of the Court of Exchequer, that court put upon the plaintiff the burden of proving a negative, namely, that Lord Halifax did not deliver them; for "a person shall be presumed duly to execute his office until the contrary appear."[3] Applying this principle to the subject under consideration, we find that the following statement, from the text of Greenleaf, has been often quoted with approval: "If the loss or non-delivery of the goods is alleged, the plaintiff must give some evidence in support of the allegation, notwithstanding its negative character."[4] The same principle is thus expressed by the late Mr.

[1] Williams *v.* East India Co., 3 East, 192.

[2] Monke *v.* Butler, 1 Rolle Rep. 83.

[3] Halifax's Case, Bull. N. P. 7th ed. 298. For another ancient case, decided upon substantially the same principle, see Rex *v.* Coombs, Comb. 57.

[4] 2 Greenl. Ev., § 213. The same language is found in Angell on Carriers, § 470, and is approved in Woodbury *v.* Frink, 14 Ill. 279, and in South &c. R. Co. *v.* Wood, 71 Ala. 215; *s. c.*

Hutchinson: "Although the claim of the plaintiff, in an action for the loss of the goods, may rest upon negligence or non-feasance, and not upon a positive misfeasance, and would therefore seem to require proof of a negative character, the burden of showing the loss is unquestionably upon him, and he must give some proof of the allegation of the loss, notwithstanding its negative character; and if it be out of his power to show positively the loss of the goods, he must, at least, prove such circumstances as would create the inference against the defendant that they had been lost: as, for instance, that they had been bailed to the carrier a sufficient length of time to be transported to their destination, and had not been there received or delivered to the person entitled to them, to whom they were consigned." As thus stated, the law casts on the plaintiff the duty of proving non-delivery.[1]

§ **1839. Strength of Such Evidence.** — But it is said that *slight evidence of non-delivery* will be sufficient.[2] It has been held not necessary that the plaintiff should prove the fact by a *preponderance of evidence*.[3] Accordingly, the mere *belief* of a witness, who was in a position to know the fact of delivery if it had taken place, that it had *not* taken place, has been held sufficient to shift the burden of proof. Thus: In *assumpsit* for negligence against carriers in losing a parcel, delivery to the carrier was shown, and, then, to show that it was never redelivered, the plaintiff 's shopman was called, who gave evidence to the effect

46 Am. Rep. 309. See also 3 Phill. Ev. 320; Griffiths *v.* Lee, 1 Car. & P. 110; Tucker *v.* Cracklin, 2 Stark. Rep. 385; Midland R. Co. *v.* Bromley, 17 C. B. 372: *s. c.* 33 Eng. L. & Eq. 235; Gilbart *v.* Dale, 5 Ad. & El. 543; Anchor Line *v.* Dater, 68 Ill. 369; Chicago &c. R. Co. *v.* Northern Line Packet Co., 70 Ill. 217; Day *v.* Ridley, 16 Vt. 48, 51.

[1] Hutch. Carr., § 764: quoted with approval in South &c. R. Co. *v.* Wood, 71 Ala. 215; *s. c.* 46 Am. Rep. 309; *s. c.* on former appeal, 66 Ala. 167; 41 Am. Rep. 749.

[2] Woodbury *v.* Frink, 14 Ill 279; Chicago &c. R. Co. *v.* Dickinson, 74 Ill. 249.

[3] Accordingly, it was held proper to refuse the following instruction requested by the carrier: "Before the plaintiffs can recover in this case, they must prove, by a preponderance of testimony, that the broom-corn in question was not delivered to them by placing the car containing the broom-corn upon the track adjacent to plaintiff 's warehouse." Chicago &c. R. Co. *v.* Dickinson, *supra*.

that he did not know of its delivery by the carrier, but *believed* that it could not have been delivered without his knowledge. Baron Hullock was of opinion that this evidence was sufficient to call upon the defendants to prove a delivery by their porter or some other witness; because the plaintiff could not be expected to prove a non-delivery better than he had done.[1] But this is quite contrary to the prevailing English view, which is that the general rule must obtain here which applies in other cases,[2] that where the evidence which the plaintiff produces is equally consistent with the conclusion of a delivery or of a non-delivery, he cannot recover; since the burden is upon him, and there is nothing in his evidence to move the court.[3] Accordingly, where a parcel is to be delivered by the defendant to another carrier for transportation, proof that it was not received at the end of the transit from such other carrier, is not evidence tending to show that it was not delivered by the defendant to such carrier.[4] Precisely the contrary has been ruled in Vermont. In that State it has been held that, where the goods are delivered to a carrier, under a contract that he will deliver them to the connecting carrier, for shipment by the latter to a destination named, evidence of such delivery and of the failure of the goods to arrive at the destination named is sufficient to charge the first carrier. The court reason that, in the usual course of things, goods forwarded arrive at their destination; and therefore, the fact that goods do not arrive at one end of the line is some evidence that they were not sent from the other. It seemed just and reasonable to the court that the carrier receiving the goods, or any other into whose hands it was proved to have come, should, in case of ulti-

[1] Griffiths *v.* Lee, 1 Car. & P. 110; *s. c.* 11 Eng. C. L. 333. Contrary to this, it was ruled, in a case in Massachusetts, that evidence that the plaintiff had sent his servant to the defendant's warehouse for the goods, and that the servant had brought back word that the defendant's agent said that the warehouse had been broken into and the goods stolen, was no legal evidence of the loss of the goods. Lamb *v.* Western R. Corp., 7 Allen (Mass.), 98.

[2] Doe d. Welsh *v.* Langfield, 16 Mees. & W. 497.

[3] Midland R. Co. *v.* Bromley, 17 C. B. 372; *s. c.* 33 Eng. L. & Eq. 235; Gilbart *v* Dale, 5 Ad. & El. 543.

[4] Gilbart *v.* Dale, *supra.*

mate loss, shown by the owner, "be required to show it out of their hands."[1] In a case of this kind, where the judgment was affirmed on error, the following instruction was given in the trial court: "The burden of proof of the non-delivery of the trunk, at the place of delivery, is on the plaintiff; and unless the plaintiff has shown some evidence that the trunk was not delivered, the defendant is not required to produce any evidence that it was so delivered, in order to sustain his defense."[2] On the other hand, it was held error, where a car load of corn had been transported by a railway company, and was left at a flag station on a side track where it had stood seven or eight days, after which, on unloading it, it was found that a considerable portion of it was missing, to charge the jury that, "in the case of goods delivered to common carriers for carriage, when there is a loss or damage of the goods, the burden of proof is always on the carrier to show that his liability terminated before the loss or damage in question occurred."[3] The Alabama court also found it necessary to apologize for a seeming discrepancy between their present ruling and their ruling on a former appeal in the same case. "The principle there stated," said Stone, J., referring to the former opinion, "is strictly applicable to a case where freight is delivered, but is found in a broken or damaged condition. In such case, the *onus* is evidently on the carrier to exculpate itself from all blame in the matter of the break or damage. But in this case the question rests on different principles. The question is the non-delivery of the corn, not the condition in which it was delivered. On this question, as we have shown above, the *onus* is on the plaintiff primarily to make some proof of the non-delivery. This question, as we have shown, being a subordinate one, and of easy proof when the freight is delivered at a depot,

[1] Brintnall *v.* Saratoga &c. R. Co., 32 Vt. 665, 675.

[2] Woodbury *v.* Frink, 14 Ill. 279.

[3] South &c. R. Co. *v.* Wood, 71 Ala. 215; *s. c.* 46 Am. Rep. 309; *s. c.* on former appeal, 66 Ala. 167; 41 Am. Rep. 749. The court quote from and approve the decision of the English Common Pleas in Midland R. Co. *v.* Bromley, 17 C. B. 372; *s. c.* 33 Eng. L. & Eq. 235, which, as above seen, is opposed to some of the American authorities, in that it requires the owner to prove the negative fact of non-delivery by a *preponderance* of evidence.

becomes very material when the freight is delivered at a private siding, as in this case." [1] The language in the former opinion, thus explained, was the following, in the opinion of the court on the former appeal, given by Somerville, J.: "The first charge requested by appellant was properly refused. It was vicious, in assuming that the liability of the railway company depended on its negligence, or that of its agents. Being a common carrier, the road, in the absence of a special contract limiting its common-law liability, was an insurer against every loss or damage except that occasioned by the act of God or the public enemy. It is obnoxious to the further objection that it fails to recognize the duty of exculpation which is always cast on common carriers, where a damage or injury is shown in the case of goods delivered to them for carriage. In such cases, the general rule is that the *onus* of proof is always on the carrier to show that his liability terminated before the loss or damage in question occurred."

§ 1840. As to Loss by Theft. — In the case of a gratuitous bailee this question does not present much difficulty, for he is liable only for slight care and answerable only for gross negligence; and it will ordinarily be a good defense on his part, to show that he took as good care of the plaintiff's goods as he did of his own.[2] On clearer grounds, the rule would be the same in a case where the defendant has furnished warehouse room merely for a rental or reward, without undertaking any duty of watchfulness or care.[3] But in an ordinary bailment for hire, the bailee unquestionably does assume the duty of exercising reasonable watchfulness and care, to prevent theft as well as to prevent other losses of or injuries to the thing bailed. Is it not, then, a reasonable conclusion that, where the thing is lost and he fails to give any better account of the loss than that it was stolen

[1] *Ib.*, 71 Ala. 219; *s. c.* 46 Am. Rep. 313.

[2] In an old case where the bailment was for *reward*, it was ruled by Lord Kenyon that the defendant exonerated himself by showing that he took as good care of the goods as he did of his own. Finucane *v.* Small, 1 Esp. 315.

[3] See Schmidt *v.* Blood, 9 Wend. (N. Y.) 268, 271; Finucane *v.* Small, 1 Esp. 315.

from him, he ought to be required to make good the damage? The courts, it is to be confessed, do not generally so hold. They generally agree that it is not enough in such a case for the bailor to rest upon the evidence that the goods were stolen from the bailee, but that he must give *other evidence* tending to show negligence on the part of the latter or his servants.[1] It will be easier in reason to uphold this rule in the case of private bailees than in the case of bailees who carry on a public business, such as warehousemen, carriers, safe deposit companies and innkeepers. The necessity of preventing theft by the carrier's servants is well known to have been the principal foundation of the ancient rule of the common law which placed the carrier under the onerous liability of an insurer in respect of all losses happening through other causes than the act of God or the king's enemies. It is not perceived why the same consideration should not operate to require public bailees of whatever character to show, in the case of loss by theft, that the theft happened notwithstanding the exercise of reasonable care on their part. The following reasoning of Mr. Circuit Judge (afterwards Chancellor) Walworth, to a jury, in an action against a warehouseman for the value of certain goods stored with him and lost, where the defense was that the store had been entered by thieves or incendiaries, who had set fire to it, in which fire the loss had happened, remains, although the decision has been overruled in the State in which it was pronounced, of much force: "In all cases of bailment of property to a person who carries on a public business of receiving it into his custody or under his care for reward, it is necessary that a strict rule should be enforced against the bailee, to prevent fraud. Hence, when property entrusted to a warehouseman, wharfinger, or storing and forwarding merchant, in the ordinary course of business, is lost, injured, or destroyed, the weight of proof is with the bailee, to show a want of fault or negligence on his part; or in other

[1] Lamb *v.* Western R. Corp., 7 Allen (Mass.), 98; Mayo *v.* Preston, 131 Mass. 304; Claflin *v.* Meyer, 75 N. Y. 260; reversing s. c. 11 Jones & Sp. 1 (overruling, it seems, Platt *v.* Hibbard, 7 Cow. (N. Y.) 497, 500); Madan *v.* Covert, 13 Jones & Sp. (N. Y.) 245.

words, to show the injury did not happen in consequence of his neglect to use all that care and diligence on his part, that a prudent or careful man would exercise in relation to his own property." [1]

§ 1841. [Continued.] **When Circumstances Carry Presumption of Negligence.** — The duty of watchfulness on the one hand, and the physical circumstances attending the theft on the other, may, however, be such that the fact of the theft will carry with it a presumption of negligence. This is well illustrated by an interesting case in Pennsylvania, where an action was sustained against a *safe deposit company* for the value of some government bonds which had been intrusted to them by the plaintiff for safe-keeping, and which had been stolen from the safe in which they were kept. The circumstances of the theft were unknown, but there was no evidence that the safe had been broken or that the lock had been tampered with. "These facts," said Mercur, J., "being unquestioned, and the bonds having been taken from the safe, it necessarily follows that it had been opened with a key suited to the lock. In order to get access to the safe, a person would be obliged to step into the vault. If he entered during business hours, one key would enable him to procure the bonds; if at other hours, it would re-

[1] Platt *v.* Hibbard, 7 Cow. (N. Y.) 497, 500. In a note to this case the reporter, Esek Cowen (afterwards a distinguished judge of the Supreme Court of New York), expresses a doubt of the soundness of the language above quoted, citing some English decisions, elsewhere considered: Harris *v.* Packwood, 3 Taunt, 264; Marsh *v.* Horne, 5 Barn. & C. 322; Clay *v.* Willan, 1 H. Bl. 298. He concludes thus: "The distinction would seem to be that, when there is a total default to deliver the goods bailed, on demand, the *onus* of accounting for the default lies with the bailee; otherwise he shall be deemed to have converted the goods to his own use, and trover will lie; but when he has shown a loss, or where the goods are injured, the law will not intend negligence. The *onus* is then shifted upon the plaintiff. In the case of a common carrier, however, the rule is different. The law presumes against him in all cases, even of accident, until he shows the loss or injury to have arisen from the enemies of the State, or the act of God." This language has been quoted with approval in subsequent cases. For instance, Claflin *v.* Meyer, 75 N. Y. 260, 263.

quire two keys to reach them from the office. The fact that the bonds were taken under these circumstances, was certainly some evidence that the company had not kept 'a constant and adequate guard and watch over and upon the safe,' as by its agreement it was bound to do. It further agreed to prevent the access of any other renter to the safe of the defendant in error, and to protect his safe and its contents from any dishonesty of the company's employés. If any third persons were given access to the vault, under circumstances that would have enabled them to unlock the safe and remove the bonds, and they had so done, although a contingency not provided for in the agreement, yet it cannot be pretended that it would not be evidence of a want of ordinary care. So, if the bonds were purloined by either renter or employé, it was certainly evidence to go to the jury of an omission on the part of the company to exercise that ordinary care and vigilance which men ordinarily exercise and ought to exercise under such circumstances in the protection of their own property. The vault and the safe were in the possession and under the protection of the company. The manner in which the bonds were most probably taken shifted the burden of proof. It threw upon the company the necessity of making some explanation to rebut its *prima facie* negligence." [1] In a case where the goods of a guest had been lost in the custody of an *innkeeper* and the defense was that the loss had happened in consequence of a burglarious entry, it was held that proof of the mere fact that the goods had been stolen while in the custody of the innkeeper, would not exonerate him, without proof of some of the circumstances which ordinarily attend the breaking of a house securely fastened; inasmuch as the majority of such burglaries may be fairly supposed to result from negligence on the part of the innkeeper or his servants, or the inmates of the house, in which case the innkeeper is liable.[2]

§ 1842. [Continued.] **No Defense to a Common Carrier.** — The writer has in his searches met with no case where a *common*

[1] Safe Deposit Co. *v.* Pollock, 85 Pa. St. 391.

[2] McDaniels *v.* Robinson, 26 Vt. 317, 319. See *ante*, § 1840.

carrier has attempted to exonerate himself on the ground that the goods were stolen from him, though it is possible that such cases may be found. It is scarcely possible that the courts will, in view of the fact that the ancient stringency of the rule against carriers was grounded on the necessity of preventing their own frauds and the thefts of their servants, allow such a defense to prevail, even if the carrier should attempt by contract to limit his liability for such a loss. If, however, the carrier completes the transit, so that his liability becomes merely that of a warehouseman, the courts will no doubt apply to him the rule which they would apply in the case of any other warehouseman, which, as above seen, exonerates him unless negligence, in addition to the mere fact of theft, is shown.

§ 1843. Burden on Innkeeper to Show Manner of Loss or Pay Damages. — It has been well said concerning the liability of an innkeeper: "He is bound to take all possible care of the goods, money and baggage of his guests, deposited in his house, or entrusted to the care of his family or servants; and he is responsible for their acts, as well as for the acts of other guests. If the goods of the guests are damaged in the inn, or are stolen from it by the servants or domestics, or by a stranger guest, he is bound to make restitution; for it is his duty to provide honest servants, and to exercise an exact vigilance over all persons coming into his house, as guests or otherwise. His responsibility extends to all his servants and domestics, and to all the goods and moneys of his guests which are placed within the inn; and he is bound in every event to pay for them if stolen, unless they were stolen by a servant or companion of the guest."[1] "And by the better authorities," adds the Supreme Court of Nebraska, "such seems to be the extent of the rule, where the goods are stolen from the inn, and, as in this case, there is no evidence to show how it was done, or by whom; the only exceptions being those losses arising from the negligence of the guest himself, the act of a companion

[1] Houser *v.* Tulley, 62 Pa. St. 96; *s. c.* 1 Am. Rep. 390; Dunbier *v.* Day, 12 Neb. 596, 606; *s. c.* 41 Am. Rep. 772, 775.

guest or superior, or, as many of the cases put it, 'irresistible force.'"[1] From this statement it follows that, in order to discharge the innkeeper, it is not enough to show that the loss or damage did not happen through his negligence or that of his servants.[2] Qualifying this doctrine, it has been said in Texas that the innkeeper may discharge himself by showing that he has used extreme care and diligence.[3] And the Nebraska court hold that, when it is established that the loss occurred within the inn, to prove which devolves upon the guest, the burden of showing it to be within one of these exceptions is cast upon the innkeeper;[4] for, "from the nature of the case, a guest cannot be presumed to have the means of knowing who is the guilty party, nor of establishing the fact of delinquency on the part of the innkeeper."[5] From this it necessarily follows that an innkeeper is liable for money stolen from his guest, the guest himself not being negligent, and there being no evidence to show how, by whom, or why it was stolen.[6] But this rule, it seems, applies only in the case of the loss or damage of the goods of guests, and not to the loss or damage of the goods of permanent *boarders* at the inn. It is a rule established by the common law for the protection of travelers and passengers; it does not apply in the case of a party who comes on a special contract to board.[7] In a case where a boarder seeks to charge the innkeeper with liability for loss or damage of his goods, it is incumbent upon him to prove negligence.[8]

[1] Dunbier *v.* Day, *supra*, 607, opinion by Lake, J. The learned Judge cites Redf. Carr., § 596; Pinkerton *v.* Woodward, 33 Cal. 557; Sibley *v.* Aldrich, 33 N. H. 553, 558; Shaw *v.* Berry, 31 Me. 478; McDaniels *v.* Robinson, 26 Vt. 316; Piper *v.* Manny, 21 Wend. (N. Y.) 282; Howth *v.* Franklin, 20 Tex. 798; Johnson *v.* Richardson, 17 Ill. 302; Mason *v.* Thompson, 9 Pick 280; *s. c.* 20 Am. Dec. 471.

[2] Shaw *v.* Berry, 31 Me. 478; Sibley *v.* Aldrich, 33 N. H. 553; Piper *v.* Manny, 21 Wend. (N. Y.) 282.

[3] Howth *v.* Franklin, 20 Tex. 798, 802.

[4] Dunbier *v.* Day, 12 Neb. 596, 607. So held in Norcross *v.* Norcross, 53 Me. 163.

[5] Johnson *v.* Richardson, 17 Ill. 302, 305.

[6] Dunbier *v.* Day, *supra*.

[7] Chamberlain *v.* Masterson, 26 Ala. 376; Manning *v.* Wells, 9 Hump. (Tenn.) 746; Willard *v.* Reinhardt, 2 E. D. Smith (N. Y.), 148.

[8] Story Bailm., § 475; Chamberlain *v.* Masterson, *supra*; Manning *v.* Wells, *supra*; Jeffords *v.* Crump, *supra*. See, further, as to the liability of boarding house keepers, Dansey *v.* Richardson, 3 El. & Bl. 144; *s. c.* 25 Eng. L. & Eq. 76; Holder *v.* Soulby.

§ **1844. As to Breakage, Leakage or Damage.** — As intimated in a preceding section,[1] the rule is precisely the same in the case of a total loss, *i.e.*, non-delivery, as in the case of damage, breakage or leakage, with an exception hereafter stated. The obligation of the bailee to redeliver the thing bailed, in as good condition as that as which it was when he received it, with the exception hereafter stated, is co-extensive with his obligation to redeliver it at all, and rests upon the same grounds. With this exception, he has undertaken not only the duty to redeliver, but to redeliver in as good a condition as when received. Accordingly, we find that, in stating the rule which casts the burden of proof upon the bailee, the courts are in the constant habit of using the words "loss or damage" in the same sentence, — the juridical conception being that there is ordinarily no distinction between the two cases.

1845. Exception in Case of Goods having Inherent Defects. — The exception to this rule is this: Where the nature of the thing bailed is such as to render it as probable that the damage may have arisen through its own *inherent defects* as through the negligence of the bailee, then, in the opinion of some judges, the law will not presume negligence from the mere happening of the damage, but will require some additional proof of it on the part of the plaintiff. This rule has been thus stated: "When the damage to the thing shipped is apparently the result of its inherent nature or inherent defects, the shipper must show something more than its damaged condition before the carrier can be called on to explain. He must show some injury to the thing shipped which cannot be the result of its inherent nature or defects, before the burden is cast upon the carrier to show that he is not in fault."[2]

§ **1846. Such as Perishable Fruit.** — On this principle, proof of the decay of *perishable fruit* committed to a common carrier

8 C. B. (N. S.) 254; Johnson *v.* Reynolds, 3 Kan. 257; Wiser *v.* Chesley, 53 Mo. 547.

[1] *Ante*, § 3.

[2] Hussey *v.* The Saragossa, 3 Woods (U. S.), 380, *per* Woods, J.

is not of itself sufficient evidence of negligence to charge him with liability for its deterioration.[1] The same principle exonerates a carrier from responsibility for *leakage* arising from an imperfection in the cask, and not caused by any negligence or omission on his part.[2]

§ **1847. And Live Animals.** — Where a *horse*, in apparent good health and condition, was shipped on board a steamer, and was delivered at the end of the voyage in a sick and dying condition, but without any fractures, wounds, or any external or visible injury, it was held that some negligence or carelessness on the part of the carrier which would account for the condition in which the horse was delivered, must be shown by the shipper, before he could put the carrier in fault and recover damages for injury to the horse.[3] The rule as to carriage of *live animals*, is, that the carrier is not an insurer against injuries arising from the

[1] Story Bailm., § 492*a*; Howard *v.* Wissman, 18 How. (U. S.) 231; Brig Collenberg, 1 Black (U. S.), 170. Compare Boyce *v.* Anderson, 2 Pet. (U. S.) 150.

[2] Hudson *v.* Baxendale, 2 Hurl. & N. 575. At least the carrier is not responsible for the *leakage* of a liquid occasioned by the peculiar nature of the liquid itself, or by secret defects existing in the casks, unknown to the carrier, when he received them for shipment; nor is he responsible for a diminution or leakage from barrels, though they be such as are commonly used for similar purposes, if the barrels have become unfitted to hold their contents by causes connected with the nature and condition of the article, which the carrier could not control. Thus, *hog's lard* having certain qualities which make its leakage from ordinary barrels or wooden casks unavoidable in hot weather, it has been held that one who ships it in that condition from a southern port for a long voyage, through low latitudes in midsummer, takes upon himself the risk of all losses which necessarily proceed from that cause. Nelson *v.* Woodruff, 1 Black (U. S.), 156, 160.

[3] Hussey *v.* The Saragossa, 3 Woods (U. S.), 380. In so holding, Mr. Circuit Judge Woods said: "As well might a passenger who embarks in good health claim to support an action for damages against the common carrier, by simply showing that, when he disembarked at the end of his voyage, he was in a sick and debilitated condition. The liability of a common carrier of animals is not, in all respects, the same as that of a carrier of inanimate property. For instance, he is not an insurer against injuries arising from the nature and propensities of the animals, and which diligent care could not prevent. He is not liable for injuries by disease contracted without his fault after the stock is delivered to him."

nature and propensities of the animals and which diligence and care cannot prevent:[1] and where the owner accompanies them, the burden of proof, in an action for their injury grounded upon negligence, is upon the owner, and not upon the carrier.[2] And so, in the case of a *hired slave* who had disappeared while in the defendant's employment, but whether he had died or had escaped was not clear from the evidence, it was ruled that the burden was on the plaintiff to show that his loss was occasioned by the want of ordinary care on the part of the defendant.[3]

§ **1848. Breakage of Fragile Articles.**— But it cannot escape observation that this exception to the general rule has been very sparingly admitted by the American judges. In the case of the *breakage* in the hands of a carrier of the most fragile articles, such as plate glass,[4] or other glass goods,[5] or glass counter cases,[6] or marble slabs packed in a box,[7] or a liquid put up in a glass vessel,[8] — it has been held that the burden is on the carrier to show that the injury happened under circumstances which exonerated him from paying the damages;[9] and the same rule has been applied in the case of the *leakage of wine* from casks.[10]

§ **1849. Leakage of Wine.** — But where the exception was against liability for *leakage* or *breakage*, and the goods consisted

[1] Clarke *v.* Rochester &c. R. Co., 14 N. Y. 570; Smith *v.* New Haven &c. R. Co., 12 Allen (Mass.), 531; Hall *v.* Renfro, 3 Metc. (Ky.) 51.

[2] Clark *v.* St. Louis &c. R. Co., 64 Mo. 440; Elizabeth &c. R. Co. *v.* Wedger (Ky.), 13 Am. Law Reg. (N. s.) 45, 49; McBeath *v.* Wabash &c R. Co., 20 Mo. App. 445. Compare White *v.* Winnisimmet Co., 7 Cush. (Mass.) 155; Ohio &c. R. Co. *v.* Dunbar, 20 Ill. 623; Harris *v.* North Ind. R. Co., 20 N. Y. 232; Kimball *v.* Rutland &c. R. Co., 26 Vt. 247.

[3] Caldwell *v.* Runyan, 7 Humph. (Tenn.) 184.

[4] Drew *v* Red Line Transit Co., 3 Mo. App. 495.

[5] Tardos *v.* Ship Toulon, 14 La. Ann. 429.

[6] Merriman *v.* The May Queen, 1 Newb. (U. S.) 464, 474.

[7] Shriver *v.* Sioux City, &c., R. Co. 24 Minn. 506.

[8] Hastings *v.* Pepper, 11 Pick. (Mass.) 41, 44.

[9] Other cases where the same rule has been applied in the case of breakage are Hall *v.* Cheney, 36 N. H. 26, 30; American Exp. Co. *v.* Sands, 55 Pa. St. 140; Steele *v.* Townsend, 37 Ala. 247, 253.

[10] Rochereau *v.* Bark Hausa, 14 La. Ann. 431.

of some casks of wine, it was held that the fact that the casks were of an inferior quality, threw upon the claimant the burden of proving that the injury to the casks was caused by the negligence of those navigating the ship, and that the leakage was greater than the average in such casks.[1]

§ 1850. Application of the Foregoing Principles in the Case of Common Carriers: A Division of Judicial Opinion Stated. — A common carrier is liable at common law, as an insurer, for any loss or damage of the goods entrusted to him for carriage, except such as happens through the act of God, the enemies of the State,[2] the owner of the goods,[3] or from inherent defects in the goods themselves.[4] He may also, by special contract with the shipper, further restrict his liability, except for loss or damage happening through the negligence or fraud of himself or his servants; but such a contract, in so far as it undertakes to exonerate him from liability for loss or damage caused by such negligence or fraud is void, as being inconsistent with his undertaking and contrary to public policy.[5] Whether his liability rests as at common law, or is thus further restricted by the terms of a special contract with the shipper, the owner of the goods ordinarily makes out a *prima facie* case to charge him, by proving the fact of delivery to him, and of non-delivery by him after the lapse of a reasonable time, or of delivery to him in a good

[1] 630 Quarter Casks, 14 Blatchf. (U. S.) 517; Vanghan *v.* 603 Casks, 7 Ben. (U. S.) 506.

[2] Forward *v.* Pittard, 1 T. R. 27; Read *v.* Spaulding, 30 N. Y. 630; Nugent *v.* Smith, 1 C. P. Div. 423.

[3] Murphy *v.* Staton, 3 Munf. (Va.) 239.

[4] *Ante*, § 1845, *et seq.*

[5] Swindler *v.* Hilliard, 2 Rich. L. (S. C.) 286; United States Exp. Co. *v.* Backman, 28 Oh. St. 144, 155; Union Exp. Co. *v.* Graham, 26 Oh. St. 595; Graham *v.* Davis, 4 Oh. St. 362; Welsh *v.* Railroad Co., 10 Oh. St. 65; Railroad Co. *v.* Curran, 19 Oh. St. 1; Berry *v.* Cooper, 28 Ga. 543; Farnham *v.* Camden, etc., R. Co., 55 Pa. St. 53; Grogan *v.* Adams Exp. Co. (Pa.), 5 Cent. Rep. 298; Lamb *v.* Camden &c., R. Co., 46 N. Y. 271; American Exp. Co. *v.* Sands, 55 Pa. St. 140; Southern Exp. Co. *v.* Moon, 39 Miss. 822; The City of Norwich, 4 Ben. (U. S.) 271; Black *v.* Goodrich Transportation Co., 55 Wis. 319; Chicago &c., R. Co. *v.* Abels, 60 Miss. 1017; Kansas City &c., R. Co. *v.* Simpson, 30 Kan. 645; Moulton *v.* St. Paul &c., R. Co., 31 Minn. 85.

condition and of redelivery by him in a damaged condition, according to the principle stated in a preceding section.[1] This

[1] *Ante*, § 1832; Hussey *v.* Saragossa, 3 Woods, 380; Ang. Carr., § 202; Choate *v.* Crowninshield, 3 Cliff. 184, opinion by Mr. Justice Clifford; Clark *v.* Barnwell, 12 How. (U. S.) 272; Rich *v.* Lambert, *Id.* 347; Chitty on Carr. 161; Story on Bailments, §§ 528, 529; 3 Kent Com. 213; 1 Smith's Leading Cas. 313; Smith Merc. Law, 348; Propeller Niagara *v.* Cordes, 21 How. (U. S.) 726; Chouteaux *v.* Leech, 18 Pa. St. 224; Bland. on Ship., § 257; Marv. on Wrks. Sal. 21; Parson Merc. Law, 348; Hooper *v.* Rathbone, Taney (U. S.), 519; Bell *v.* Reed, 4 Binn. (Pa.) 127, 135; Tarbox *v.* Eastern Steamboat Co., 50 Me. 339, 343; Beckman *v.* Shouse, 5 Rawle (Pa.), 179, 189; Tucker *v.* Cracklin, 2 Stark. 385; Hawkes *v.* Smith, 1 Car. & M. 72; Day *v.* Ridley, 16 Vt. 48; Van Winkle *v.* South Carolina R. Co., 38 Ga. 32; Little *v.* Boston &c. R Co., 66 Me. 239; Davis *v.* Wabash &c., R. Co. 89 Mo. 340; *s. c.* 1 S. W. Rep. 327; 13 Mo. App. 449; Adams *v.* Stettaners, 61 Ill. 184, 187; Fairfax *v.* New York Central &c., R. Co., 73 N. Y. 167, 170; Turnbull *v.* Citizens' Bank, 16 Fed. Rep. 145, 148; United States *v.* Pacific Exp. Co., 15 Fed. Rep. 867; Buddy *v.* Wabash &c., R. Co., 20 Mo. App. 206; Turney *v.* Wilson, 7 Yerg. (Tenn.) 340; Camden &c., R. Co. *v.* Baldauf, 16 Pa. St. 67, 77; Clark *v.* Spence, 10 Watts (Pa.), 335; Verner *v.* Sweitzer, 32 Pa. St. 208, 214; South &c., R. Co. *v.* Henlein, 52 Ala. 606, 612; Fairfax *v.* New York &c., R. Co., 67 N. Y. 11 (reversing *s. c.* 5 Jones & Sp. 516); Steers *v.* Liverpool &c. Steamship Co., 57 N. Y. 1 (distinguishing Cochran *v.* Dinsmore, 49 N. Y. 249); Swindler *v.* Hilliard, 2 Rich. L. (S. C.) 286, 305; United States Exp. Co. *v.* Backman, 28 Oh. St. 144; Berry *v.* Cooper, 28 Ga. 543; Hill *v.* Sturgeon, 28 Mo. 233; Baker *v.* Brinson, 9 Rich. L. (S. C.) 201; Union Exp. Co. *v.* Graham, 26 Oh. St. 595; Singleton *v.* Hilliard, 1 Strobh. L. (S. C.) 203, 218; American Exp. Co. *v.* Sands, 55 Pa. St. 140; Farnham *v.* Camden &c. R. Co., 55 Pa. St. 53; Burnell *v.* New York &c. R. Co., 45 N. Y. 184; Grogan *v.* Adams Exp. Co. (Pa.), 5 Cent. Rep. 298; Riley *v.* Horne, 5 Bing. 217, 226; Spyer *v.* The Mary Belle Roberts, 2 Sawy. (U. S.) 1; Hunt *v.* The Cleveland, 6 McLean (U. S.), 76, 79; The Mohler, 21 Wall. (U. S.) 230; The Ocean Wave, 3 Biss. (U. S.) 317; Wertheimer *v.* Pennsylvania R. Co., 17 Blatchf. (U. S.) 421; The Neptune, 6 Blatchf. (U. S.) 194; Davidson *v.* Graham, 2 Oh. St. 131, 141; Whitesides *v.* Russell, 8 Watts & S. (Pa.) 44; Alden *v.* Pearson, 3 Gray (Mass.), 342; Levering *v.* Union &c. Co., 42 Mo. 88, 95; King *v.* Shepherd, 3 Story (U. S.), 349; Steele *v.* Townsend, 37 Ala. 247; Gray *v.* Mobile Trade Co., 55 Ala. 387, 399, 400; Mobile &c. R. Co. *v.* Hopkins, 41 Ala. 486; Mobile &c. R. Co. *v.* Jarboe, 41 Ala. 644; Shaw *v.* Gardner, 12 Gray (Mass.), 488, 490; Mann *v.* Birchard, 40 Vt. 326; Colton *v.* Cleveland &c. R. Co., 67 Pa. St. 211; Graham *v.* Davis, 4 Oh. St. 362; Roberts *v.* Riley, 15 La. Ann. 103; Chicago &c. R. Co. *v.* Moss, 60 Miss. 1003; *s. c.* 45 Am. Rep. 428; Chicago &c. R. Co. *v.* Abels, 60 Miss. 1017; Patterson *v.* Clyde, 67 Pa. St. 500, 506; Little Rock &c. R. Co. *v.* Talbot, 39 Ark. 523, 529; Railroad Co. *v.* Lockwood, 17 Wall. (U. S.) 357, 376, 377; Brown *v.*

done, the carrier must exonerate himself or pay damages. At this point there is a divergence in the judicial conception of what is necessary on his part to exonerate himself. According to one conception, it is sufficient for him to present proof which, according to the usual formula of judicial speech, "brings the case within the excepted peril;" which means that he must produce evidence showing that, at the time of the happening of the loss or damage, the excepted peril, — whether it be a peril excepted by the rule of the common law or by the terms of a special contract with the shipper, — was present and operating as an efficient cause of the loss or damage. By showing this, according to this conception, he rebuts the presumption of negligence created by the naked proof of the fact of the loss or damage, as above stated, and the burden of proof then *shifts* upon the plaintiff to prove that, notwithstanding the presence of the excepted peril and its operation as an efficient cause in producing the loss or damage, the carrier was not guilty of negligence or fault.[1] The other conception is that it is not enough for the

Adams Exp. Co., 15 W. Va. 812, 818; Dunseth *v.* Wade, 3 Ill. 285, 288; Ewart *v.* Street, 2 Bailey (S. C.), 157, 161; Atwood *v.* Reliance Transportation Co., 9 Watts (Pa.) 87; Smyrl *v.* Niolon, 2 Bailey (S. C.), 421; Schooner Emma Johnson, 1 Sprague (U. S.), 527; Bearse *v.* Ropes, 1 Sprague (U. S.), 331; Mitchell *v.* United States Exp. Co., 46 Ia. 214; Whitworth *v.* Erie R. Co., 87 N. Y. 413, 419; Lamb *v.* Camden &c. R. Co., 46 N. Y. 271; Caldwell *v.* New Jersey Steamboat Co., 47 N. Y. 282; Hays *v.* Kennedy, 41 Pa. St. 378, 384; Humphreys *v.* Reed, 6 Whart. (Pa.) 435, 444; Letchford *v.* Golden Eagle, 17 La. Ann. 9; Kirk *v.* Folsom, 23 La. Ann. 584; Price *v.* Ship Uriel, 10 La. Ann. 413. The following is the celebrated passage of Lord Mansfield on this question, often quoted in modern opinions: "To prevent litigation, collusion, and the necessity of going into circumstances impossible to be unravelled, the law presumes against the carrier, unless he shows it was done by the king's enemies, or by such act as could not happen by the intervention of man, as storms, lightning and tempests." Forward *v.* Pittard, 1 T. R. 27, 33. In cases where there is no contract limiting the liability of the carrier, this position is beyond all controversy, "since everything is negligence which the law does not excuse." Dale *v.* Hall, 1 Wils. 281.

[1] Clark *v.* Barnwell, 12 How. (U. S.) 272; Spyer *v.* The Mary Belle Roberts, 2 Sawyr. (U. S.) 1; Hunt *v.* The Cleveland, 6 McLean (U. S.), 76, 79; Wertheimer *v.* Pennsylvania R. Co., 17 Blatchf. (U. S.) 421; The Neptune, 6 Blatchf. (U. S.) 194; Kelham *v.* The Kensington, 24 La. Ann. 100; Kirk *v.* Folsom, 23 La. Ann. 584; Price *v.*

carrier to show that, at the time of the happening of the loss or damage, the excepted peril was present and operating to produce it, but that he must *also* show that he and his servants were *not* guilty of negligence or fault in the premises, — in other words that the excepted peril was the *sole* cause of the loss or damage.[1]

§ **1851. Source of this Divergence of Opinion: Whether the Special Contract Reduces the Carrier to the Status of an Ordinary Bailee for Hire.** — In searching for the source of this difference of opinion, it is found that the views of the courts have diverged upon the question of the effect of the special contract with the shipper, by which the carrier attempts to discharge himself from his liability as an insurer at common law. All the American courts agree to the conclusion stated in the preceding section, that such a contract cannot be allowed to have the effect of discharging the carrier from liability for losses or injuries happening through the negligence, fraud, or other fault of himself or his servants. Upon this point there is now no substantial difference of opinion, and the subject may be laid entirely out of

Ship Uriel, 10 La. Ann. 413; Colton *v.* Cleveland &c. R. Co., 67 Pa. St. 211; Patterson *v.* Clyde, 67 Pa. St. 500, 506; Little Rock &c. R. Co. *v.* Corcoran, 40 Ark. 375; Little Rock &c. R. Co. *v.* Talbot, 39 Ark. 523, 530; Little Rock &c. R. Co. *v.* Harper, 44 Ark. 208; Mitchell *v.* United States Exp. Co., 46 Ia. 214; Whitworth *v.* Erie R. Co., 87 N. Y. 413, 419; Lamb *v.* Camden &c. R. Co., 46 N. Y. 271 (two of the five judges dissenting); Farnham *v.* Camden &c. R. Co., 55 Pa. St. 53; Read *v.* St. Louis &c. R. Co., 60 Mo. 199; Davis *v.* Wabash &c. R. Co., 89 Mo. 340, 352 (reversing *s. c.* 13 Mo. App. 449).

[1] Swindler *v.* Hilliard, 2 Rich. L. (S. C.) 286; Baker *v.* Brinson, 9 Rich. L. (S. C.) 201; Singleton *v.* Hilliard, 1 Strobh. L. (S. C.) 203; United States Exp. Co. *v.* Backman, 28 Oh. St. 144; Union Exp. Co. *v.* Graham, 26 Oh. St. 595; Berry *v.* Cooper, 28 Ga. 543; Davidson *v.* Graham, 2 Oh. St. 131, 141; Graham *v.* Davis, 4 Oh. St. 362; Whitesides *v.* Russell, 8 Watts & S. (Pa.) 44; Levering *v.* Union Transp. &c. Co., 42 Mo. 88, 95, 96 (overruled, it seems by Read *v.* St. Louis &c. R. Co., 60 Mo. 199); Chicago &c. R. Co. *v.* Moss, 60 Miss. 1003; *s. c.* 45 Am. Rep. 428; Chicago &c. R. Co. *v.* Abels, 60 Miss. 1017; Brown *v.* Adams Exp. Co., 15 W. Va. 812, 818; Hays *v.* Kennedy, 41 Pa. St. 378, 384; Humphreys *v.* Reed, 6 Whart. (Pa.) 435, 444 (overruled, it seems, by Patterson *v.* Clyde, 67 Pa. St. 500, 506; and Farnham *v.* Camden &c. R. Co., 55 Pa. St. 53); South &c. R. Co. *v.* Henlein, 52 Ala. 606, 612; Read *v.* Spaulding, 30 N. Y. 630, 645; Michaels *v.* New York &c. R. Co., 30 N. Y. 564, 578 (overruled by Whitworth *v.* Erie R. Co., 87 N. Y. 413, 419, and Lamb *v.* Camden &c. R. Co., 46 N. Y. 271).

view. But the divergence of opinion commences at the point where some of the courts concede to such a contract the effect of reducing the liability of the common carrier to that of a mere private carrier or ordinary bailee for hire, so as to make him liable only for the exercise of ordinary care, diligence and skill; [1] while others deny this effect to it, and hold that the law will not, on grounds of public policy, permit the carrier thus to cast off entirely the liability imposed upon him by the common law, but that he still remains, though to a modified degree, a public carrier and subject to the obligations attaching to that office.[2]

§ 1852. Inconsistency of the Courts in Respect of this Question. — But some of the courts have not been consistent in adopting and applying one or the other of these conclusions. Both conclusions have been announced in decisions of the same court.[3] The courts which adopt the former view reason that "this neither changes nor interferes with any established rule of law;

[1] York Co. *v.* Central Railroad, 3 Wall. (U. S.) 107; Merriman *v.* Brig May Queen, 1 Newb. (U. S.) 464; Colton *v.* Cleveland &c. R. Co., 67 Pa. St. 211; Sager *v.* Portsmouth &c. R. Co., 31 Me. 228, 238; Camden &c. R. Co. *v.* Baldauf, 16 Pa. St. 67, 77; Verner *v.* Sweitzer, 32 Pa. St. 208; Goldey *v.* Pennsylvania R. Co., 30 Pa. St. 242, 246; Dorr *v.* New Jersey Steam Nav. Co., 11 N. Y. 485, 493; Lamb *v.* Camden &c. R. Co., 46 N. Y. 271, 278.

[2] Davidson *v.* Graham, 2 Oh. St. 131, 140; Graham *v.* Davis, 4 Oh. St. 362; Levering *v.* Union &c. Co., 42 Mo. 88, 95; Steele *v.* Townsend, 37 Ala. 247, 253; Swindler *v.* Hilliard, 2 Rich. L. (S. C.) 286; Baker *v.* Brinson, 9 *Id.* 201; Railroad Co. *v.* Lockwood, 17 Wall. (U. S.) 357, 376; Brown *v.* Adams Exp. Co., 15 W. Va. 812, 818; Atchison &c. R. Co. *v.* Washburn, 5 Neb. 117, 121; Bank of Kentucky *v.* Adams Exp. Co., 93 U. S. 174, 180, 185.

[3] Compare York Co. *v.* Central Railroad, 3 Wall. (U. S.) 107, with Railroad Co. *v.* Lockwood, 17 Wall. (U. S.) 357, 376, and Bank of Kentucky *v.* Adams Exp. Co., 93 U. S. 174, 185. In Railroad Co. *v.* Lockwood, *supra*, Mr. Justice Bradley, in giving the opinion of the court, cites Davidson *v.* Graham, 2 Oh. St. 131; Graham *v.* Davis, 4 Oh. St. 362; Swindler *v.* Hilliard, 2 Rich. L. (S. C.) 286; Baker *v.* Brinson, 9 *Id.* 201; Steele *v.* Townsend, 37 Ala. 247, — all of which hold that, where there is a special contract limiting the liability of the carrier, the burden is upon the carrier, not only to bring the loss within the exception of the contract, but also of showing that he was guilty of no negligence contributing thereto. Now, it is to be observed that this doctrine had been denied by the Supreme Court of the United States in Clark *v.* Barnwell, 12 How. (U. S.) 272, which is the leading case in favor of the opposing doctrine,

it only makes a case to be governed by a different rule;"[1] and that "the most that it can do is to relieve them from those conclusive presumptions of negligence which arise when the accident is not inevitable, even by the highest care, and to require that negligence be actually proved against them.[2]

§ 1853. Reasoning of those Courts which deny this Effect to the Contract. — On the other hand, those courts which have denied that it is within the power of the common carrier, by a mere contract with the shipper, to reduce his status to that of a private carrier or bailee for hire, have placed their conclusions upon such unanswerable reasoning as this: "It is not true that the character of the employment is changed by such contract, and the carrier is not, and cannot in fact be regarded as a mere private bailee for hire. He is still a common carrier, and not at liberty to refuse to perform his duties as such, even in regard to the particular transaction to which the contract relates. In con-

that where the carrier brings the case within the excepted peril, the burden is shifted upon the owner, of showing negligence or fault. In one of the cases above cited by Mr. Justice Bradley (Graham *v.* State, 4 Oh. St. 362), the decision in Clark *v.* Barnwell was severely criticised by Ranney, J. The Supreme Court of the United States in Railroad Co. *v.* Reeves (10 Wall. (U. S.) 176, 189), had reaffirmed the doctrine of Clark *v.* Barnwell, *supra*. So that the announcement of the principle in Railroad Co. *v.* Lockwood, *supra*, has not had any apparent practical influence upon the decisions of that court, but remains a mere abstract theory. So, in Missouri, where the doctrine that a carrier cannot, by contract, reduce himself to the status of an ordinary bailee for hire, was asserted in a vigorous opinion by Wagner, J. (Levering *v.* Union &c. Co., 42 Mo. 88, 95, 96), the same court, in a subsequent case (Read *v.* St. Louis &c. R. Co., 60 Mo. 199), in which the opinion was delivered by the same judge, entirely ignoring or forgetting its previous ruling, announced its adherence to the doctrine of Railroad Co. *v.* Reeves, and then decided the case on another ground; and the same court, in Davis *v.* Wabash &c. R. Co. (89 Mo. 340, 354), has recently reaffirmed its adherence to the same idea,— which is, that the carrier exonerates himself by showing the presence of the excepted peril, and that the shipper must then show negligence or fault. In New York, Pennsylvania and Missouri, the courts have swung back and forth upon this question like the oscillations of a pendulum, and the writer is justified in saying that some of their decisions have been loosely and feebly considered.

[1] Dorr *v.* New Jersey Steam Nav. Co., 11 N. Y. 485, 493, opinion by Parker, J.

[2] Goldey *v.* Pennsylvania R. Co., 30 Pa. St. 242, 246.

sequence of the nature of his employment and its connection with the public interests, the common carrier is held to a higher degree of diligence than the private carrier; and he cannot be allowed, with proper regard for the public safety, to relieve himself to any extent from that care and diligence which have been enjoined upon him from considerations of great public interest. We are unanimous in holding that the common carrier cannot relieve himself to *any extent* by special contract, from losses occasioned by his own neglect; and that, although he may, by contract, restrict his liability as an insurer, yet that he cannot stipulate for a less degree of care and diligence, in the discharge of his duty, than that which pertains to his peculiar trust as a bailee." [1] "The taking of reasonable care, and the furnishing of cars reasonably safe and suitable for the business — these seem to be the very things required by law; and unless the carrier shows satisfactorily that he has come up to these requirements, he will be responsible for loss without regard to his special contract for exemption." [2] "It is a mistake to suppose that, by the insertion of such an exception as is found in this bill of lading, the character of the employment is changed. The party receiving the goods still remains, notwithstanding this feature of the contract, a common carrier; his liability only to the extent of the exception is diminished. 'In all things else, the very same principles apply. Care and diligence are still elements of the contract, and strict proof is properly required before any exemption may be claimed.'" [3] "The true view is that common carriers are such by virtue of their occupation, not by virtue of the responsibilites under which they rest. These responsibilities may vary in different countries and at different times, or by reason of special contracts, but this does not change the character of the employment; and they are still common carriers, it may may be with enlarged exemptions from responsibility." [4]

[1] Davidson *v.* Graham, 2 Oh. St. 131, 140, opinion by Bartley, J.

[2] Levering *v.* Union &c. Co., 42 Mo. 88, 96, opinion by Wagner, J.

[3] Steele *v.* Townsend, 37 Ala. 247, 253, opinion by R. W. Walker, J.; citing Baker *v.* Brinson, 9 Rich. L. (S. C.) 201, 203.

[4] Brown *v.* Adams Exp. Co., 15 W. W. Va. 812, 818, opinion by Green, President.

§ **1854. Views of the Supreme Court of the United States on this Question.** — The reasoning by which the same conclusion was enforced in the Supreme Court of the United States, deserves, in view of the eminent character of that court, the extent of its jurisdiction, and the great influence of its decisions on questions of commerce, no less than in view of the standing of the judges who pronounced the opinions quoted from, a separate statement. This view was first announced by Mr. Justice Bradley in that tribunal, in what has since come to be regarded as a leading case, in the following language: "It is argued that a common carrier, by entering into a special contract with a party for carrying his goods or person on modified terms, drops his character and becomes an ordinary bailee for hire, and, therefore, may make any contract he pleases. That is, he may make any contract whatever because he is an ordinary bailee; and he is an ordinary bailee because he has made the contract. We are unable to see the soundness of this reasoning. It seems to us more accurate to say that common carriers are such by virtue of their occupation, not by virtue of the responsibilities under which they rest. Those responsibilities may vary in different countries, and at different times, without changing the character of the employment. The common law subjects the common carrier to insurance of the goods, except as against the act of God or public enemies. The civil law excepts also losses by means of *any* superior force, and any inevitable accident. Yet the employment is the same in both cases. And if, by special agreement, the carrier is exempted from still other responsibilities, it does not follow that his employment is changed, but only that his responsibilities are changed. The theory occasionally announced, that a special contract as to the terms and responsibilities of carriage changes the nature of the employment, is calculated to mislead. The responsibilities of a common carrier may be reduced to those of an ordinary bailee for hire, whilst the nature of his business renders him a common carrier still. Is there any good sense in holding that a railroad company, whose only business is to carry passengers and goods, and which was created and established for that purpose alone, is changed to a private

carrier for hire by a mere contract with a customer, whereby the latter assumes the risk of inevitable accidents in the carriage of his goods? Suppose the contract relates to a simple crate of glass or crockery, whilst at the same time the carrier receives from the same person twenty other parcels, respecting which no such contract is made. Is the company a public carrier as to the twenty parcels, and a private carrier as to the one? On this point there are several authorities which support our view, some of which are noted in the margin." [1] A common carrier may, undoubtedly become a private carrier, or a bailee for hire, when, as a matter of accommodation or special engagement, he undertakes to carry something which it is not his business to carry. For example, if a carrier of produce running a truck boat between New York City and Norfolk, should be requested to carry a keg of specie, or a load of expensive furniture, which he could justly refuse to take, such agreement might be made, in reference to his taking and carrying the same, as the parties chose to make, not involving any stipulation contrary to law or public policy. But when a carrier has a regularly established business for carrying all or certain articles, and especially if that carrier be a corporation created for the purpose of the carrying trade, and the carriage of the articles is embraced within the scope of its chartered powers, it is a common carrier, and a special contract about its responsibility does not divest it of the character." [2]

[1] The learned judge here cited Davidson *v.* Graham, 2 Oh. St. 131; Graham *v.* Davis, 4 Oh. St. 362; Swindler *v.* Hilliard, 2 Rich L. (S. C.) 286; Baker *v.* Brinson, 9 *Id.* 201; Steele *v.* Townsend, 37 Ala. 247, — all of which hold that, where there is a special contract limiting the liability of the carrier, the burden is upon the carrier not only to bring the loss within the exemption of the contract, but also to show that he was guilty of no negligence contributing thereto.

[2] Railroad Co. *v.* Lockwood, 17 Wall. (U. S.) 357, 376, 377. In another part of the same opinion, the learned justice adverted to a consequence of this view, in the following language: "The Pennsylvania and Ohio decisions differ mainly in this, that the former give to a special contract (when the same is admissible) the effect of converting the common carrier into a special bailee for hire, whose duties are governed by his contract, and against whom, if negligence is charged, it must be proved by the party injured; whilst the latter hold that the character of the carrier is not changed by the contract, but that he is a common carrier still, with enlarged exemptions from responsibility

In a subsequent case, in certain actions against the Adams Express Company, to recover for the loss of certain money delivered to them for carriage, which money was lost in a fire caused by the wreck of the railway train on which the safe of the company was carried, the circuit court instructed the jury, in substance, that, under the modified contract of bailment which was shown to have been made in this case, the defendants were liable for loss by fire only to the extent to which mere bailees for hire, not common carriers, were liable; that is, that they were responsible only for the want of ordinary care exercised by them or those who were under their control. "With this," said Mr. Justice Strong, in giving the opinion of the Supreme Court, "we cannot concur, though we are not unmindful of the ability with which the learned judge had defended his opinion. We have already remarked, the defendants were common carriers. They were not the less such because they had stipulated for a more restricted liability than would have been theirs had their receipt contained only a contract to carry and deliver. What they were, is to be determined by the nature of their business, not by the contract they made respecting the liabilities which should attend it. Having taken up the occupation, its fixed legal character could not be thrown off by any declaration or stipulation that they should not be considered such carriers." [1] Further on in the opinion, the learned justice says: "We cannot close our eyes to the well known course of business in the country. Over very many of our railroads the contracts for transportation of goods are made, not with the owners of the roads, nor with the railroad companies themselves, but with transportation agencies or companies which have arrangements with the railroad companies for the carriage. In this manner some of the responsibilities of common carriage are often sought to be evaded, but in vain. Public pol-

within which the burden of proof is on him to show that an injury occurs. The effect of this difference is to shift the burden of proof from one party to the other. It is unnecessary to adjudicate that point in this case, as the judge on the trial charged the jury, as requested by the defendants, that the burden of proof was on the plaintiff." *Ibid.* 370.

[1] Bank of Kentucky *v.* Adams Exp. Co., 93 U. S. 174, 180.

icy demands that the right of the owners to absolute security, against the negligence of the carrier, and of all persons engaged in performing the carrier's duty, shall not be taken away by any reservation in the carrier's receipt, or by any arrangement between him and the performing company." [1]

§ 1855. **Reasons given for the Opposing Views in Case of Loss by Fire.** — The conclusion, sustained by the numerical weight of authority, as stated in the preceding sub-section, seems to proceed upon the conception, supported to a considerable extent by experience, that the mere fact of the happening of a fire may be as consistent with the inference of *mere casualty* as with the inference of negligence, and that the former inference is consequently to be preferred. The view of the courts which so hold has nowhere, perhaps, been thrown into a stronger light than in the following reasoning of Mr. Justice Agnew: "The burthen of the proof of the loss which brings the carrier within the restriction in his contract lies on him: but when he has proved such a loss, unattended by circumstances indicating negligence, the *onus* of the proof of negligence is cast upon the plaintiff. The effect is that the carrier must begin the proof, and, if he cannot make it without showing negligence, or circumstances from which it will be inferred, he is not exonerated. But when he has shown a loss within the restriction, to require more of him is to limit the restriction, and destroy its chief purpose. It is the great risk of fire, not compensated by the ordinary compensation of the carriage, and the difficulty of preventing it even with great care, as well as the impossibility oftentimes of proving the attending circumstances, which constitute the great reason for the limitations of liability from this cause. When vessel and cargo have both been consumed, and the sailors have gone to the bottom, or have been scattered over the seas in other service, no evidence remains of the attending circumstances; and the limitation is useless, if, in addition, the carrier must prove due care and diligence affirmatively. When he has shown the loss within the exception of his

[1] *Ibid*, 185.

contract, without apparent negligence, he has brought himself within the terms of his bargain. On what principle is that bargain to be nullified, by requiring of him the production of that evidence, the loss or difficulty of obtaining which was the very reason for limiting his responsibility? He may well say to the shipper, 'If this be the rule you would put me under, pay me the extra hire for the service, for I might as well omit the restriction if I am held to a measure of evidence I probably cannot furnish.' To load down his contract with this measure of proof is simply to hold that he cannot limit his responsibility. It is surely enough to say to him, 'If your own evidence shows your negligence, you have not acquitted yourself of liability.' The presumption of self interest, as well as of honesty, forbids the idea of a voluntary or a negligent fire, which must cause so much loss to the owner and so much danger to his servants. That the *onus* of establishing negligence should rest upon the plaintiff is therefore a proper consequence of the power to limit liability by special contract." [1] This reasoning overlooks the consideration that the difficulty of producing proof of negligence would be even greater in the shipper, than that of producing proof of diligence in the carrier. It is at least possible for the latter, on notice to the shipper, knowing from the books of his agent in port who the shipper is, to take the depositions of the sailors *de bene esse*, before they scattered on other voyages. Aside from this, the shipper, from the nature of the case, can never prove the circumstances attending a loss, even by fire at sea, such as the one under consideration in the above case, unless he actually accompanies his goods on the voyage and watches them all the time. He must, in most of such cases, resort for his evidence to the carrier's servants, which is tantamount to excluding the possibility of his proving negligence.

The other view was thus clearly stated by Mr. Justice Stone: "The shipper makes a *prima facie* case against the carrier, when he shows the goods were not delivered. This casts the *onus* on the carrier, to show that the loss occurred from a danger of the

[1] Patterson *v.* Clyde, 67 Pa. St. 500, 506.

river, or from fire; and he must also prove a *prima facie* case of diligence on his part. This, of course, implies a river-worthy vessel, properly furnished and appointed, competent and sufficient officers and crew, and care and vigilance to prevent danger, and to avert it when impending. Any deficiency in the skill or watchfulness of the officers or crew, in the matter of their special function, in the apparatus to extinguish fire, or in its whereabouts or readiness for prompt present use, or in prompt and vigorous effort to extinguish a fire when it originates, would fall short of proving a *prima facie* case of diligence. Beyond these two shifting stages, our decisions have declared no rule in the matter of the burden of proof." [1]

§ **1856. What Excepted Perils are within the Rule.** — The rule which exonerates a carrier from liability, who adduces evidence which, so to speak, "brings the case within the excepted peril," has been applied in the case of dangers of navigation,[2] perils of the seas,[3] "accident of machinery, boilers, or dangers of the sea of any kind," [4] fire,[5] dangers of the river,[6] "unavoidable dangers of river navigation" — sinking of the vessel in a collision,[7] "accidental and uncontrollable events," under the Louisiana

[1] Gray *v.* Mobile Trade Co., 55 Ala. 387, 399, opinion by Stone, J.

[2] The Mohler, 21 Wall. (U. S.) 230; Hunt *v.* The Cleveland, 6 McLean (U. S.), 76, 79; Clark *v.* Barnwell, 12 How. (U. S.) 272; Transportation Co. *v.* Downer, 11 Wall. (U. S.) 129, 134; The Neptune, 6 Batchf. (U. S.) 194.

[3] Speyer *v.* The Mary Bell Roberts, 2 Sawy. (U. S.) 1; Schooner Emma *v.* Johnson, 1 Sprague (U. S.), 527; Bearse *v.* Ropes, 1 Sprague (U. S.), 331.

[4] Kelhan *v.* The Kensington, 24 La. Ann. 100.

[5] Colton *v.* Cleveland &c. R. Co., 67 Pa. St. 211; Wertheimer *v.* Pennsylvania R. Co., 17 Blatchf. (U. S.) 421; Patterson *v.* Clyde, 67 Pa. St. 500, 506; Little Rock &c. R. Co. *v.* Corcoran, 40 Ark. 376; Little Rock &c. R. Co. *v.* Talbott, 39 Ark. 523, 530; Little Rock &c. R. Co. *v.* Harper, 44 Ark. 208; Whitworth *v.* Erie R. Co., 87 N. Y. 413, 419; Railroad Co. *v.* Reeves, 10 Wall. (U. S.) 176; Union Ins. Co. *v.* Shaw, 2 Dill. (U. S.) 14, 21; Mims *v.* Mitchell, 1 Tex. 443, 453; Denton *v.* Chicago &c. R. Co., 52 Ia. 161, 164; Farnham *v.* Camden &c. R. Co., 55 Pa. St. 53.

[6] Turney *v.* Wilson, 7 Yerg. (Tenn.) 340, 343; Dunseth *v.* Wade, 3 Ill. 285, 288.

[7] Hays *v.* Kennedy, 41 Pa. St. 378, 384.

Code,[1] theft,[2] and an extraordinary flood, ascribed to the "act of God,"[3]

§ **1857. Defense of Loss by Perils of Navigation.** — Coming now to the question what the carrier must prove in order to exonerate himself in the case of particular exemptions in the contract of carriage, let us first consider the usual clause in marine bills of lading which exonerates the carrier from liability for loss or damage happening through "perils of the seas," "dangers of navigation," and the like, couched in varying forms of expression. Here, remembering the principle that the carrier must make out a *prima facie* case of exoneration, and that the shipper will not be required to prove a negative — that is, that the loss did *not* happen by perils of the sea,[4] and that, notwithstanding the exemption, he remains responsible for losses which could not have been prevented by ordinary skill and foresight,[5] — it is a reasonable conclusion that the carrier does not complete his excuse by merely showing the *presence* of a sea-peril, such as a violent storm. He must *also* show that his vessel was sea-worthy, at least unless it appears that the storm was of such violence that a sea-worthy ship might have gone down in it. This is equivalent to saying that, whether the *onus probandi* as to sea-worthiness lies upon the carrier or upon the shipper will depend upon the facts of the particular case; and in a case of marine insurance, the rule has been said to be: "If a ship, within a day or two after her departure, become leaky and founder at sea, or be obliged to put back, without any visible or adequate cause to produce such an effect, the natural presumption is that she was not sea-worthy when she sailed; and it will be then incumbent on the assured to show the state she was in at the time. But if it appears from the facts of the case that the loss may be fairly attributed to sea damage, or any other unforeseen misfortune,

[1] Kirk *v.* Folsom, 23 La. Ann. 584; Price *v.* Ship Uriel, 10 La. Ann. 413.

[2] Claflin *v.* Meyer, 75 N. Y. 260, 263.

[3] Davis *v.* Wabash &c. R. Co., 89 Mo. 340, 352.

[4] Shaw *v.* Gardner, 12 Gray (Mass.), 488, 490.

[5] Turney *v.* Wilson, 7 Yerg. (Tenn.) 340, 343.

but yet the insurers mean to allege that the ship at her departure was not sea-worthy, the *onus probandi* will lie on them. This seems to be the simplest rule, and simple rules are always best in matters of commerce."[1] Upon parallel reasoning he ought to be required, in order to make out a *prima facie* exoneration, to show a vessel well manned by competent seamen, not overloaded, the cargo properly stowed, and a display of good seamanship and good conduct on the part of the officers and crew in the face of the storm. Until he adduces evidence establishing such a predicate, he does not, in a case where the burden of proof is upon him, presumptively show that the proximate cause of the loss or injury was the fury of the elements instead of the negligence of himself or servants; if his evidence leaves the question equally balanced, he fails to exonerate himself. "It is important," said Lowrie, C. J., "to have a clear idea of this. The carrier is bound to carry safely, and if he fail to do so, the burden of proof of a valid excuse is cast upon him. If he show a cause which the law admits to be sufficiently serious to be called inevitable, he has merely prepared the way for showing that he has used all possible care. At this stage of the case, the law does not presume any fault on his part, but simply demands that he shall complete his excuse by showing that, in the midst of the danger, he exercised all the skill and care he could to avoid it. If this be made out, then he stands entirely without fault before the law, having performed his whole duty under his contract, as it is interpreted by law, according to the customs of merchants and carriers."[2]

[1] Bell *v.* Reed, 4 Binn. (Pa.) 127, 135. See *ante*, § 1850.

[2] Hays *v.* Kennedy, 41 Pa. St. 378, 384. See also Humphreys *v.* Reed, 6 Whart. (Pa.) 435, 444; Letchford *v.* Golden Eagle, 17 La. Ann. 9. Ignoring this principle, as it would seem, it was held in one case that, where the vessel encountered a severe storm, sufficient to account for the damage in the exception of the bill of lading, this shifted the burden of proving negligence to the shipper. The Neptune, 6 Blatchf. (U. S.) 194. In another case it was ruled that "a peril of navigation having been shown to exist, and to have occasioned the loss which is the subject of complaint, the defendant was *prima facie* relieved from liability, for the loss was thus brought within the exceptions of the bill of lading. There was no pre-

§ 1858. **Defense of Loss by Fire.** — The divergence of judicial opinion, already pointed out,[1] appears to some extent in cases where the defense set up by the carrier is that the goods were lost by fire, and where there is a special contract exempting the carrier from liability in the case of such a loss. The prevailing opinion in these cases has been possibly influenced to some extent (unconsciously no doubt on the part of the judges), by the rule in cases of fire insurance, which prohibits the insurer from proving, as a defense, that the loss happened through the negligence of the insured or his servants. A very great numerical preponderance of authority is to the effect that a carrier whose liability is governed by such a contract, exonerates himself by showing a loss from a fire happening from some unknown cause, and that it is therefore incumbent upon the plaintiff, in order to sustain a recovery, to show negligence on the part of the carrier or his servants, either in the happening of the fire or in failing to rescue the goods from it.[2] Only three cases are now recalled by the writer which apply, in the case of loss by fire, the rule that it is not only incumbent upon the carrier to prove that such

sumption, from the simple fact of a loss occurring in this way, that there was any negligence on the part of the company." Transportation Co. *v.* Downer, 11 Wall. (U. S.) 129,134. This case was severely criticised by Mr. District Judge Miller, in a subsequent case in the Circuit Court of the United States, in which he used the following language: "If that case, as reported, is adhered to as law, all that the owners of steamboats are required, in order to bring themselves within the exception, is to show that they encountered shallow water and stuck. Before a shipper should be put to prove negligence on the part of the carrier, the carrier should furnish evidence tending to show that the accident was unavoidable." The Ocean Wave, 3 Biss. (U. S.) 317.

[1] *Ante*, § 1850.

[2] Kelham *v.* The Kensington, 24 La. Ann. 100; New Orleans Mutual Insurance Co. *v.* New Orleans &c. R. Co., 20 La. Ann. 302; Colton *v.* Cleveland &c. R. Co., 67 Pa. St. 211; Wertheimer *v.* Pennsylvania R. Co., 17 Blatchf. (U. S.) 421; Cochran *v.* Dinsmore, 49 N. Y. 249, 252; Patterson *v.* Clyde, 67 Pa. St. 500, 506; Whitworth *v.* Erie R. Co., 87 N. Y. 413, 419; Farnham *v.* Camden &c. R. Co., 55 Pa. St. 53; Railroad Co. *v.* Reeves, 10 Wall. (U. S.) 176; Union Ins. Co. *v.* Shaw, 2 Dill. (U. S.) 14, 21; Mims *v.* Mitchell, 1 Tex. 443, 453; Wilson *v.* Southern Pacific R. Co., 62 Cal. 164, 172; Steamboat Emily *v.* Carney, 5 Kan. 645; Denton *v.* Chicago &c. R. Co., 52 Ia. 161, 164.

was the cause of the loss, but *also* to prove that there was no negligence or fault on the part of himself or his servants.[1]

§ **1859. Effect of Stipulations as to Value.** — It is next to be considered how the principles here discussed apply in cases where the carrier stipulates for a limited liability as to value; and here the authorities are in direct conflict. The better opinion, supported by the weight of adjudicated cases, is that a common carrier cannot stipulate for a limited liability as to value in case of loss, where the loss is occasioned by his own negligence.[2] Another class of cases hold that, where contracts restricting the liability of the carrier, in respect of the limit of value which he shall be compelled to pay in case of loss, are signed by the shipper and fairly made, with a rate of freight based on the condition that the carrier assumes liability only to the extent of the agreed valuation, the contract will be upheld, even in case of loss or damage by the negligence of the carrier, as a proper and lawful mode of securing a due proportion between the amount for which the carrier may be responsible and the freight he receives, and of protecting himself against extravagant and fanciful valuations.[3] The courts which adopt the

[1] Grey *v.* Mobile Trade Co., 55 Ala. 387, 399; Ryan *v.* Missouri &c. R. Co. (Tex.), 23 Am. & Eng. R. Cas. 703. Wardlaw *v.* South Carolina R. Co., 11 Rich. L. (S. C.) 337, 341. In this last case the court sustained an instruction "that, it was right to require the company to show how the fire occurred; in the absence of such proof it might be that the jury would think them liable." Where the petition charges that the goods were, *through the negligence of the defendant*, allowed to be destroyed by fire, the plaintiff must not only prove the destruction by fire, but that the fire originated, or the goods were not rescued therefrom, in consequence of the defendant's negligence. Denton *v.* Chicago &c. R. Co., 52 Ia. 161, 164.

[2] Southern Exp. Co. *v.* Moon, 39 Miss. 822; The City of Norwich, 4 Ben. (U. S.) 271; United States Exp. Co. *v.* Backman, 28 Oh. St. 144; Black *v.* Goodrich Transp. Co., 55 Wis. 319; Chicago &c. R. Co. *v.* Abels, 60 Miss. 1017; Kansas City &c. R. Co. *v.* Simpson, 30 Kan. 645; Moulton *v.* St. Paul &c. R. Co., 31 Minn. 85.

[3] Hart *v.* Pennsylvania R. Co., 112 U. S. 331; Squire *v.* New York Central R. Co., 98 Mass. 239; Newburger *v.* Howard, 6 Phila. 174; Hopkins *v.* Westcott, 6 Blatchf. (U. S.) 64; Belger *v.* Dinsmore, 51 N. Y. 166; Magnin *v.* Dinsmore, 56 N. Y. 168; 62 *Id.* 35; 70 *Id.* 410; Oppenheimer *v.* United States Exp. Co., 69 Ill. 62; Earnest *v.* Express Co., 1 Woods (U. S.), 573; Elkins *v.* Empire Transpor-

former rule have generally held that, where the carrier would exonerate himself from the payment of damages beyond the amount stipulated, in case the loss is proved to have been in fact greater, the burden is upon him to show that he was not guilty of negligence.[1] On the other hand, the cases which allow the carrier, by a contract with the shipper, to fix a limit of valuation in consideration of the rate of freight received, which shall prevail even in case of loss or damage by his neglect, generally take the view that, in the case of a loss or damage, the shipper must prove that it happened through negligence, and the carrier is not required in the first instance to disprove negligence.[2]

§ 1860. What Presumption in Case of Loss or Injury by Connecting Carriers: (*a.*) The English Rule.—On this question there is a division of judicial opinion. One rule, commonly known as

tation Co., 81 Pa. St. (32 P. F. Simth) 315; South &c. R. Co. *v.* Henlein, 52 Ala. 606; *s. c.* 56 Ala. 368; Muser *v.* Holland, 17 Blatchf. (U. S.) 412; Harvey *v.* Terre Haute R. Co., 74 Mo. 538; Graves *v.* Lake Shore R. Co., 137 Mass. 33.

[1] Grogan *v.* Adams Exp. Co. 114 Pa. St. 523; *s. c.* 5 Cent. Rep. 298; American Exp. Co. *v.* Sands, 55 Pa. St. 140.

[2] The doctrine, perhaps, takes root in an early case where, according to the syllabus, it was ruled that "if a carrier gives notice that he will not be accountable for goods above the value of £20, unless entered and an insurance paid over and above the price charged for carriage, according to their value, a person who enters silk exceeding the value of £20 and does not pay the insurance, cannot recover any part of the value of the goods, if lost; although the price he agrees to pay for the carriage of the silk is, on account of its superior value, higher than the ordinary price charged for the carriage even of bulky articles; and although the carrier does not prove that the loss happened by any of those accidents against which the law makes him an insurer. The carrier is not bound to prove that he used reasonable care." Harris *v.* Packwood, 3 Taunt. 264. In an old case (*anno* 1789), a carrier gave notice by printed proposals that he would not be answerable for certain valuable goods if lost, of more than the value of a certain sum, to the extent of more than £5 value, unless entered as such, and a penny insurance paid for each pound value. Goods of that description were delivered to him by one who knew the conditions of the notice, but who concealed the value of the goods and paid no more than the ordinary price of carriage and booking. The goods having been lost, and the owner having brought an action against the carrier, it was held that he was not liable to the extent of the sum specified, nor even to repay the price actually paid for the carriage or booking. Clay *v.* Willan, 1 H. Bl. 298.

the English rule,[1] adopted in Illinois,[2] and possibly in some other American jurisdictions, is that, where a carrier receives goods consigned to a point beyond the terminus of its own line, it impliedly engages to carry them to their destination, and becomes liable for any neglect of duty by the other carriers in whose hands the goods are placed for the completion of the transit. This rule is founded on the conception, stated by Baron Rolfe in charging a jury and afterwards approved by the whole Court of Exchequer, that, where a common carrier takes into his care a parcel directed to a particular place, and does not, by positive agreement, limit his responsibility to a part only of the distance, that is *prima facie* evidence of an undertaking on his part to carry the parcel to the place to which it is directed; and that the same rule applies, although that place is beyond the limits within which he generally professes to carry on his trade of a carrier.[3] The reason given for the rule by the Supreme Court of Illinois is that, where goods are lost by one carrier, in a line of carriers composed of several, it is more just to hold the carrier liable to whom the goods are delivered by the consignor, than to require the consignor to spend time and money in searching for the carrier in whose hands they were lost, and to bring suit for the injury, possibly in a distant State. The intermediate carriers are therefore considered the agents of the first carrier; and, as the first carrier has facilities which the consignor cannot have for tracing out the loss, he can locate it upon the carrier who committed it, and have an action over against him.[4]

§ **1861.** (*b.*) **The American Rule.**—The American rule which, under the same circumstances, holds the last carrier *prima facie* liable, proceeds to some extent upon the policy of relieving the owner from the necessity of doing what, in most cases, would be

[1] Muschamp *v.* Lancaster &c. R. Co., 8 Mees. & W. 421.

[2] Illinois Central R. Co. *v.* Frankenburg, 54 Ill. 88, 98; Chicago &c. R. Co. *v.* Northern Line Packet Co., 70 Ill. 217.

[3] Muschamp *v.* Lancaster &c. R. Co., 8 Mees. & W. 421.

[4] Illinois Central R. Co. *v.* Frankenburg, *supra*; Chicago &c. R. Co *v.* Northern Line Packet Co., *supra.*

a practical impossibility, tracing the goods and discovering the carrier in whose hands they were lost. It is thus stated: Where goods are delivered to the first carrier, in a line of several connecting carriers, to be transported over the entire line, and they are lost in transit, or are delivered at the end of the transit in a damaged condition, if there is no direct evidence to show where they were lost or injured, the jury may, if there is nothing in the evidence to render the presumption improbable, presume that they reached the hands of the last carrier in the same condition as when delivered to the first; and consequently the last carrier will be charged with the loss or damage, unless he exonerates himself by proving that the goods did not come into his hands, in the case of loss, or that he delivered them in the condition in which he received them from the next connecting carrier, in the case of damage.[1] In so holding it was said: "It must be confessed that, separate from any question of public or judicial policy, this is about as weak a presumption as the law could well raise upon any state of facts; for the mere fact that B. delivers a thing to C. in a broken condition does not, when considered as a mere question of moral evidence, raise any presumption one way or the other as to whether the thing was broken or whole when it came into the hands of B. But it must be remembered that this is not a mere question what conclusion is morally deducible from the facts; it is a question which concerns the burden of proof. The burden of proof is the necessity of proof. In general, the evidence to sustain the allegation must be produced by the party making it; but when, from the circumstances of the case, the other party can alone produce this evidence, there are many cases in which the law, to prevent a failure of justice, compels him to produce it; and it compels him to do this by making such slight circumstances against him as the party making the allegation may be able to show, conclusive against him unless he does produce it." And the court after quoting in

[1] Shriver *v.* Sioux City &c. R. Co., 24 Minn. 506, 512; Smith *v.* New York &c. R. Co., 43 Barb. (N. Y) 225 (affirmed, see index, 41 N. Y. 620); Laughlin *v.* Chicago &c. R. Co., 28 Wis. 204; Southern Exp. Co. *v.* Hess, 53 Ala. 19, 24; Lin *v.* Terre Haute &c. R. Co., 10 Mo. App. 125, 131.

favor of the rule the decisions in other jurisdictions last cited, concluded by saying: "These decisions do not rest for support merely upon the principle of necessity. They are supported by the rule that, when a certain state of facts is shown to exist, it is (at least, within certain limits) presumed to continue till the contrary appears."[1]

§ 1862. Assent of Shipper to Conditions in Receipt. — If a shipper takes a receipt for his goods from a common carrier, which contains conditions limiting the liability of the carrier, with a full understanding of such conditions, and an intention to assent to them, it becomes his contract as fully as if had signed it, and these are questions for the jury.[2]

§ 1863. Burden on Carrier to bring Notice Home to Shipper. — Where the carrier relies upon a printed or written notice, exempting him from his common-law liability, the burden is upon him of showing that the shipper had notice or actual knowledge of the terms expressed in such notice, before the delivery of the goods or cattle to him for shipment, and that they were assented to by him; and whether he had such notice or knowledge and assented thereto, is a question of fact for a jury.[3]

[1] Lin *v.* Terre Haute &c. R. Co., 10 Mo. App. 125, 130.

[2] Anchor Line *v.* Dater, 68 Ill. 369; Merchants' Dispatch *v.* Theilbar, 86 Ill. 71; Adams Exp. Co. *v.* King, 3 Ill. App. 316; Field *v.* Chicago &c. R. Co., 71 Ill. 458. Compare Adams Exp. Co. *v.* Haines, 42 Ill. 89; Illinois &c. R. Co. *v.* Frankenburg, 54 Ill. 88; Louisville &c. R. Co. *v.* Brownlee, 14 Bush (Ky.), 590; Morrison *v.* Phillips &c. Co., 44 Wis. 405; White *v.* Goodrich Transp. Co., 46 Wis. 493; Merchants' Dispatch *v.* Cornforth, 3 Col. 280.

[3] Baltimore &c. R. Co. *v.* Brady, 32 Md. 333; Kallman *v.* United States Exp. Co., 3 Kan. 205; Ang. Car., § 276. "In every case of public notice," says Prof. Greenleaf, "the burden of proof is on the carrier, to show that the person with whom he deals is fully informed of its tenor and extent." 2 Greenl. Ev., § 216. The learned author cites Butler *v.* Heane, 2 Campb. 415, *per* Lord Ellenborough; Kerr *v.* Willan, 2 Stark. 53; Macklin *v.* Waterhouse, 5 Bing. 212. But if the shipper take a receipt, the terms of which limit the liability of the carrier to a specified amount, unless the value of the package be specially stated in the receipt, he will, it has been held, be *presumed to know* its contents and to assent thereto. Oppenheimer *v.* United States Exp. Co., 69

§ 1864. Where there is a Special Exemption and then a Deviation. — Where a carrier accepts goods to be carried, with a direction on the part of the owner to carry them in a particular way, or by a particular route, as "all rail," he is bound to obey such instructions; and if he attempts to perform his contract in a manner different from his undertaking, he becomes an insurer, and cannot avail himself of any exception in the contract.[1] But if it be shown in such a case that the loss must certainly have occurred from the same cause, if there had been no default, misconduct or deviation, the carrier will be excused; but the burden of proving this fact is upon him.[2]

§ 1865. Strength of the Evidence to Excuse. — It has been reasoned that, in an action against a common carrier for damage

Ill. 62; Belger *v.* Dinsmore, 51 N. Y. 166; Grace *v.* Adams, 100 Mass. 505; Mulligan *v.* Illinois Central R. Co., 36 Ia. 181. So, it has been held a passenger will be presumed to know the conditions printed upon the ticket which he receives. Steers *v.* Liverpool &c. Co., 57 N. Y. 1. But this is a very unjust rule, and the contrary has been decided in the House of Lords. Henderson *v.* Stevenson, L. R. 2 H. L. (Sc.) 470. See further on this presumption of assent in the case of contracts of affreightment, express receipts, etc., Adams Exp. Co. *v.* Stettauers, 61 Ill. 184; Gott *v.* Dinsmore, 111 Mass. 45; Buckland *v.* Adams Exp. Co., 97 Mass. 125; Blossom *v.* Dodd, 43 N. Y. 264; Illinois Central R. Co. *v.* Frankenburg, 54 Ill. 88. And in the case of passenger tickets: Rawson *v.* Pennsylvania R. Co., 48 N. Y. 212; Parker *v.* Southeastern R. Co., 2 C. P. Div. 416; Brown *v.* Eastern Railroad, 11 Cush. (Mass.) 97. A notice in the English language to a German, ignorant of that language, is not sufficient. Camden &c. R. Co. *v.* Baldauf, 16 Pa. St. 67. Evidence that a notice that baggage sent or carried on the so-called Telegraph Line would be at the risk of the owner, printed on a large sheet, placarded in most of the stage offices from Albany to Buffalo (the route of the coach), and particularly at Utica, where the plaintiff had resided for three years immediately preceding the loss of his trunk, which was the occasion of the action, was held not sufficient to authorize the jury to infer knowledge on the part of the plaintiff of the terms on which the coach proprietor intended to transact his business. Hollister *v.* Nowlen, 19 Wend. (N. Y.) 234. Compare Cole *v.* Goodwin, 19 Wend. (N. Y.) 251.

[1] Maghee *v.* Camden &c. R. Co., 45 N. Y. 514, 522; Dunseth *v.* Wade, 3 Ill. 285; Hastings *v.* Pepper, 11 Pick. (Mass.) 41; Steel *v.* Flagg, 5 Barn. & Ald. 342; Coleman *v.* New York Central R. Co., 33 N. Y. 610; Story Bailm., § 509.

[2] Maghee *v.* Camden &c. R. Co., 45 N. Y. 514, 523; Davis *v.* Garrett, 6 Bing. 716; Dunseth *v.* Wade, 3 Ill. 285; Abbott on Shipping, 362; Story Bailm. § 509

to goods, the proof which will relieve him from liability must be *clear and certain*, to the effect that the damage did not arise while the goods were in his hands; for the presumption is against him, not only from the terms of the bill of lading, but from the policy of the law; and the testimony of his servants must be received with great caution.[1] But while this may be true, it has been reasoned that, in sustaining the burden which is thus cast upon him, it is not necessary for the carrier to show the precise manner in which the loss of the goods occurred; it will be sufficient for him to show clearly that he exercised ordinary care respecting the goods, and that the loss did not happen from any negligence or want of care on his part.[2] The extent to which the courts have swung backward and forward on this question, will be seen in the statement of as great a judge as Chief Justice Shaw, that the evidence to exonerate the carrier ought to clear him of fault beyond a *reasonable doubt;*[3] while, on the other hand, Lord Denman, in directing a jury in such a case, where the defense was damage by peril of the sea, told them that if the injury might as well be attributable to a peril of the sea as to negligence, they should find the former, and that, if, on the whole, it was left in *doubt* what the cause of the damage was, the defendants would be entitled to the verdict.[4]

§ 1866. Effect of Recital in Bill of Lading that Goods were Received in Good Condition. — The following statement of legal doctrine by Chief Justice Shaw has been often cited in subsequent cases with approval: "It may be taken to be perfectly well established that the signing of a bill of lading acknowledging to have received the goods in question in good order and well conditioned, is *prima facie* evidence that, as to all circumstances which were open to inspection and visible, the goods were in good order; but it does not preclude the carrier from showing, in case of loss or damage, that the loss proceeded from some cause which

[1] Bond *v.* Frost, 8 La. Ann. 297, 300.

[2] Lichtenhein *v.* Boston &c. R. Co., 11 Cush. (Mass.) 70, 72.

[3] Hastings *v.* Pepper, 11 Pick. (Mass.) 41, 44.

[4] Muddle *v.* Strude, 9 Car. & P 380.

existed, but was not apparent, when he received the goods, and which, if shown satisfactorily, will discharge the carrier from liability. But, in case of loss or damage, the presumption of law is, that it was occasioned by the act or default of the carrier, and, of course, the burden of proof is upon him to show that it arose from a cause existing before his receipt of the goods for carriage, and for which he is not responsible."[1] Like a receipt, it may be explained or contradicted by parol. The reason of the rule that it does not estop the carrier from showing that in point of fact the goods were not in the condition therein described, is that, if the carrier were bound absolutely by the statement of the bill of lading as to the condition of the goods, he could never safely sign a bill of lading, especially in the form now universally in use, without subjecting the goods to an examination which would be detrimental to shippers and more injurious in its general operation than the rule of law which lets in the very truth of the case and exonerates him from liability, when, in fact, he is guilty of no wrong.[2]

§ 1867. Burden to Show Compliance with Engagement to Present Claim within a Limited Time. — Many of the contracts imposed upon shippers by carriers contain the stipulation that, in case of loss or damage, the owner shall present his claim for reimbursement within a specified time, otherwise the carrier will be exempt from liability. In such a case, where the shipper brings the action, not upon the carrier's common-law duty, but upon the special contract, it has been reasoned that, as in other cases of action upon express contracts, the burden is upon the plaintiff to show compliance with all the obligations which the contract imposes upon him, including the obligation to present

[1] Hastings *v.* Pepper, 11 Pick. (Mass.) 43; quoted and reaffirmed in Nelson *v.* Woodruff, 1 Black (U. S.), 156; Tarbox *v.* Eastern Steamboat Co., 50 Me. 339, 346. See also The Invincible, 1 Lowell (U. S.), 225; Howard *v.* Wissman, 18 How. (U. S.) 189; Bates *v.* Todd, 1 Mood. & R. 106; Warden *v.* Green, 6 Watts (Pa.), 424; Meyer *v.* Peck, 28 N. Y. 590; Canfield *v.* Northern R. Co., 18 Barb. (N. Y.) 586; Dickerson *v.* Seelye, 12 Barb. (N. Y.) 99; Bissell *v.* Price, 16 Ill. 408, 413; Ang. Carr., § 231.

[2] Bissell *v.* Price, *supra.*

his claim within the stipulated time.[1] But where there were two contracts, and the one which contained this clause was not counted upon by the shipper in his action against the carrier, but was put in evidence to prove the fact and date of the delivery of the package to the carrier and its destination, it was held that this rule did not apply to it. The court said: "It does not, therefore, seem that, because the plaintiff may have been compelled to put this agreement in evidence for the purpose of proving the facts named, the burden was cast upon him of showing, as a condition precedent to his right to recover upon another contract, that he had complied with the special condition in *this* contract."[2]

Article II. — Precedents of Instructions in such Actions.

Section

1872. Effect of Bill of Lading acknowledging the Receipt of Goods in good Order.
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§ 1872. Effect of Bill of Lading acknowledging Receipt of Goods in Good Order. — "If the jury believe, from the evidence, that the defendant received the corn and oats claimed to be in a damaged condition when it arrived, and gave bills of lading acknowledging the receipt of such grain in apparent good order, then such bills of lading are *prima facie* evidence that the grain mentioned in such bills of lading was, at the time it was shipped, in good order and condition, and is

[1] McNichol *v.* Pacific Express Co., 12 Mo. App. 401; citing Eyerman *v.* Cemetery Association, 61 Mo. 489. So held in McBeath *v.* Wabash &c. R. Co., 20 Mo. App. 445. Compare Brown *v.* Wabash &c. R. Co., 18 Mo. App. 568, 577; Dawson *v.* Railway Co., 76 Mo. 514.

[2] McNichol *v.* Pacific Exp. Co., 12 Mo. App. 401, 406.

binding on the defendant unless rebutted; and to overcome such *prima facie* evidence, it is incumbent on the defendant to introduce such evidence as will show, to the satisfaction of the jury, that such grain was not, in fact, in good order and condition." [1]

§ 1873. "ACT OF GOD:" INJURY TO WINE BY FREEZING. — "The term 'act of God,' in law, means a cause which operates without any aid or interference from man; for if the cause which produced or occasioned the injury became destructive by human agency or co-operation, then the loss is to be ascribed to man, and not to God.[2] - - - - And if the jury believe from the evidence that the wine in question was damaged after it was received by the defendant, and before it was delivered to the plaintiff, then the jury must find for the plaintiff, unless they further find from the evidence that the 'act of God' was the immediate and sole cause of such damage, and that the defendant was not guilty of any carelessness, negligence, or fault which conduced to the damage. - - - - The burden of proving that the injury complained of (if any happened) was caused by the 'act of God' rests upon the defendant in the first instance.[3] - - - - If the jury believe from the evidence that, after defendant received the wine in question, and before the same was delivered to the plaintiff, the defendant permitted said wine carelessly to lie exposed in the weather, and thereby the same was frozen and spoiled, they will find for the plaintiff — unless the jury further find that defendant was prevented from taking proper care of said wine by the 'act of the God.'" [4]

[1] Approved in Illinois &c. R. Co. *v.* Cobb, 72 Ill. 148, 154. Citing: Bissel *v.* Price, 16 Ill. 408, and Railroad Co. *v.* McDonald, 18 Ill. 172. In Kirkpatrick *v.* Kansas City &c. R. Co., 86 Mo. 341, an instruction will be found applicable to the case of the destruction of grain in the hands of a carrier which had been sold to the plaintiff while in transit. In Bartlett *v.* Steamboat Philadelphia, 32 Mo. 258, instructions will be found as to the duty of the carrier in respect of goods which are not called for at the end of the transit. In Evans *v.* Rudy, 34 Ark. 387, a series of instructions will be found applicable to the case where the plaintiff's mules and wagon were precipitated into the river from the defendant's *ferry-boat*, the court citing Harvey *v.* Rose, 26 Ark. 3, and authorities there cited; and also Wyckoff *v.* Ferry Co., 52 N. Y. 32. In O'Rourk *v.* Chicago &c. R. Co., 44 Iowa, 530, instructions will be found applicable to a case where goods were committed to a member of a connecting line and the place of destination was wrongly marked.

[2] *Ante*, § 1856.

[3] *Ante*, § 1850.

[4] Approved in Wolf *v.* American Express Co., 43 Mo. 422, 423.

§ 1874. Defendant's Instructions on the Same Hypothesis. — "If the jury believe from the evidence that the wine of plaintiff was damaged by reason of the sudden and extreme change of weather, and without any carelessness or negligence on the part of defendant, its agents, servants, or employés, they will find for defendant. - - - - The common carrier is not liable for injury to property in its charge which is occasioned by the 'act of God;' and extreme cold weather is such an act. If, then, the jury believe from the evidence that the injury complained of was, by reason of the severe cold, and that the carrier could not, by the exercise of the greatest care and foresight which its agents or employés could have exercised under the circumstances, prevented the accident, then the jury will find for the defendant." [1]

§ 1875. Delivery on a Forged Order. — "If you believe, from the evidence, that the defendant was a common carrier, and as such received the money in question, to be carried and delivered to the plaintiff, at Kankakee, and that the defendant delivered said money to one Edmonds, on a writing purporting to be an order of the plaintiff, and that said order was a forgery, then the defendant was guilty of gross negligence, and the plaintiff is entitled to recover the amount of said money." [2]

§ 1876. Loss of Baggage on Connecting Lines. — "A railroad company may become liable as a common carrier by contract for transportation of passengers and baggage over other railroads forming with their own a continuous line; and where they do so contract, their liability is the same for losses occasioned by negligence or fault while the baggage is upon such other road, as while it is upon their own road. - - - - The first question in this case is, what was the contract between the parties? Did the defendant agree to carry the plaintiff and her baggage all the way from New York, or only from Baltimore? and in selling the ticket to carry plaintiff and her baggage from New York to Baltimore, did it act only as the agent of the other roads named? If the contract of the defendant was only to carry plaintiff and her baggage from Baltimore, then it would not be liable unless the baggage came into the possession or custody of some agent or employé of the de-

[1] Given in Wolf *v.* American Express Co., 43 Mo. 423. As the express company was the appellant, these instructions were not challenged on appeal; but they were drawn by able lawyers and are probably correct.

[2] Approved in American &c. Express Co. *v.* Milk, 73 Ill. 226.

fendant. - - - - If the jury find from the testimony that the ticket sold by the defendant to Mrs. Campbell, at its office in New York City, in December, 1874, for her transportation from said city, or Jersey City, to Columbus, Ohio, was issued by the Pennsylvania Railroad Company, that the trunk was checked at Brooklyn, with a check issued by said Pennsylvania Railroad Company, and that the defendant acted as the agent only of the said Pennsylvania Railroad Company in the sale of said ticket, and the defendant, with a knowledge thereof, acquiesced therein; and if the jury shall further find that the defendant has no interest in the price of said ticket other than the proportion it would be entitled to for the distance traveled upon the line of road of defendant from Baltimore westwardly, and if the jury shall further find that the trunk was not received into the custody of the defendant or its agents at Baltimore or some other place on its line of road, the plaintiffs in such case are not entitled to recover. - - - - On the other hand, if you find the contract was an undertaking on the part of the defendant to carry plaintiff, Martha, and her baggage, from New York to Washington, and thence westwardly over its road to Columbus, Ohio, and the baggage was delivered to an agent of the defendant, then the defendant would be liable. - - - - If the baggage was delivered to Dodd's Express Company and Dodd's Express Company was the agent of the defendant for receiving baggage, then the receipt of the baggage by said company would be a delivery to the defendant. And if Dodd's Express Company was, in fact, the agent of the defendant in receipt of plaintiff's baggage, then it would make no difference as to defendant's liability, whether it ever went from the possession of Dodd's Express or not." [1]

§ 1877. TRANSPORTATION OF LIVE STOCK. — "The court instructs the jury that, under the contract sued on, the defendant was bound to transport the mules from the town of Shelbina to the station at the city of St. Louis, and to deliver said mules to the plaintiff at said station; that by said contract plaintiff undertook to feed, water and take care of said mules during their transit, and that, under said contract, it was the duty of defendant to provide all the necessary means for transporting said mules with a reasonable degree of safety, and to provide plaintiff with such facilities to water, feed and take care of the mules as, under

[1] Approved in Railroad Co. *v.* Campbell, 36 Ohio St. 647, 653, 654, 655; citing Schouler on Bailments, 336; Thomp. Carr. 431; Lawson Carr., § 235; Hutch. Carr., § 145.

the circumstances, were reasonably requisite for that purpose; and if the jury find from the evidence that the mules were detained at Macon City, on their way to St. Louis, for want of means of transportation, and that the circumstances accompanying such detention were such as to make it necessary to avoid injury to the mules, that they should be removed from the cars, watered and fed; and if the jury further find that defendant, or its agents and employés neglected and failed to furnish the usual and customary facilities for that purpose; and if the jury further find that, in consequence of such negligence and failure, plaintiff's mules were injured, — the jury ought to find the issue for plaintiff, and assess his damages at the actual amount of injury or damage sustained by plaintiff caused by such negligence, with interest thereon at the rate of six per cent, from the institution of this suit to the present time. - - - - The court instructs the jury that, although the jury may believe, from the evidence, that the mules were injured in value, by reason of the fact that they were confined in defendant's cars at Macon City from the time of their arrival at said point until they were started from said point to St. Louis, and by reason of the condition of the weather during said period of time, and want of water and food, — yet unless the jury further find from the evidence that such injury was caused by the failure of defendant, or its agents or employés, to use a reasonable degree of care to prevent such injury, they ought to find for the defendant. - - - - The defendant is not liable in this action for any injury that the mules, in consequence of any vicious propensities may have inflicted on each other, unless such vicious propensities were excited by the negligence or want of proper care on the part of the defendant, or its employés, nor is defendant liable for any injury to said mules arising from want of water or food, provided defendant, its agents or employés, used reasonable care to provide plaintiff with such facilities as may have been necessary to enable him to water and feed the mules.[1]"

§ 1878. Special Contract Limiting Liability: Does not Exclude Liability for Negligence. — "A railroad company, engaged in the

[1] Approved in Dunn *v.* Hannibal &c. R. Co., 68 Mo. 270, 271. In Tuggle *v.* St. Louis &c. R. Co., 62 Mo. 427, instructions will be found applicable to an action for damages for delay by a carrier in delivering live stock. In Maslin *v.* Baltimore &c. R. Co., 14 W. Va. 180, 187, instructions will be found applicable to a case of injury to cattle (probably by the heat) where there was a special contract limiting liability. In Railroad Co. *v.* Akers, 4 Kan. 457, instructions will be found applicable to the liability of one member of a connecting line in respect of the carriage of live stock.

business of transporting live stock, assumes all the responsibilities of a common carrier. In the absence of any special contract limiting its liability, it insures against all loss, except that caused by the act of God or of the public enemy. It may limit its liability by special contract with the shipper or consignor of the property, but such special contract can never relieve the railroad company from liability for its own negligence." [1] - - - - The special contract in this case contains the following clause: 'Said company shall not be liable for loss by jumping from the cars, delay of train from any cause, or any damage said property may sustain, except such as may result from a collision of the train, or when cars are thrown from the track in the course of transportation.' It will be observed that this special contract purports to limit the liability of the railroad company for injury to the property transported to two classes of perils, namely, 'collision of train and being thrown from the track.' But notwithstanding this contract, if the horse was injured by the negligence of the railroad company, or want of ordinary care on its part, then it would still be liable to the proper party for the injury, although such negligence did not result in 'collision of train,' nor 'in being thrown from the track.' In such case, however, the burden of proving such negligence is on the shipper, and it devolves upon him to prove such negligence by a preponderance of the evidence." [2]

§ 1879. NOTICE LIMITING LIABILITY AS TO PASSENGER'S BAGGAGE. — "A carrier may restrict or limit the amount of its liability by a special contract accepted on the part of the owner of the baggage; and this may be done by notice brought home to the owner of the baggage, before or at the delivery to the carrier, if assented to by the owner. - - - - The *onus* of proving any qualification of the liability of the defendant as a carrier, rests upon it. The notice, to be of any force, must amount to actual notice. At all events, to exonerate the defendant as a carrier from its general liability, it must be shown, at least, by the evidence, that the plaintiff, or those acting for her, assented to the demands of the notice, or, with a knowledge of it, acquiesced in it, by making no remonstrance. - - - - And in determining whether or not the conditions or limitations were brought to the notice of plaintiff and those acting for her, you will look to all the evidence in the case; as to the manner of the delivery of the ticket and the check; whether any-

[1] Approved in Kansas City &c. R. Co. *v.* Simpson, 30 Kan. 647, 648.

[2] Approved in Kansas City &c. R. Co. *v.* Simpson, 30 Kan. 648.

thing was said or done calling the attention to them or not; whether they were or were not read at the time of or before their receipt." [1]

§ 1880. When Liability as Common Carrier ceases and that of Warehouseman attaches. — "While said goods were in transit, the defendant would be liable as a common carrier, for any loss or injury to the property, not caused by the act of God, or the public enemy; but that after the goods had arrived at Waseca, and were deposited in defendant's warehouse or freight room, ready for delivery to the plaintiff, and a reasonable time thereafter for the removal thereof by the plaintiff had elapsed, the liability of the defendant as common carrier ceased, and it would be liable thereafter only as a warehouseman." [2]

§ 1881. Reasonable Time for Removing Goods after Transit Ended. — "What would be, under the circumstances of the case, such reasonable time for the removal of the goods, is not to be measured by any peculiar circumstances in the condition or situation of the consignee, or plaintiff, which might render it necessary for his convenienc or accommodation, that he should have a longer time or better opportunity than if he resided in the vicinity of the depot and was prepared with the means and facilities of removing them. But what is meant by reasonable time, is such as would give a person, residing in the vicinity of the place of delivery, and informed of the usual course of business on the part of the company, a suitable opportunity, within the usual business hours, after the goods are ready for delivery, to come to the place of delivery, inspect the goods and take them away." [3]

[1] Approved in Railroad Co. *v.* Campbell, 36 Ohio St. 647, 655; citing Davidson *v.* Graham, 2 Ohio St. 231; Graham *v.* Davis, 4 Ohio St. 362; Wilsons *v.* Hamilton, 4 Ohio St. 722, 740; Welsh *v.* Pittsburg &c. R. Co., 10 Ohio St. 65; Cleveland &c. R. Co. *v.* Curran, 19 Ohio St. 1; Cincinnati &c. R. Co. *v.* Pontius, 19 Ohio St. 221; Union Express Co. *v.* Graham, 26 Ohio St. 595; United States Express Co. *v.* Backman, 28 Ohio St. 144; Gaines *v.* Union T. & I. Co., 28 Ohio St. 418; Pittsburg &c. R. Co. *v.* Barrett, 36 Ohio St. 448; Burke *v.* South Eastern R. Co., L. R. 5 C. P. Div. 1; Laws. Carr. 455, 460; Thomp. Carr. 432, 437.

[2] Approved in Dersia *v.* The Winona &c. R. Co., 18 Minn. 139; citing Moses *v.* Boston &c. R. Co., 32 N. H. 523; Buckley *v.* Railroad Co., 18 Mich. 121; Winslow *v.* Railroad Co., 42 Vt. 700; Wood *v.* Crocker, 18 Wis. 345; Jefferson R. Co. *v.* Cleveland, 2 Bush (Ky.), 468; Ala. &c. R. Co. *v.* Kidd, 35 Ala. 209; Angell on Carriers, 271, note *a;* Chicago &c. R. Co. *v.* Scott, 42 Ill. 132; Fenner *v.* Buffalo &c. R. Co., 44 N. Y. 505. *Contra,* New Albany &c. R. Co. *v.* Campbell, 12 Ind. 55; Morris &c. R. Co. *v.* Ayres, 29 N. J. L. 394; Francis *v.* Dubuque &c. R. Co., 25 Ia. 60; Hilliard *v.* Wilmington &c. R. Co., 6 Jones L. (N. C.) 343.

[3] Approved in Derosia *v.* Winona &c. R. Co., 18 Minn. 142.

CHAPTER LVI.

NUISANCE AND OBSTRUCTION.

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§ **1886. Closing of Public Street.** — In an action for damages against a municipal corporation for an injury sustained by reason of its street or highway being in a defective condition, whether the street or highway was closed from public travel at the time of the injury, is a *question of fact* for the jury.[1]

§ **1887. Whether a Given Object is an Obstruction of a Street.** — It was held that, whether the driving of piles in Front Street, in the City of San Francisco (the street being laid out over the waters of the bay), was an obstruction to the free use of the street by the public, was a *question of fact* for a jury, in an action to enjoin the defendants from driving piles in that street; and because the question was not submitted to a jury, a new trial was ordered.[2] But where the obstruction in a street which caused an injury to the plaintiff's son, a small boy, consisted of a *railway train* of the defendant standing so as to block the street, and the boy was injured while trying to effect a passage along the street by creeping under the cars, and it appeared that the conductor stopped the train on the crossing of the street and absented himself from it, and that a servant of the defendant attached the horses to it and moved it, from which act the injury ensued, — it was held error to submit the question to the jury whether the obstruction of the street was inevitable, since it plainly appeared that it could have been avoided by the exercise of proper care and diligence on the part of the conductor. It

[1] White *v.* City of Boston, 122 Mass. 491; Stephens *v.* City of Macon, 83 Mo. 345, 356.

[2] San Francisco *v.* Clark, 1 Cal. 386. This must have been under a practice peculiar to that State, or else under a conception of practice peculiar to that period, which introduced jury trial into equity cases.

was the duty of the court to instruct the jury, as *matter of law*, that the obstruction was unauthorized and unlawful.[1]

§ 1888. [Continued.] **Trees Growing upon Highway.** — The *trees* upon a highway belong to the owners of the fee, except under statutory regulations which vest the title to the fee of the highway in a municipal corporation, which is the case in some American cities. Where trees, thus standing and belonging to the owner of the fee, constitute an obstruction of the highway, the overseer of the highway may cut them down and remove them; but if they do not obstruct the highway, and he nevertheless cuts them down, he commits a trespass, and if he does it maliciously he is liable to exemplary damages. Whether, in such a case, a tree cut down by the overseer of highways did obstruct the public in the use of the highway, or whether it was cut down maliciously, has been held a *question of fact* for a jury, in an action of trespass against the overseer.[2]

§ 1889. [Continued.] **In Actions for Injuries sustained by Travelers.** — In general, it is a *question of fact* for a jury, in an action against a town for damages for an injury sustained by a traveler through an alleged defect in the highway, whether a given object, on or near the traveled part of the highway, constitutes an incumbrance in the highway, within the meaning of a statute giving such a right of action.[3] The question whether the highway, at the time and place of the accident, was obstructed, insufficient, or out of repair, is one of fact for the jury, under the instructions of the court as to what is meant by those terms as used in the statute.[4] It has also been said that "the law justifies obstructions of a partial and temporary character, from the necessity of the case and for the convenience of mankind, when those obstructions occur in the customary or contemplated use of the highway, and that the question of their necessity and reason-

[1] Rauch *v.* Lloyd, 31 Pa. St. 358.
[2] Winter *v.* Peterson, 24 N. J. L. 524.
[3] Chamberlain *v.* Enfield, 43 N. H. 356, 362.
[4] Johnson *v.* Haverhill, 35 N. H. 74, 82; Hubbard *v.* Concord, 35 N. H. 52, 65; Carlton *v.* Bath, 22 N. H. 559.

ableness, and of the customary or contemplated use, is one for the consideration and determination of the jury, under all the circumstances of each particular case."[1]

§ 1890. Whether an Obstruction of a Street is Unreasonable. — It has been ruled that an adjacent owner may be entitled to maintain an action for damages against a municipal corporation, for an obstruction in the street, where the obstruction, taking into view the nature of the work to be done, and the rights of adjacent owners, situated as he is, to the free use of the street, is unnecessary and unreasonable, or where it creates a nuisance more noxious and offensive than is ordinarily incident to the work to be done (in the particular case, the repairing of a market), or where the obstruction continues beyond a *reasonable time;* but whether, upon all or any of these grounds, the plaintiff is entitled to recover, is a *question of fact* for the jury, and it is error for the judge to withdraw it from them and to direct a verdict for the plaintiff for the damages claimed.[2] So, in an action by an abutting land-owner against the defendant, for obstructing the highway so as to interfere with the free use and enjoyment of the plaintiff's property, the question whether such obstructions amount to a nuisance is a *question of fact* for the jury.[3] It has been held that, where highways have been commonly used for *moving buildings* through them, it is no nuisance to use them for that purpose, selecting suitable streets, using proper expedition, and causing no unnecessary obstruction; and the *reasonableness* of such use, under all the circumstances of the case, is a *question for a jury.*[4] So, in an action against a town for damages sustained by a traveler who has been injured by reason of obstructions in the highway, it is a question for a jury whether timber, wood, lumber, or other materials, placed within the limits of the highway by any person, are, under the circum-

[1] Graves *v.* Shattuck, 35 N. H. 257, 268.

[2] St. John *v.* New York, 6 Duer (N. Y.), 315.

[3] Blanc *v.* Klumpke, 29 Cal. 156, 159. Compare Gunter *v.* Geary, 2 Cal. 462; Griffith *v.* McCullum, 46 Barb. (N. Y.) 561.

[4] Graves *v.* Shattuck, 35 N. H. 258, 268.

stances, to be regarded as obstructions and incumbrances in such highway.[1] So, it has been held, in an application for an injunction, that the annoyances arising from the necessary use of a railroad do not constitute a nuisance *per se*, but that the fact of nuisance must be determined by a jury, before the court will interfere by injunction.[2] A statute of Massachusetts provides that "a person owning or occupying lands adjoining a highway or road in a town, may construct a sidewalk within such highway or road, and along the line of such land, indicating the width of such sidewalk by trees, posts or curbstones, set at reasonable distances apart, or by a railing."[3] This statute gives to an abutter the privilege of appropriating a part of the highway for the purpose of a sidewalk, but the privilege is limited and qualified by provisions that the section "shall not diminish or interfere with the authority of surveyors of highways, or any other authority that can be legally exercised over highways or roads; nor shall it in any manner diminish the liability of any person for unreasonably obstructing highways or roads." Whether a sidewalk, built in a particular way, unreasonably obstructs the highway, is, under an indictment for obstructing the highway, a *question of fact* for the jury.[4]

§ **1891. Existence of a Private Road.** — Where the defendant, in an action of trespass, sets up the defense that the way over which he passed was a private or by-road, whether it was such road or not, is a *question of fact* for the jury.[5]

§ **1892. Proper use of a Water-course.** — In an action by a riparian owner to recover damages from a superior proprietor for a pollutionof the stream by maintaining there on a hog-pen, thus converting its margins into a hog-wallow, the question whether the superior proprietor has made a proper use of the

[1] Winship *v.* Enfield, 42 N. H. 197.

[2] Bell *v.* Ohio &c. R. Co., 25 Pa. St. 161, 182; *post*, § 1918.

[3] Gen. Stats. Mass., ch. 45, § 6.

[4] Com. *v.* Franklin, 133 Mass. 569. Compare, as to the statute, Macomber *v.* Taunton, 100 Mass. 255; Appleton *v.* Nantucket, 121 Mass. 161.

[5] Van Blarcom *v.* Frike, 29 N. J. L. 516.

stream, is a *question for a jury*, under proper instructions.[1] In such a case the court properly directs the jury that each proprietor is entitled to the use and enjoyment of the stream in its natural flow, subject to its reasonable use by other proprietors; that each has an equal right to the use of it for the ordinary purposes of his house and farm, and for the purpose of watering his stock, even though such use might, in some degree, lessen the volume of the stream or affect the purity of the water; that the lower proprietor has no superior right in this regard over the upper proprietor; that if, in its natural state, the stream was useful both for domestic purposes and for watering stock, but the use for ordinary stock purposes was more valuable or beneficial for all the owners along the stream than the use for domestic purposes, then the less valuable must yield to the more valuable use; but that its reasonable use for all purposes should be preferred if possible; and that the jury must determine from all the facts, taking into account the size, nature and condition of the stream, whether the defendant made a reasonable and proper use of it.[2]

§ 1893. **Mill-Dam and Flowage of Adjacent Land.** — In an action for injury to the plaintiff's land, alleged to have been caused by a mill-dam owned by the defendant, but which injury was, according to the contention of the defendants, occasioned by an older dam erected about thirty years before, the court *submitted to the jury* whether the dam last erected was a nuisance, and whether the notice to remove it was reasonable.[3] So, on the trial of an indictment for a public nuisance alleged to have been produced by the erection and maintenance of a mill-dam, the governing principle has been held to be that such a dam becomes a nuisance when it causes the waters to overflow the banks of the stream and the surrounding country, and to become stagnant, whereby the water on the highways and around the dwellings becomes noxious and unwholesome, and the health of the community sensibly impaired, and whether or not the dam produced

[1] Hazeltine *v.* Case, 46 Wis. 392.

[2] Hazeltine *v.* Case, *supra*.

[3] Kemmerer *v.* Edelman, 23 Pa. St. 143.

such mischievous consequences, is a *question of fact* for the jury.[1] In an action for damages due to the flowage of the plaintiff's land, in consequence of the maintenance of a certain dam by the defendant, it has been held error for the court to instruct the jury that, if the dam had been maintained at a uniform height and head for *twenty years*, and had not flowed the plaintiff's land for the first *ten years* of that time, and afterwards said lands were overflowed, the *presumption* would be that the flowage had been produced by other causes than the dam, and the defendants would not be liable. Whether the subsequent flowage of the land, though not flowed during the first ten years of the existence of the dam, was caused by the maintenance of the dam, was a *question of fact* for the jury.[2]

§ **1894. Prescriptive Right to Divert Water.** — Where, in an action for damages for obstructing a water-course and diverting water from the plaintiff's mill, it was admitted that the defendants had acquired a prescriptive right to divert a certain portion of the water from a stream, by means of a dam which was in existence many years before, — the question whether they did divert water to a greater extent than was done by the dam, as it existed prior to a date named, was *submitted to the jury*.[3]

§ **1895. Whether Drains were Made in Furtherance of Good Agricultural Usage.** — In an action by one land-owner against a coterminous land-owner for raising an embankment and casting back the surface water upon the land of the plaintiff, it has been held that where it is not clear from admitted or established facts, it is generally a *question of fact* for the jury to determine what work may be done in furtherance of good agricultural usage, for the purpose of raising crops, so as to exonerate the defendant, from a liability for such a tort.[4]

§ **1896. Whether a Stream is Navigable.** — Whether a stream is navigable or not, is a *mixed question of law and fact;*

[1] Douglass *v.* State, 4 Wis. 387.
[2] Smith *v.* Russ, 17 Wis. 227.
[3] Whetstone *v.* Bowser, 29 Pa. St. 65.
[4] Knoll *v.* Mayer, 13 Bradw. (Ill.) 203.

but when the facts are ascertained it becomes a *question of law*.[1] The courts will sometimes decide the question of fact by taking *judicial notice* of it. Thus, in Alabama, the court will judicially notice that there are no tidal streams in Jackson county, in that State; from whence the conclusion follows that Paint Rock River in that State is, *prima facie*, not a public navigable stream;[2] the governing principle being that all tidal streams are, *prima facie*, public and navigable, and that all streams above tide water, if, in the survey of the public lands by the United States, they have not been treated as navigable, if fractional sections have been made upon their margin and the bed reserved from grant or sale, are *prima facie* private, not navigable and not subject to a public right of floatage. Accordingly, in the case of such a stream the *onus* of proving that it is navigable rests upon the party averring it.[3]

§ 1897. What would Constitute an Interference with an Easement Conveyed by Deed. — The construction of a deed conveying certain grist mill privileges is, of course, a matter of law, but whether a gate constructed by the plaintiff in the stream would interfere with the use of the grist mill privileges granted in a particular deed, is a *question of fact*, to be determined by a jury under proper instructions, in a case properly before them for such determination.[4]

§ 1898. Prescriptive Right to Carry on a Business which otherwise would be a Nuisance. — In an action on the case for damages from a nuisance, which consisted of a mill established and operated so near the public highway as to frighten horses, the defendant requested the court to charge the jury that, if his mill had been run for *thirty years* next before the accident, in the same condition in which it was at that time, he had a right

[1] Walker *v.* Allen, 72 Ala. 456; Rhodes *v.* Otis, 33 Ala. 578.

[2] Walker *v.* Allen, *supra*.

[3] Walker *v.* Allen, *supra*. See also Bullock *v.* Wilson, 2 Port. (Ala.) 436; Ellis *v.* Carey, 30 Ala. 725; Rhodes *v* Otis, 33 Ala 578· Peters *v.* New Orleans &c. R. Co., 56 Ala. 528.

[4] Douglass *v.* Whittemore, 32 Vt. 685, 690.

so to run it, and was not liable for such accident. The court declined so to charge, and it was held that the ruling was correct. "There is no doubt," said Sanford, J., "that less than thirty years' enjoyment of an easement in the land of another, or thirty years' continuance of a private nuisance, affords evidence from which the jury may presume and find, as a fact, the existence of the right, derived from the owner of the property named, by grant or otherwise. But the evidence arising from such enjoyment or continuance may be rebutted; and the court cannot decide, as a matter of law, that such enjoyment or continuance confers the right. And if, in like manner, thirty years' continuance of a public nuisance affords similar evidence (a point which it is not now our intention to decide), that evidence must be submitted to the jury, for them to make the proper inference, and decide the question whether the right has been acquired or not. The *question* is one, not of law, but *of fact*, and the court could not determine it. Upon this ground, therefore, the omission of the judge to give the instruction prayed for was not erroneous." [1]

§ 1899. Noise alone may Constitute a Nuisance. — Since the decision of *Elliotson* v. *Feetham*,[2] it has not been doubted, so far as the writer knows, that noise alone may constitute an actionable nuisance, such as may form the basis of a recovery of damages at law, or such as a court of equity will restrain by an injunction.[3] "There is," said Lord Romilly, "I apprehend, no distinction between any of the cases, whether it be smoke, smell, noise, vapor or water, or any gas or fluid. An owner of one tenement cannot cause or permit to pass over or flow into his neighbor's tenement any one or more of these things, in such a way as materially to interfere with the ordinary comfort of the occupier of the neighboring tenement, or so as to injure his property." [4] So, it is said in a case in New Jersey: "There may be

[1] House *v.* Metcalf, 27 Conn. 631, 639.

[2] 2 Bing. N. C. 134.

[3] Soltau *v. v.* De Held, 2 Sim. (N. S.) 133; Crump *v.* Lambert, L. R. 3 Eq. 409; Fish *v.* Dodge, 4 Denio (N. Y.), 311; Harrison *v.* St. Mark's Church, 12 Phila. (Pa.) 259; Wallace *v.* Auer, 10 *Id.* 356; Inchbald *v.* Robinson, L. R. 4 Ch. App. 388.

[4] Crump *v.* Lambert, L. R. 3 Eq. 409, 413.

circumstances where even the noise of a steam engine may become a private nuisance, and its use, on that account, be restrained by the court. The authorities are abundant to sustain the position that an individual cannot erect, in a densely settled portion of a city or town, occupied by private dwellings, any kind of manufacturing establishment, and so use the machinery and carry on the business as to render living in the neighborhood uncomfortable, either on account of the noise it occasions, or of its smoke and offensive smells.[1] In like manner it was laid down by the Supreme Court of Pennsylvania that the courts have power to restrain by injunction noises which disturb rest and prevent sleep.[2] "Noise which constitutes an annoyance to a person of ordinary sensibility to sound, such as materially to interfere with the ordinary comfort of life and impair the reasonable enjoyment of his habitation, is a nuisance to him."[3]

§ 1900. Noises, when Indictable as a Public Nuisance. — It may be premised that, to render an act indictable as a nuisance, it is not sufficient that it should annoy *particular persons* only, but it must be so inconvenient and troublesome as to annoy the *whole community*.[4] Beating a drum is not a nuisance; to blow a fife is not; neither is a procession through the street with these accompaniments a crime. To constitute them such, the exceptional facts and circumstances which make acts, otherwise innocent, a crime, must be set forth particularly, so that the court can see that, from their very nature, if proved, they are a nuisance to the whole community.[5] Accordingly, where there was an indictment containing three counts, the first for a riot, the second for a common nuisance by the beating of drums, the blowing of fifes and shouting in the streets of a town, and the third for obstructing the streets, and it appeared that the defendants,

[1] Davidson *v.* Isham, 9 N. J. Eq. (1 Stock.) 186, 190.

[2] Rhodes *v.* Dunbar, 57 Penn. St. 274. To the same effect see Ross *v.* Butler, 19 N. J. Eq. 294.

[3] Davis *v.* Sawyer, 133 Mass. 289, opinion by Allen, J. See also Wesson *v.* Washburn Iron Co., 13 Allen (Mass.), 95; Fay *v.* Whitman, 100 Mass. 76.

[4] State *v.* Baldwin, 1 Dev. & Batt. (N. C.) 197; State *v.* Hughes, 72 N. C. 25.

[5] State *v.* Hughes, *supra*.

who were persons of color, were celebrating emancipation day, and that there was no further irregularity than usually accompanies any promiscuous mass-meeting and parade, it was held, on a special verdict, that the defendants must be discharged.[1]

§ 1901. Whether Nuisance must be Established by a Verdict at Law. — Courts of equity are reluctant, in these cases, to enjoin an otherwise lawful trade which produces disturbing noises, until the parties complaining have established that it is a nuisance by a judgment at law. Thus, where a bill was brought to enjoin a *glass factory*, on the ground that the carrying of it on produced noises which disturbed the plaintiff and several other persons in the neighborhood, Vice-Chancellor Kindersley refused relief on this ground; but the view which he took of it seems to be untenable. It is to be gathered from what he is reported to have said, that he did not place his refusal on the ground that the thing complained of was no nuisance in point of law, but on the ground that it was remediable in an action at law for damages. Among other things he said: "In a case where the only questions are mere inconvenience to the parties by the alleged noise, disturbing more or less their sleep, or in reference to the diminution of the value of the plaintiff's property: in either case the injury is not irremediable, but is capable of compensation in damages."[2] A learned judge in Pennsylvania took the opposite and only tenable view of this question, when he said: "I cannot doubt that a constant annoyance, which at law cannot be abated, is never remedied by damages. The loss of health and sleep, the enjoyment of quiet and repose, and the comforts of home cannot be restored or compensated in money. It may afford consolation, but it does not remedy the evil, if that goes on, to be paid for by installments. The law operates upon the *past* only, while equity can and will act on the present and future, will abate the nuisance itself, and restore the injured party to his rights."[3] This was a case where there was no substantial conflict in the evi-

[1] *Ibid.*

[2] White *v.* Cohen, 1 Drewry, 312, 318.

[3] Dennis *v.* Eckhardt, 3 Grant Cas. (Pa.) 390.

dence. It is said that, where the thing sought to be enjoined is lawful, and there is a conflict of testimony as to whether it is a nuisance, the question of fact must be determined at law before equity will enjoin.[1]

§ **1902. Noises which render Dwelling Houses Uncomfortable.** — The grounds on which courts of equity interfere to restrain occupations or things which produce such noises as to render people uncomfortable in their adjacent dwelling-houses, have been thus stated by an eminent judge: "If there were no authority on the question, I should have felt no difficulty about it, because I take it the law is this, that a man is entitled to the comfortable enjoyment of his dwelling-house. If his neighbor make such a noise as to interfere with the ordinary use and enjoyment of his dwelling-house, so as to cause serious annoyance and disturbance, the occupier of the dwelling-house is entitled to be protected from it. It is no answer to say that the defendant is only making a reasonable use of his property, because there are many trades and many occupations which are not only reasonable, but necessary to be followed, and which still cannot be allowed to be followed in the proximity of dwelling-houses so as to interfere with the comfort of their inhabitants. I suppose a blacksmith's trade is as necessary as most trades in this kingdom; or I might take instances of many noisy and offensive trades, some of which are absolutely necessary, and some of which no doubt may not only be reasonably followed, but to which it is absolutely and indispensably necessary for the welfare of mankind that some houses and some pieces of land should be devoted; therefore, I think, that is not the test." [2]

§ **1903. Noises ordinarily Incident to Certain Situations.** — Those who live in *cities*, in *hotels*, or in *tenement houses*, cannot claim the aid of a court of equity to gain for themselves immunity from those noises which are customary and usual, and which are the ordinary incidents of the place in which such persons may

[1] Davidson *v.* Isham, 9 N. J. Eq. (1 Stock.) 186.

[2] Broder *v.* Saillard, 2 Ch. Div. 692, 701, per Jessel, M. R.

choose to take up their abode. Thus, a man living in a *tenement* house was denied an injunction to prevent his neighbor, who lived on the floor immediately above him, from trundling a *baby carriage* back and forth over his carpet at night, in order to appease a child which was teething and fretful. Good neighborship, might, indeed, suggest that a noiseless cradle, or some other appliance should be used; but in such a case the law would not interfere. "As a matter of law," the court said, "if the plaintiff himself was taken sick and obliged to walk the floor all night through pain, the defendant would have no right to insist that he should put on india rubbers. * * * Where people indulge their inclination to be gregarious they must not expect the quiet that belongs to solitude." [1]

§ **1904. Necessary Noises in Cities.** — In determining the question of nuisance from *smoke* or *noxious vapor*, or from *noise* or *vibration*, it has been well laid down that reference must always be had to the locality, the nature of the trade, the character of the machinery, and the manner of using the property producing the annoyance and injury complained of. "A party dwelling in the midst of a crowded commercial and manufacturing city cannot claim to have the same quiet and freedom from annoyance that he might rightfully claim if he were dwelling in the country. Every one taking up his abode in a city must expect to encounter the inconveniences and annoyances incident to such community, and he must be taken to have consented to endure such annoyances to a certain extent." [2] Or, as was said by Lord Westbury, L. C., in a leading case: "If a man lives in a town it is necessary that he should subject himself to the consequences of those operations of trade which may be carried on in his immediate locality, which are actually necessary for trade and commerce, and also for the enjoyment of property and for the benefit of the inhabitants of the town and of the public at large. If a man lives in a street where there are numerous shops, and a shop is opened next door to him which is carried on in a fair and

[1] Pool *v.* Higginson, 8 Daly (N. Y.), 113; *s. c.* 7 Cent. L. J. 102.

[2] Dittman *v.* Repp, 50 Md. 516, 522.

reasonable way, he has no ground for complaint because, to himself individually, there may arise much discomfort from the trade carried on in that shop." And Lord Cranworth also said: "You must look at it, not with a view to the question whether abstractly that kind of smoke was a nuisance, but whether it was a nuisance to a person living in the town of Shields." [1]

§ **1905. Useless Noises in Cities.** — On the other hand, the courts have not dealt leniently with *useless* noises in cities or in public places. Thus, *outcries* uttered in a public street, although they disturb but a single person, if they are accompanied with the other circumstances necessary to constitute the offense, are indictable as a public nuisance.[2] In like manner, a *circus* has been enjoined as a nuisance, where the performances were carried on for eight weeks every evening, from about half-past seven until half-past ten, consisting of music and shouting, which could be distinctly heard all over plaintiff's house and in his dining room, even above the sounds of conversation, when the windows were closed and several persons were talking.[3] So, the striking of a clock in the night time, upon a bell that weighed 3080 pounds, was enjoined upon the testimony of the two plaintiffs and four others, to the effect that it disturbed their rest, although more than a hundred witnesses living at various distances from it, many of them as near to it as the plaintiffs and the plaintiffs' witnesses, testified that it had no unpleasant effect upon them.[4]

§ **1906. Noisy Trades located in Neighborhoods devoted to Residences.**— In like manner, the business of a *gold* or *silver beater*, set up in a quiet neighborhood occupied by dwellings, the noise and concussion of which unreasonably interfere with the comfort of the inhabitants in their dwellings, and perhaps also

[1] Tipping *v.* St. Helen's Smelting Co., 4 Best &. S. 608; *s. c.* 11 H. L. Cas. 642, 650.

[2] Com. *v.* Oaks, 113 Mass. 8; Com. *v.* Smith, 6 Cush. (Mass.) 80; Com. *v.* Harris, 101 Mass. 29.

[3] Inchbald *v.* Robinson, L. R. 4 Ch. App. 388.

[4] Leete *v.* Pilgrim Cong. Church, St. Louis Court of Appeals, 1883 (not reported).

with the safety of neighboring property, was held such a nuisance as equity would restrain. In giving his judgment in this case Allison, P. J., referred to a decision of the late Chief Justice Thompson of Pennsylvania, granting an injunction against a *tinsmith*, at the suit of a householder disturbed by the noise of his business. He also said: "Everything that disturbs, in an unreasonable degree, the quiet enjoyment of home or dwelling-house, is a nuisance. A man is to be protected in the enjoyment of his property against all unlawful disturbances, if he does not, by such enjoyment, invade the rights of others. * * * The defendant has no right to complain if the injunction presses hard on him. He intruded his business into one of the most quiet neighborhoods in the city — a neighborhood rendered desirable as a home, in which quiet and rest could be found. This was wholly unnecessary on his part, many portions of the city being given up to business and its attendant noise and turmoil; other portions affording isolation in which business could be carried on causing discomfort to no one. While business is to be fostered and protected against unreasonable objection, the home of the citizen, under the law, has an equal right to be defended against the wanton intrusion that destroys or unreasonably impairs its enjoyment." [1]

§ 1907. Noises proceeding from a Business carried on at Unreasonable Hours. — A lawful trade may be enjoined as a nuisance, on the ground that it is carried on at unreasonable hours. Thus, where the defendant erected a tin-shop some eighty feet from the back building and sleeping room of the complainant, and there carried on work, generally beginning in the morning before daylight, and resuming it again in the evening at or about 6 o'clock p. m., and keeping it up until 11 o'clock at night, having general employment elsewhere during the day; and the affidavits showed that the noises which proceeded therefrom were intolerable, so as almost to drown conversation in the plaintiff's house, and to compel them to abandon their chambers next to the shop, and to deprive them of their rest, — the court saw in the case

[1] Wallace *v.* Auer, 10 Phila. (Pa.) 356.

no disputed question which required a trial at law, and had no difficulty in granting an injunction.[1]

§ **1908. Doctrine that in order to constitute a Nuisance the Noise must be "Unusual, Ill-timed, or Deafening."** — In a case in the Superior Court of New York it was said by Sandford, J.: "Noise is usually incident to the motion of machinery and to mechanical pursuits, especially those which are carried on through the agency of steam. But noises are not, *ex necessitate*, nuisances, even when disagreeable; and it is only when they are of a character so objectionable as fairly to come within the meaning of that significant term that a court of equity will interfere to repress or restrain them."[2] In another case in the same State it was said: "Mere noise, perhaps, unless *unusual*, *ill-timed*, or *deafening*, may not be such a nuisance as to authorize the entertainment of an action therefor, even when it interferes with another person's avocation or pursuits;" and the decision, which was in favor of the plaintiff, proceeded on the ground that something more palpable than discomfort by noise was established by the evidence.[3] Where, upon the examination of the evidence, it appeared that the noise produced by machinery, operated by steam, in a marble-cutting establishment adjacent to a property owned by the plaintiff and occupied as residences, was not *unusual*, — that is, was such a noise as is ordinarily incident to the use of similar machinery; was not *ill-timed*, — that is, was produced only in the ordinary working hours of the day; and was not even *loud*, though it was audible from some of the residences near by, — the court refused an injunction on the ground of these noises.[4]

§ **1909. The Question said to be a Question of Degree.** — "A nuisance of this kind," said Lord Selborne, L. C., "is much more difficult to prove, than when the injury complained of is the

[1] Dennis *v.* Eckhardt, 3 Grant Cas. (Pa.) 390.

[2] Butterfield *v.* Klaber, 52 How. Pr. (N. Y.) 255, 262.

[3] McKeon *v.* See, 4 Rob. (N. Y.) 449.

[4] Butterfield *v.* Klaber, 52 How. Pr. (N. Y.) 255, 263.

demonstrable effect of a visible or tangible cause, as when waters are fouled by sewage, or when the fumes of mineral acids pass from the chimneys of factories or other works, over land or houses, producing deleterious physical changes which science can trace and explain. A nuisance by noise, supposing malice to be out of the question, is emphatically a question of degree. If my neighbor builds a house against a party wall next to my own, and I hear through the wall more than is agreeable to me of the sounds from his nursery, or his music room, it does not follow, even if I am nervously sensitive or in infirm health, that I can bring an action or obtain an injunction. Such things, to offend against the law, must be done in a manner which, beyond fair controversy, ought to be regarded as exceptive and unreasonable." [1]

§ 1910. Whether a Right to Perpetuate Disagreeable Noises may be acquired by User. — The carrying on of a trade which produced certain injurious noises for *ten years* was held not to be such a user as gave the defendant a prescriptive right to continue the same, though possibly a user of *twenty years*, if pleaded and proved, would have been a good defense.[2] It is said by Lord Romilly: "It is true that, by lapse of time, if an owner of the adjoining tenement, which, in case of light or water, is usually called the servient tenement, has not resisted for a period of twenty years, then the owner of the dominant tenement has acquired the right of discharging the gases or fluid, or sending smoke or noise, from his tenement over the tenement of his neighbor; but, until that time has elapsed, the owner of the adjoining or neighboring tenement, whether he has or has not previously occupied it, — in other words, whether he comes to the nuisance, or the nuisance comes to him, — retains his right to have the air that passes over his land pure and unpolluted, and the soil and produce of it uninjured by the passage of gases, by the deposit of deleterious substances, or by the flow of water." [3]

[1] Gaunt *v.* Fynney, L. R. 8 Ch. App. 8, 11.

[2] Elliotson *v.* Feetham, 2 Bing. (N. C.) 134.

[3] Crump *v.* Lambert, L. R. 3 Eq. 408.

A later English case goes far against the doctrine that the right to perpetuate a nuisance can be acquired by user. The defendant, a confectioner in Wigmore street, London, had, for more than twenty years, used, without interruption, a *pestle and mortar* in a back shop, built on what had been the garden of his house. Subsequently, the plaintiff, who was a physician, built a consulting room in his garden, abutting on the defendant's back shop, and sought to restrain the use of the defendant's pestle and mortar, which had now become a nuisance, though formerly it had not been noticed. It was held that the defendant had not acquired by user a right to make the noise complained of, which was neither physically capable of being prevented, nor actionable by the servient owner. This principle was held applicable both to affirmative and negative easements.[1]

§ **1911. Effect of Expectant Attention.** — In estimating the value of evidence in these cases, as juries and courts of equity are called upon to do, science has offered valuable aid in explaining what is "expectant attention." This is shown to produce effects something like these: If, for any reason, or from any cause, the attention of a person is specially drawn to a sound, which under ordinary circumstances would not disturb him at all, it may thereafter become disturbing and a source of serious annoyance. This is perhaps well illustrated by a case before Lord Selborne, where it was sought to enjoin the noises and vibrations produced by the *machinery in a silk factory*. It appeared to the satisfaction of his lordship that the noises complained of had gone on for five years, just as they were going on at the time of the complaint, during all which time the plaintiffs, who were unmarried ladies, did not regard them as nuisances. It also appeared that, at the time when the noises began to be a source of annoyance to them, a sudden noise had alarmed their servants, since which time the plaintiffs had entertained an idea of some danger from the boilers used by defendant, and that, from that time, the noises of his machinery became a source of constant ir-

[1] Sturges *v* Bridgman, 11 Ch. Div. 852; *s. c.* 28 Weekly Rep. 200.

ritation and uneasiness to them — a fact which was obviously attributed by his lordship to the cause named. The noises now seemed to them to be very much louder and more disturbing than before, and they testified to this as a fact, though the undoubted evidence was to the contrary.[1] Lord Selborne quoted from a recent scientific work[2] "that the thought uppermost in the mind, the predominant idea or expectation, makes a real sensation from without assume a different character." There is little doubt that nervous persons, after commencing a legal action in respect of a nuisance, are conscious of being very seriously annoyed by it, when, under ordinary circumstances, they might not notice it.

§ 1912. Effect of Conflicting Evidence as to whether Sounds are Disturbing. — In cases in equity the court will frequently be called upon to discharge the painful responsibility of deciding, upon conflicting evidence, the question whether the sounds complained of are really disturbing. It has been pointed out that, in such cases, a useful principle for the government of the court is the rule which regards the testimony of a credible witness, swearing positively to an affirmative fact, and which disregards that of another witness, equally credible and standing in a similar situation, who swears that he is not aware of the same fact. Applying this test, it has been said that, where the witnesses in a certain house say that they were pleasurably affected by sounds which the witnesses in other houses agree is a cause of pain, it will appear that such testimony is not necessarily conflicting, and that the court is not reduced to the disagreeable necessity of supposing that either statement is inaccurate. "The similarity which exists among mankind, while they are well, and which authorizes us to infer that like causes will produce the same result, is replaced under the influence of ill-health, by divergences, which not only render the sufferer unlike his fellows, but may, for the time being, seem to render him the denizen of some other world. The senses of one patient may be dulled by his malady, while those of another become preternaturally acute, and

[1] Gaunt *v.* Fynney, L. R. 8 Ch. 8, 13.

[2] Tuke on the Influence of the Mind on the Body.

are tortured by that which brings pleasing reminiscences to the first."[1]

§ **1913. Stables.** — Livery stables are *not nuisances per se*, though they may manifestly be so conducted as to become such. A court of equity will not therefore enjoin the establishment of a livery stable, although in a neighborhood occupied by elegant residences in a city; since this would be exerting the extraordinary powers of such a court against the establishment of an occupation which might or might not become a nuisance, according to circumstances.[2] But stables erected in the immediate proximity of dwelling-houses, so that the inmates of the same were disturbed and kept awake by the stamping of the horses, have been enjoined as nuisances.[3] Thus, where the occupier of a house in a street in London had, many years ago, converted the ground floor into a stable, and, in 1871, a new occupier

[1] Harrison *v.* St. Mark's Church, 12 Phila. (Pa.) 259; opinion by Hare, P. J. In a case in Virginia, the nuisance complained of was a *slaughter-house*, and the annoyance and discomfort which the complainant alleged, was hearing the groans and cries of the animals when being slaughtered, and more especially the offensive odors. Many witnesses were introduced by the defendants, whose testimony, as we infer, was to the effect that they were not incommoded by the slaughter-house in the manner in which the plaintiff claimed to have been incommoded. Concerning this testimony, the court said: "1. Many of the witnesses do not live in the immediate vicinity of the slaughter-house, and none of them, except perhaps one or two, as near as the residence of Mrs. Pendleton (the plaintiff), and some of them only occasionally visited the slaughter-house. 2. The testimony, or the most of it, in its relation to the grounds of the complaint, is negative in its character, and not necessarily inconsistent with the testimony on behalf of the appellee (the plaintiff). On the other hand, the witnesses for Mrs. Pendleton speak positively of matters that came directly under their personal observation — facts within their own knowledge — facts which constitute the nuisance charged, and they had the best opportunity to be informed and to know whereof they spoke." A decree restraining the nuisance was affirmed. Pruner *v.* Pendleton, 75 Va. 516.

[2] Flint *v.* Russell, 5 Dill. (U. S.) 151. See also Aldrich *v.* Howard, 7 R. I. 87; *s. c.* 8 *Id.* 246; Burditt *v.* Swenson, 17 Tex. 489; Dargan *v.* Waddill, 9 Ired. Law (N. C.) 244; Kirkman *v.* Handy, 11 Humph. (Tenn.) 406; Coker *v.* Birge, 10 Ga. 336; Harrison *v.* Brooks, 20 *Id.* 537; Morris *v.* Brower, 1 Anth. (N. Y.) 368.

[3] Ball *v.* Ray, L. R. 8 Ch. 467; Broder *v.* Saillard, 2 Ch. Div. 692.

altered the stable, so that the noise of the horses was an annoyance to the next door neighbor and prevented him from letting his house as a lodging, it was held, in 1873, that the fact of horses having been previously kept in the stable, but not so as to be an annoyance, did not deprive the neighbor of his right to have the nuisance restrained.[1] In such a case, the following language was used by an eminent judge:[2] "A man has a right to turn his dwelling-house into a stable, or his stable into a dwelling-house. That is not the question." The learned judge then quoted the language of Lord Justice Mellish in a previous case as follows: "When, in a street like Green street, the ground floor of a neighboring house is turned into a stable, we are not to consider the noise of horses from that stable like the noise of a pianoforte from a neighbor's house, or the noise of a neighbor's children in their nursery, which are noises we must reasonably expect, and must, to a considerable extent, put up with. A noise of this kind, if it materially disturbs the comfort of the plaintiff's dwelling-house, and prevents people from sleeping at night, and still more, if it does really and seriously interfere with the plaintiff's trade as a lodging-house keeper, beyond all question constitutes an actionable nuisance."[3] "The test," continued Sir George Jessel, "therefore, is, whether the stables are unluckily so situated, as that the noise from the horses, not being uncommon horses in any way, materially disturbs the comfort of the plaintiff's dwelling-house, and prevents the people from sleeping at night."[4] And he accordingly concluded that, "if a stable is built as this stable is, not as stables usually are, at some distance from dwelling-houses, but next to the wall of plaintiff's dwelling-house, in such a position that the noise would actually prevent the neighbors' sleeping, and would frighten them out of their sleep, and would prevent their ordinary and comfortable enjoyment of their dwellings,— all I can say is that is not a proper place to keep horses in, although the horses may be ordinarily quiet."[5]

[1] Ball *v.* Ray, L. R. 8 Ch. 467.

[2] Sir George Jessel, M. R., in Broder *v.* Saillard, *supra*.

[3] Ball *v.* Ray, L. R. 8 Ch. 467, 471.

[4] Broder *v.* Saillard, *supra*.

[5] *Ibid.*

§ **1914. Factory Bell Rung early in the Morning.** — A bell weighing 2128 pounds was placed by the owners of a factory upon their mill, and was rung every working day, once at five o'clock and twice between six and six and a half o'clock in the morning, and at other times during the day, except that the five o'clock bell was discontinued during the summer months. The plaintiffs resided respectively 1090 and 295 feet from the bell tower. Upon a bill brought by them, the ringing of this bell was restrained as a nuisance, although a large majority of persons, living nearer to the bell than the plaintiffs, were not annoyed by it, and although some persons may have had such associations with the sound that it may have been to them a pleasure rather than an annoyance; whilst the sensibilities of others to the sound may have become so deadened that it did not disturb them. As the ringing of the bell was not essential to the defendant's business, and was nothing more than a convenience, while it interfered with the rights of the plaintiffs, it was held that they were entitled to an injunction without having obtained a previous judgment at law.[1]

§ **1915. Church Bells.** — Where a church was built upon a side of a street, at about the center of one side of a block, in a neighborhood compactly built up by residences, many of them four and five stories high, so that it stood in a sort of court with its belfry not more than sixty feet from the windows of some of the surrounding residences, in which belfry its bells were sus-

[1] Davis *v.* Sawyer, 113 Mass. 289. In an old case of an information for erecting and continuing a *soap boilery* in Wood Street, in London, to the annoyance of the neighborhood, the trial was before Jeffreys, C. J., at Guildhall — a judge whose name is more unsavory to posterity than any soap boilery. The defendant was found guilty, and the reporter has put down the following statement: "In this case was remembered the case of a calendar man here in London, in Bread street, who was convicted before Lord Hale on such an information, for that the noise of it disturbed the neighbors and shook the adjacent houses; and the case of The King *v.* Jordan for a brewhouse on Ludgate Hill, about a year and a half since; and he was forced to prostrate the same and direct it to another use; for that such trade ought not to be in the principal parts of the city, but in the outskirts." Rex *v.* Pierce, 2 Shower, 327.

pended at a height of sixty-seven feet from the ground, and nearly on a level with the roofs of the nearest houses, and the chime consisted of four large bells, which were rung at various times during the week and on Sundays, producing sounds which disturbed a large number of persons residing in the immediate neighborhood, and which were, according to competent medical testimony, injurious to the sick and productive of disease, a provisional order was entered restraining the defendant from ringing the bells or otherwise using the same, so as to cause nuisance or annoyance, by sound or noise, to the complainants, or any of them, within their respective homes.[1] This was affirmed, in a modified form, by the Supreme Court of Pennsylvania, three of the judges, Mercur, Paxson and Sterrett, dissenting, on the ground that it was not a proper case for a preliminary injunction. The restraining order, as entered in the Supreme Court, compelled the cessation of the ringing at seven o'clock in the morning, and limited the ringing for the ordinary services to five minutes before each service.

§ **1916. Continued.** — A still earlier precedent is found for this relief. In 1851, Vice-Chancellor Kindersley enjoined the ringing of a church bell under the following circumstances: A Catholic order called the Redemptorist Fathers took a lease of a house adjoining the plaintiffs, and on it caused a wooden frame to be erected, in which a bell was hung which was rung five times on Monday, Tuesday, Wednesday, Thursday and Friday, six times on Saturday, and oftener on Sunday, in every week. The ringing ordinarily commenced at five o'clock in the morning and continued for ten minutes, to the great discomfort and annoyance of the plaintiff and his family. Subsequently a Roman Catholic church was erected on the ground adjoining the chapel, with a steeple in which was placed a peal of six bells, which were rung at intervals during every day, commencing at five o'clock in the morning, and very frequently on Sunday. This peal of bells was suspended but sixty feet from the plaintiff's bedroom window.

[1] Harrison *v.* St. Mark's Church, 12 Phila. (Pa.) 259.

An injunction was granted "to restrain the defendant and all persons acting under his direction or by his authority, from tolling or ringing the bells in the plaintiff's bill mentioned, or any of them, so as to occasion any nuisance, disturbance and annoyance to the plaintiff and his family residing in the dwelling-house in the bill mentioned."[1] The learned judge thought that it was possible that some of those bells might be rung so as not to occasion any nuisance or annoyance to the plaintiff, and therefore he did not think it right to say that none of the bells should be rung again. At that time the feeling against Roman Catholics in England was much stronger than at present. It was boldly urged in behalf of the plaintiff that Roman Catholics had no right to keep and ring bells in connection with their places of worship. The vice-chancellor carefully refrained from deciding this question; but he was equally careful to point out that this was not a "church" within the meaning of the English law, but that it was a Roman Catholic "chapel," and that his decision would not accordingly affect the ringing of bells in any parish church established under that law. Another very important feature of this case was that the plaintiff had previously established the fact that this was a nuisance, by a recovery of damages at law.

§ **1917. Continued.** — Going back to 1724 we find a case where the plaintiffs' house (they were husband and wife) being so near a parish church that the five o'clock bell greatly disturbed the wife, who was sickly, they purchased their peace by agreeing in writing with the churchwardens and inhabitants at a vestry, that they would erect a cupola and clock at the church, and that, in consideration thereof, the five o'clock bell should not be rung during their lives or that of the survivor of them. In pursuance of the agreement the plaintiffs erected a cupola, clock and bell, and the five o'clock bell remained silent for about two years, until "the defendant, an ale-house keeper, being chosen churchwarden, a new order of vestry was obtained for the ringing of the five o'clock bell." Upon a bill filed to enjoin this

[1] Soltau v. De Held, 2 Sim. (N. S.) 133.

ringing, it was held that this was a good contract, and the court enjoined the ringing of the five o'clock bell during the lives of the plaintiffs or the survivor of them, according to its terms. Among other things, the lords commissioners are reported to have said that the ringing of the five o'clock bell did not seem to be "of any use to the parish, though of very ill consequence to the plaintiff, the Lady Howard." [1]

§ **1918. Railway Engines in the Neighborhood of Churches.** — It has been held and denied that an action on the case lies against a railroad company for nuisance in running their cars and engines, ringing bells, blowing off steam, and making other noises in the neighborhood of a church or meeting-house on the Sabbath, and during public worship, which so annoy and molest the congregation worshiping there, as greatly to depreciate the value of the house and render the same unfit for a place of religious worship.[2] The Supreme Court of Pennsylvania refused to enjoin the running of street railway cars on Sunday, on the ground that, if it were a nuisance at all, it was a *public* nuisance, to be redressed at a suit of the Commonwealth.[3] It was also held that an action for such an injury is properly brought against the railroad company, in its corporate character, by the church in its corporate character.[4]

§ **1919. Noises Frightening Horses.** — It is not every occasional and accidental noise which might frighten a horse in a stable on a particular day, that would entitle the plaintiff to an injunction, if the general case or habitual nuisance alleged in the bill were not satisfactorily proved.[5] Accordingly, where the bill sought to enjoin the noise and vibration produced by machinery

[1] Martin *v.* Nutkin, 2 P. Wms. 266.

[2] First Baptist Church *v.* Schenectady &c. Railroad Co., 5 Barb. (N. Y.) 79, where it was held that such an action would lie. First Baptist Church *v.* Utica &c. Railroad Co., 6 Barb. (N. Y.) 313, where the contrary was held.

[3] Sparhawk *v.* Union Passenger Railroad Co., 54 Pa. St. 401.

[4] First Baptist Church *v.* Schenectady &c. Railroad Co., *supra*. See also Baltimore &c. R. Co. *v.* Fifth Baptist Church, 108 U. S. Rep. 317; *s. c.* 2 Sup. Ct. Rep. 719.

[5] Gaunt *v.* Fynney, L. R. 8 Ch. 8, 14, *per* Lord Selborne, L. C.

in a silk factory, witnesses for the plaintiff stated that, on one occasion, the horse of a visitor, when put in the adjoining stable, suffered tremors,— "as to which his lordship said that this evidence did not make a powerful impression on his mind." [1] The governing principle here was, that effects which are only occasional or accidental, and which do not necessarily flow from the thing complained of, are not ground of injunction, although they may afford ground of an action at law.[2]

§ 1920. Steam Whistles. — It is said that a steam whistle is not *per se* a nuisance, but those who make use of it are bound to use it in such a place and in such a manner that it shall not become a nuisance.[3] "Such whistles are necessary upon railroad engines to frighten horses and cattle that may stray upon the road in front of the engine, and drive them from the track. They are also necessary to give notice of the approach of a train to persons about to cross the track, at such a distance that the bell cannot be heard. In this and other cases, their use upon railroads is important and valuable, and both sanctioned and required by law; and in such cases, the usefulness of the whistle depends upon the alarming and frightening character of the noise it makes; and one of the purposes for which it is used is to frighten and alarm. This is well understood, and the owners of animals, which have not become accustomed to whistles, are bound to submit to the necessities of the case, and if they drive them where locomotive whistles are liable to be blown, they take the risk upon themselves, and, if any injury results, they can have no redress. But the rule should be and is different in respect to whistles used upon factories. Their use is not necessary at all, but, if used, there is no necessity for constructing them in such a way, and using them in such a manner, as to alarm or frighten any person or animal. All the purposes to be attained from their use upon factories can be attained without constructing and using them in an alarming man-

[1] *Ibid.*

[2] Cooke *v.* Forbes, L. R. 5 Eq. 166.

[3] Parker *v.* Union Woolen Works, 42 Conn. 399; Knight *v.* Goodyear &c. Co., 38 Conn. 438.

ner. It follows that an unnecessary alarming or frightening use of them, if productive of injury to another, is wrongful, and the proprietors should be holden responsible for the injury." [1] It was accordingly held that proprietors of factories are not entitled to use steam whistles on their factories so located, of such a character, and used in such a manner, as to frighten horses of ordinary gentleness, when passing upon the highway adjoining their land; and that they are responsible for an injury caused by an unnecessary, alarming, or frightening use of them.[2]

§ 1921. How far Plaintiff under Obligation to avoid Consequences of such a Nuisance: Contributory Negligence. — Every person is ordinarily bound to take reasonable precaution to guard against known dangers, and cannot make the negligence or fault of another a ground of recovering damages for injuries which he himself might have avoided by the exercise of ordinary care. But contributory negligence cannot be attributed to a person for driving a well-broken and ordinarily gentle horse upon the highway, in the course of his business, in good faith, although in the vicinity of a factory where a steam whistle is kept and where it may be unnecessarily blown;[3] but where the plaintiff's horse which, otherwise gentle, had the vicious habit of pulling when tied to a post, was fastened by a stout rope on the side of a public street near a factory, which had a steam whistle upon it which was used for the purpose of calling its operatives, the sound of which was shrill and calculated to frighten ordinary horses; and while the plaintiff's horse was so tied, the whistle was blown, whereat the horse became frightened and pulled violently at the rope, which broke and he was killed, it was held that the plaintiff could not recover damages, although it was found as a fact that if the whistle had not sounded, the horse would not have been killed, it having been also found that, if the horse had been free from the habit of pulling, he would not have been killed.[4]

[1] Knight *v.* Goodyear &c. Co., 38 Conn. 438, 441.

[2] *Ibid.*

[3] Knight *v.* Goodyear &c. Co., 38 Conn. 438.

[4] Parker *v.* Woolen Co., 42 Conn. 399

§ 1922. **Injuries Produced by Vibration.**— Courts of equity have, in a number of cases, either interposed to restrain nuisances produced by *machinery* which results in the vibration of adjoining buildings or residences, or have otherwise recognized the principle that such nuisances may, in proper cases, be abated by an injunction.[1] Thus, in a well-considered case, the complainant and defendant occupied adjoining buildings, the walls of which touched each other in places. The defendant carried on, in his place of business, a printing and book-binding establishment. He had there a twelve-horse power engine with boiler attached, and six printing presses, four operated by steam and two by hand. This machinery was so placed that its power was exerted in lines running east and west; in other words, across the building, and not longitudinally, so that the west wall of complainant's building was compelled to receive whatever shock was produced by this vibratory force. The defendant carried on, in the adjoining building, a saddlery manufactory. The evidence tended to show that the vibrations received from the plaintiff's building were so great at times as to render it impossible to do certain kinds of work in the defendant's building. One witness said that, when the vibration was greatest, the floor seemed to creep under his feet, and he could not write at all. The defendant's book-keeper said that it prevented him at times from making marks with his pen that he ought to make. Several of the defendant's employés swore that they were more or less disturbed by the vibration. It gave a headache to some, or produced a dizzy sensation; in others it produced nausea closely resembling sea-sickness. Others testified that, when the motion was strongest, they found it impossible to do such parts of their work as required a steady hand and clear eye, such as delicate stitching and exact cutting in curved or irregular lines. One swore that on several occasions he had been compelled, in consequence of the vibration, to take his work to his dwelling and do it there. Everything pendant about the building oscillated like the pendulum of a clock. The actual deflection of the walls, however, was

[1] See Wood on Nuisances, 553–568.

not shown to be over one-eighth to three-sixteenths of an inch. The court found it difficult to believe that so much disturbance could be produced by so slight a deflection. The learned judge, however, said: "I am not at liberty to decide the case on a theory or deduction based on a single fact, but must find the fact according to the truth as established by the evidence as a whole. Unless complainants' witnesses, without exception, have exaggerated the effect of the vibration to such an extent as to render their stories downright falsehoods, it must be taken, as an established fact in the case, that the vibration very sensibly and materially interferes with the complainants in the prosecution of their business. My judgment is that the defendant is guilty of a nuisance which it is the duty of this court to redress. But this conclusion does not necessarily involve the destruction of the defendant's business. The injury to the complainants, in my judgment, is caused solely by the position of the machinery. As already stated, it is now placed so that its whole force is expended across the defendant's building and directly against that occupied by the complainants. To me it seems very plain that, if it is changed so that its force shall be expended longitudinally with the building, and not transversely, the injury the complainants now suffer will be remedied, and all cause of complaint removed. That is the unanimous opinion of all the experts who have spoken on the subject. A decree will be advised directing the defendant to change the position of his machinery in accordance with the view above indicated, and that an injunction shall issue, restraining him from operating any machinery in the building occupied by him, to such an extent as shall produce a vibration in the complainants' building sufficient to annoy or disturb them in the conduct of their business." [1]

§ **1923. Vibration of Steam-hammers in a Rolling-mill.** — In an action at law for damages, caused by the cracking of certain cottage walls belonging to the plaintiff, by the vibration caused by steam-hammers in a rolling-mill operated by the de-

[1] Demarest *v.* Hardham, 34 N. J. Eq. 469, 476–7.

fendant, Blackburn, J., in summing up to the jury, said: "The question is, whether this is a case of nuisance, that is, an actionable wrong. If the defendant, in the course of using these hammers, produced, not merely a nominal, but such a sensible and real damage, as a sensible person occupying the cottage would find injurious, that is a nuisance; but that which is a sensible and real inconvenience to property situated in one place or occupied in one way, will be none to property situated in another place or occupied in another way. If you are of opinion that the vibration caused by the hammers has shaken and cracked the walls of the cottages, you will probably consider that to be a substantial and real mischief. If, on the other hand, you think the damage was caused by the removal of the adjoining cottages, whether that was justifiable or not, you ought to find a verdict for the defendant on that part of the case. So, with regard to the cottages standing empty; if that was caused by the hammering, you will find a verdict for the plaintiff; if by the want of repair, for the defendant. A further point has been raised by the plea that the grievances complained of were caused by the defendant in a reasonable and proper exercise of his trade in a reasonable and proper place. My opinion is, that in law that is no answer to the action. I think that that cannot be a reasonable and proper exercise of a trade which has caused such injury to the plaintiff as she complains of." [1]

§ **1924. Action, by Whom Brought.** — Injuries which flow from noises are not permanent in their nature, and an action to redress them can only be brought by those who are *presently* injured by them. Such an action, accordingly, cannot be brought by the *reversioner;* it must be brought, if at all, by the *tenant.*[2] The rule is otherwise where the injury is not to the use merely, but to the property itself, — as in the case of the obstruction of light.[3] The rule is familiar that several complainants may unite

[1] Scott *v.* Firth, 4 Fost. & Fin. 349.

[2] Mumford *v.* Oxford &c. Railroad Co., 1 Hurl. & N. 34.

[3] Tucker *v.* Newman, 11 Ad. & El. 40. See Dobson *v.* Blackmore, 9 Ad. & El. (N. S.) 991; Shadwell *v.* Hutchinson, M. & M. 350.

in the bill to enjoin a nuisance, where the injury complained of is *common to all*,— as in case of a noise or stench, common to a neighborhood.[1] But where the injury is not common to all, as where it consists in part of vibration produced by machinery, which affects the buildings of some of the complainants, and not those of the rest of them, there is a misjoinder of parties.[2]

§ 1925. Instruction as to Nuisance Caused by Running a Mill. — "If the jury find from the evidence that the running and use of said mill materially and essentially lessens the personal enjoyment of plaintiffs, by reason of the noise, smoke, dust, dirt and cinders, in their said dwelling, then the allegations in the plaintiff's complaint have been sustained. - - - - If the jury find from the evidence that the personal enjoyment of the plaintiffs in their residence has been and will be materially and essentially lessened, by either the noise, smoke, dust, dirt, cinders, horses, mules or teams, caused by the running and use of said mill, then the allegations of the complaint have been sustained." [3]

[1] Davidson *v.* Isham, 9 N. J. Eq. (1 Stock.) 186; Catlin *v.* Valentine, 9 Paige (N. Y.), 575.

[2] Davidson *v.* Isham, *supra*.

[3] Approved in Owen *v.* Phillips, 73 Ind. 287.

CHAPTER LVII.

FRAUD.

ARTICLE I. — IN GENERAL.
ARTICLE II. — MISREPRESENTATION AND DECEIT.
ARTICLE III. — FRAUDULENT CONVEYANCES.

ARTICLE I. — IN GENERAL.

SECTION
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§ 1930. Distinction between Fraud in Fact and Fraud in Law. — Fraud in law differs from fraud in fact, in that in the former the *intent* of the party charged with the fraud is immaterial, and it is determined by the court regardless of such intent; while in the latter, the fraud depends upon the fraudulent intent of the party, and the facts, establishing such intent, are for the jury.[1] It has been said that "fraud and fraudulent intent is always a question of fact for the jury; and although there are cases where it is said the law presumes fraud from certain acts, yet that presumption is only the conclusion of the law upon the facts as they are proven."[2]

[1] Milne *v.* Henry, 40 Pa. St. 352.

[2] Wakeman *v.* Dalley, 44 Barb. (N. Y.) 498, 503.

§ **1931. Court adjudges when Self-Evident.** — When fraud in fact is self-evident, as in the case of deceitful misrepresentations, found or admitted, it is the duty of the court to adjudge upon it without submitting it to the jury.[1]

§ **1932. And Where Facts are Indisputable.** — "Fraud," said Kent, C. J., "is a question of law, and especially, when there is no dispute about the facts. *It is the judgment of law on facts and intents*, as has been frequently observed by judges of the greatest eminence."[2] "Whether a transaction be fair or fraudulent," said Lord Mansfield, "is often a *question of law:* it is the judgment of law, upon facts and intents."[3] It is said that fraud is a question of law, when the facts on which it depends are well pleaded on one side and admitted by demurrer on the other.[4]

§ **1933. Unless depending on a Variety of Circumstances involving Motive or Intent.** — It is said by a recent writer of reputation: "In some cases, fraud is self-evident; and, when so, it is the proper province of the court to adjudge upon it, without submitting its existence to the decision of the jury. Case of dishonest misrepresentation and deceitful attempts to mislead are examples. Indeed, the whole law of deceit is an illustration of this proposition. Certain elements of deceit being found or admitted, the court rules that they constitute fraud. In other cases, the existence of fraud depends upon a variety of circumstances, arising from motive and intent, and inferences from circumstantial evidence; and, in such cases, the courts should submit to the jury the question of fraud, under proper instructions concerning the tests of fraud."[5] "What constitutes fraud is a question of law," says Pearson, J. "In some cases, the fraud is *self-evident:* when it is the province of the court so to adjudge, and the jury has nothing to with it. In other cases,

[1] Williams *v.* Hartshorn, 30 Ala. 211; Hardy *v.* Simpson, 13 Ired. L. (N. C.) 132, 139.

[2] Sturtevant *v.* Ballard, 9 Johns. (N. Y.) 337, 342.

[3] Worsely *v.* DeMattos, 1 Burr. 467, 474.

[4] Gerrish *v.* Mace, 9 Gray (Mass.), 235.

[5] Bigelow on Fraud (1st ed.), 468.

it depends upon a variety of circumstances, arising from the motive and intent; then it must be left as an open question of fact to the jury, with instructions as to what, in law, constitutes fraud. And, in other cases, there is a *presumption* of fraud, which may be rebutted, Then, if there is any evidence tending to rebut it, that must be submitted to the jury; but if there is no such evidence, it is the duty of the court so to adjudge and to act upon the presumption. Fraud is very subtile and frequently alludes the grasp, both of the court and jury. When, therefore, the court has hold of it, there is no reason for passing it over to the jury, unless there is some evidence that will justify them in coming to the conclusion that the presumption is rebutted."[1] Questions of motive or intent are always questions of fact for the jury,[2] except in cases where the facts are admitted, or the evidence is unequivocal and involves no question of the credibility of testimony, in which case it is supposed that the court may make the deduction.[3]

§ **1934. Or Upon Conflicting Evidence.** — Where the question of fraud or no fraud is directly in issue, and the evidence is conflicting, the jury must decide the question, and it will be error for the court to instruct them that if they believe the evidence, they must find for the plaintiff.[4] It is said in other cases that, although fraud *vel non* is, where the facts are clear and undisputed, a pure question of law,[5] yet where there is a conflict of evidence upon the question of fraud, depending upon the weight of evidence and the credibility of witnesses, it is error to withdraw the question from the jury.[6]

§ **1935. Whether there is Evidence tending to show Fraud a Question of Law.** — It has been observed, with the most ob-

[1] Hardy *v.* Simpson, 13 Ired. L. (N. C.) 132, 139.

[2] Western Stage Co. *v.* Walker, 2 Ia. 505.

[3] *Ante*, § 1333. *et seq.*

[4] Williams *v.* Hartshorn, 30 Ala. 211.

[5] Swift *v.* Fitzhugh, 9 Port. (Ala.) 39; Upson *v.* Raiford, 29 Ala. 188, 199. See also Horn *v.* Amicable &c. Co. 64 Barb. 81; *s. c.* 3, Big. Ins. Cas. 712.

[6] Henderson *v.* Mabey, 13 Ala. 715; Boyd *v.* McIvor, 11 Ala. 822; Upson *v.* Raiford, *supra.*

vious propriety, that, while fraud is a question of fact for a jury, or for the court where there is no jury, yet it is a question of law whether the evidence before the court or jury tends in any respect to establish fraud; if fraud is found, as a conclusion of fact, where there is no evidence tending to such conclusion, it is the duty of the court to set the finding aside.[1]

§ 1936. Situations in which the Law presumes Fraud. — There are cases where the law, from the situation or relation of the parties, presumes fraud, — examples of which are found in transactions had between *superiors* and *inferiors* in a *fiduciary relation*, as attorney and client, guardian and ward, physician and patient, pastor and parishioner, etc., in which the superior obtains a gift or advantage from the inferior. In such cases the law, on grounds of public policy, presumes fraud, or, what is tantamount to fraud, *undue influence*, sufficient to avoid the contract, gift, devise or legacy, and casts the burden upon the party acquiring the benefit, of showing that it was acquired without undue influence, and generally, that the inferior had independent advice. In many such cases, certain facts being established, it becomes the duty of the court to declare what is called constructive fraud, to exist.[2] "For the sake of protecting parties in such dependent situations," says Dr. Bigelow, "the law wisely requires the party in the superior position to overcome the positive presumption against the fairness of the particular transaction. But, if there be evidence tending to overturn the presumption, it must, in most cases at least, be submitted to the jury, and their decision of the existence of fraud invoked; or rather their decision must be invoked to determine whether the presumption is rebutted. If no rebutting evidence be offered, it is the duty of

[1] Gage *v.* Parker, 25 Barb. (N. Y.) 141, 145; Erwin *v.* Voorhees, 26 Barb. (N. Y.) 127.

[2] Hardy *v.* Simpson, 13 Ired. L. (N. C.) 132. On the trial of contest of a will the question of the existence of undue influence at the time of the execution of a will, is a question of fact for the jury, and if the evidence is such that a rational mind might reasonably and fairly draw the conclusion reached by the jury, the court, on appeal, will not disturb the verdict. Moore *v.* McDonald (Md.), 12 Atl. Rep. 117.

the court to adjudge the existence of fraud as matter of law."[1] Although matters of this kind generally arise in suits in equity, the object of which is to impeach deeds as well as other instruments of conveyance, by which property is passed from an inferior to a superior in some confidential relation, yet the principle stated by the above writer is one of universal recognition, and applies equally in proceedings at law and in equity. Transactions of this kind, taking place between attorney and client, spiritual adviser and advisee, trustee and *cestui que trust*, parent and child, guardian and ward, physician and patient, and parties in other like relations, are watched by the courts with the most scrutinizing jealousy, and are generally held to be presumptively void.[2]

§ 1937. When Declared as a Question of Interpretation of Writings. — In many cases the *presumption of fraud* will arise on the face of a deed or other instrument of writing, which presumption will be rebuttable; and, if it be an action at law, it will in such a case be for the jury to say whether it has been rebutted.[3] The interpretation of written statements of fact, in connection with the question whether they are false or not, seems to belong to the court.[4] Whether facts not disclosed or falsely stated, are material, is for the jury to determine;[5] unless it appear, either directly or by plain inference from the contract,

[1] Bigelow on Fraud (1st ed.), 469.

[2] This doctrine will be found, in various forms of expression, in the following and many other cases: Caspari *v.* First German Church, 12 Mo. App. 293; Garvin *v.* Williams, 44 Mo. 465, 469; *s. c.* 50 Mo. 206; Harvey *v.* Sullens, 46 Mo. 147; Yosti *v.* Laughran, 49 Mo. 594; Street *v.* Goss, 62 Mo. 226; Rankin *v.* Patton, 65 Mo. 378, 411; Bradshaw *v.* Yates, 67 Mo. 221, 228; Ford *v.* Hennessey, 70 Mo. 580.

[3] Hardy *v.* Simpson, 13 Ired. L. (N. C.) 132; Johnson *v.* McAllister, 30 Mo. 327, 330; Weber *v.* Armstrong, 70 Mo. 217, 220; Hewson *v.* Tootle, 72 Mo. 632, 636; American Exchange Bank *v.* Inloes, 7 Md. 380, 393; Gates *v.* Labeaume, 19 Mo. 17; Wise *v.* Wimer, 23 Mo. 237; Oliver *v.* Eaton, 7 Mich. 108, 113. Compare Hardy *v.* Skinner, 9 Ired. L. (N. C.) 191.

[4] Swift *v.* Mass. Life Ins. Co., 63 N. Y. 186. See further authorities, Bigelow on Fraud, 470.

[5] Rawlins *v.* Desbrough, 2 Mood. & R. 328.

that they are deemed material,[1] or unless they are of an evident and glaring character.[2]

§ 1938. Fraud in Fact not Presumed, but Must be Proved: Statement of the Rule. — An initial doctrine is that fraud is never to be presumed, but that, on the contrary, honesty and right acting are always presumed in the absence of evidence to the contrary; from whence it follows that fraud must be clearly proved by the party alleging it.[3] The law presumes in favor of innocence until the opposite is shown, — will never infer evil intentions and dishonest purposes from language or conduct which is susceptible of upholding intentions and purposes which are good and honest,— its maxim being: "*Odiosa et inhonesta non sunt in lege præsumenda, et in facto quod in se habet et bonum, et malum, magis de bono, quam de malo, præsumendum est.*" [4]

§ 1939. An Instruction Presenting the Rule. — It is the constant practice of courts, in actions raising the question of actual fraud, to instruct the jury concerning this principle. The following is offered as a good model: "The court instructs the jury that fraud is never presumed, but must be clearly proved, to entitle a party to relief on the ground that it has been fraudulent; and the presumption of law is, that the business transactions of every man are done in good faith, and for an honest purpose; and any one who alleges that such acts are done in bad faith, or for a dishonest purpose, takes upon himself the burden of showing, by specific acts and circumstances, tending to prove fraud, that such acts were done in bad faith." [5]

§ 1940. Fraud in Fact always a Question for the Jury. — What is called fraud in fact is, as the term implies, always a question of fact, and, in cases tried by a jury, must be established to the satisfaction of the jury; and whether it is proved or not, is a question for the jury, subject, of course, to the power of

[1] Campbell *v.* New England Life Ins. Co., 98 Mass. 381; *s. c.* 1 Big. L. Ins. Cas. 229.

[2] Bufe *v.* Turner, 6 Taunt. 338; *ante*, § 1284.

[3] Stewart *v.* English, 6 Ind. 176.

[4] Norton *v.* Kearney, 10 Wis. 443, 451.

[5] Approved in Ahlman *v.* Meyer, 19 Neb. 66.

the judge, on principles elsewhere discussed, to withdraw the question from them, on the ground that there is no evidence tending to show fraud.[1] It may be said, as a general rule, that, in every case where the law does not, on grounds of public policy, impute fraud to a particular transaction, it becomes a question of fact for the jury, whether it was fraudulent or not. In every case where the question is one of *motive or intent*, it is manifestly so.[2]

§ 1941. Illustrations. — By a statute of Missouri[3] a landlord is allowed an *attachment against his tenant*, if the latter intends to remove, or is removing, or has within thirty days removed his property from the leased premises, or shall in any manner dispose of such crop or attempt to dispose of the same, so as to endanger, hinder or delay the landlord from the collection of his rent, etc. It is held not to be the sense of this statute that the tenant shall not remove any portion of the crop, but only that he shall not remove or dispose of it so as to endanger or hinder the landlord's collection of the rent; and this is a question for the jury.[4] So, in Texas it is ruled that when a judgment is offered in evidence in an action to try title to land, it cannot be objected to its admissibility that it was obtained by fraud; for the reason that the question of *fraud in obtaining a judgment* depends upon extrinsic evidence and raises a question for the jury, and not for the court to decide.[5] And it should be added that this question can only be tried in a direct proceeding in equity, or in a proceeding of that nature, the object of which is to impeach the judgment for fraud. It cannot be tried collaterally, when the judgment is offered in evidence for some other purpose. "Whether an *award* is void by reason of fraud in the party, or corruption, gross partiality or prejudice on the part of the arbitrators, is not a question of law to be determined upon a demurrer to a plea, but a question of fact to be submitted, if the parties desire it, to a jury, with an opportunity to the party whose award is impeached, to explain by testimony any circumstances on the face of the proceedings that might tend to excite suspicion of unfair practices."[6] So, on a question of the

[1] Hanna *v.* Phillips, 1 Grant Cas. (Pa.) 253.

[2] Buckley *v.* Artcher, 21 Barb. (N. Y.) 585.

[3] Rev. Stat. Mo. 1879, § 3091.

[4] Haseltine *v.* Ausherman, 87 Mo. 410. The question is not, however, to be determined with reference to any property which the tenant may have elsewhere. *Ibid.*

[5] Maverick *v.* Salinas, 15 Tex. 57.

[6] Duren *v.* Getchell, 55 Me. 241, 251.

right to receive a *bounty*, voted by a town for volunteers enlisting to serve in the late war, it was held a question for the jury, under all the circumstances of the case, whether the claimant, in the true sense of the law, engaged to serve for the term of nine months, either as a private or an officer, in such a manner that he might be reckoned as one of the nine months' quota for the town; and included in this was the question whether the enlistment was a *bona fide* contract to serve in some capacity for a stipulated term of nine months, or was a colorable engagement for the purpose of obtaining the bounty.[1] So, where a *will is written on several sheets of paper*, fastened together by a string, the question whether all the sheets were attached at the time of the signing, or whether there has been a subsequent fraudulent addition to the instrument, has been held under circumstances a question for the jury.[2] So, in an action of *ejectment*, whether an entry of land was fraudulent or not, should be submitted to the jury as a question of fact. In other words, whether an entry was procured from the United States by fraudulent means or not, in a contest between two claimants from the United States, is a question which must be submitted to the jury.[3] So, where lands were sold by a deed which described it by courses and distances, and stated the contents to be thirty-two acres, and a subsequent purchaser, finding marks on the ground and adjoiners, as described in the deed, embracing about thirty acres more, claimed to hold these additional acres, it was held in ejectment to be a question for the jury whether the surveyor had not run the lines by fraud or mistake.[4] So, where a *husband* carries on his *wife's farm* as her *agent*, it is a question for a jury, in cases open to suspicion, whether the business is being carried on in good faith by the wife as her enterprise, at her expense and for her benefit, or is being transacted by the husband in her name as a cover to protect the product from his creditors.[5]

[1] Stone *v.* Danbury, 46 N. H., 139.
[2] Ginder *v.* Farnum, 10 Pa. St. 98.
[3] Waller *v.* Von Phul, 14 Mo. 84.
[4] Bentley *v.* Rickabaugh, 62 Pa. St. 281. Compare McCall *v.* Davis, 56 Pa St. 431.
[5] Hassfeldt *v.* Dill, 28 Minn. 469.

Article II. — Misrepresentation and Deceit.

Subdivision 1. — What Questions for Court and what for Jury.
Subdivision 2. — Precedents of Instructions.

Subdivision 1. — What Questions for Court and What for Jury.

Section
1945. Generally a Question for the Jury.
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§ 1945. Generally a question for the Jury. — In a very numerous class of cases which arise in the legal forum, actions upon contracts are defended upon the ground that the contract was procured by the fraudulent misrepresentations, concealments, or contrivances of the plaintiff or the party through whom he claims. The fraud involved in these cases is positive fraud — deceit — otherwise termed fraud in fact. The question is very largely a question of motive and intent; and the question of fraud or no fraud will, therefore, in most cases, be a question of fact for the jury.[1]

[1] Laidlow *v.* Organ, 2 Wheat. (U. S.) 178, 195; Prescott *v.* Wright, 4 Gray (Mass.), 461; Crump *v.* United States Mining Co., 7 Gratt. (Va.) 352, 369; Graham *v.* Holliger, 46 Pa. St. 55; Yates *v.* Alden, 41 Barb. (N. Y.) 172; Burr *v.* Todd, 41 Pa. St. 207; Matthews *v.* Rice, 31 N. Y. 457; Griffith *v.* Eby, 12 Mo. 517; Owens *v.* Rector, 44 Mo. 389, 392. Whether a

§ 1946. Statement of Fact or of Opinion. — Fraudulent representations, in order to avoid a contract, must be representations of facts susceptible of knowledge, as distinguished from matters of mere belief or opinion.[1] Where the language was, "I want to tell you how I stand. I could pay every dollar of indebtedness of mine, including the mortages on my real estate, and not owe on that real estate more than $15,000 to $20,000,"— it was held that whether this was the statement of a fact, or the expression of an opinion, was a *question for the jury*.[2]

§ 1947. Whether the Plaintiff acted upon the False Representations or upon his own Knowledge. — In such an action, it has also been held to be a *question for the jury* whether the plaintiff, although he had some general knowledge of the character and responsibility of the corporation, was governed by the representations of the defendant, who was its financial agent, and had been connected with its management and had an intimate knowledge of its affairs.[3]

§ 1948. Character and Design of the Representations.— It was also held to be a *question for the jury*, whether representations made by the defendant on the same day and only a short time before the agreement was executed, were designed to influence and did influence the plaintiff, and also whether they were made in reference to the contract.[4]

person who has suffered damages through *negligence* was induced to sign a *release of damages* through fraud or deceit, is a question of fact for the jury. (Ryan *v.* Gross (Md.), 12 Atl. Rep. 115), assuming, of course, that there is evidence tending to show fraud in obtaining such release. It has been laid down that, whether there was fraud and misrepresentation in the concoction of a contract, or in the performance or offer to perform its terms, are questions to be decided by the jury, where there is any evidence on those points. So held in Pennsylvania, in an action to enforce the *specific performance* of a contract for the sale of land. Williams *v.* Bentley, 29 Pa. St. 272, 276.

[1] Safford *v.* Grout, 120 Mass. 20; Litchfield *v.* Hutchinson, 117 Mass. 195; Morse *v.* Shaw, 124 Mass. 59. For a corresponding rule as to *warranties*, see *ante*, § 1198.

[2] Morse *v.* Shaw, *supra*.

[3] Yates *v.* Alden, 41 Barb. (N. Y.) 172.

[4] Yates *v.* Alden, 41 Barb. (N. Y.) 172.

§ **1949. Province of Jury in Respect of Parts of an Extended Conversation.** — In such an action, where much evidence was given as to the conversations which led up to the sale and purchase, it has been held to be the *province of the jury* to decide upon the connection and effect of the parts of an extended conversation.[1]

§ **1950. Materiality of False Statements.** — In instructing the jury in such an action, it has been held improper to leave them to conjecture what were "*material* false statements."[2]

§ **1951. Purchasing Goods with the Intent not to pay for them.** — Where a person purchases goods with the intent not to pay for them, or, as some courts have formulated the rule, with the intent never to pay for them, the vendor may rescind the contract of sale and reclaim the goods.[3] In such a case the fraudulent intent is of course a *question of fact* to be found by the jury, and the difficulty which will arise in most cases will be that of determining whether the evidence is sufficient to take the case to them. In such a case the evidence is necessarily circumstantial, and the jury are to determine whether there was such an intent, from a view of the surroundings of the person at the time when he made the purchase. If he was a merchant and in such a state of embarrassment that no reasonable man, possessing his knowledge of his affairs, would regard payment as possible, then a jury may infer that payment was not intended.[4]

§ **1952. In Applications for Insurance.** — It has been held a *question of fact* for a jury, whether a fact not communicated by the applicant for a policy of *insurance* was, under the circum-

[1] Peck *v.* Bacon, 18 Conn. 377, 387; *ante*, § 1105.

[2] Anderson *v.* McPike, 86 Mo. 293, 299. For a contrary rule in the law of *insurance*, see *ante*, § 1284.

[3] Bidault *v.* Wales, 19 Mo. 36; *s. c.* 29 Mo. 550; Fox *v.* Webster, 46 Mo. 181; Thomas *v.* Freligh, 9 Mo. App. 151; Davis *v.* Stewart, 8 Fed. Rep. 803; *s. c.* 3 McCrary (U. S.) 174. For a case where the circumstances were sufficient to take the case to the jury, see King *v.* Phillips, 8 Bosw. (N. Y.) 603.

[4] Manheimer *v.* Harrington, 20 Mo. App. 297.

stances, one which the assured ought to have communicated.[1] Where, in an application on a policy of life insurance, in answer to the question, "Who is your usual medical attendant?" the applicant replied, "C. D.," — it was held that it was a question for the jury upon the evidence whether C. D. was the usual medical attendant of the applicant.[2] So, where the assured misdescribed her residence by stating that she lived at a certain place, when, in point of fact, she was a prisoner in the county jail at the place named, — it was held a question for the jury whether the imprisonment was a material fact which ought to have been communicated.[3]

§ **1953. At Auction Sales.** — Fraud at auction sales, by which bidding is suppressed, seems to be a *question of fact* for a jury.[4] Where, at a judicial sale of personal property, the only bid offered was by the auctioneer, who cried the sale by the direction and in the presence of the officer entrusted with it, and the property was struck down at a price much below its actual value, in consequence of false representations alleged to have been made by him, which deterred others from bidding, — it was held that the fraudulent intent of the buyer was a question of fact for the jury, and that it was error for the court to direct them that the sale was fraudulent.[5]

§ **1954. By-bidding at such Sales.** — The vendor at such a sale, may, with a *bona fide* intention of preventing a sacrifice of

[1] Rawlins *v.* Desborough, 2 Mood. & R. 328. Compare Swete *v.* Fairlie, 6 Car. & P. 1; Swift *v.* Mass. Life Ins. Co., 63 N. Y. 186; *s. c.* 5 Big. Ins. Cas. 392; Smith *v.* Ætna Life Ins. Co., 49 N. Y. 211; *s. c.* 3 Big. Ins. Cas. 708; Hutchinson *v.* National Assurance Soc., 3 Big. Ins. Cas. 444; Cazenove *v.* British Ins. Co., *Id.* 202; Fowkes *v.* Manchester &c. Ass. Soc., 3 Best & Smith, 917; *s. c.* 2 Big. Ins. Cas. 631; Perrins *v.* Marine &c. Soc. 2 El. & El. 317; *s. c.* 2 Big. Ins. Cas. 561; *ante*, § 1284.

[2] Huckman *v.* Fernie, 3 Mees. & W. 505.

[3] Hugenin *v.* Rayley, 6 Taunt. 186; *s. c.* 2 Big. Ins. Cas. 208. See also Bufe *v.* Turner, 6 Taunt. 338. Compare Campbell *v.* New England Ins. Co., 98 Mass. 381; *s. c.* 1 Big. Ins. Cas. 229.

[4] Walter *v.* Gernant, 13 Pa. St. 515; Crook *v.* Williams, 8 *Ibid.* 345; Abbey *v.* Dewey, 25 Pa. St. 413; Hogg *v.* Wilkins, 1 Grant (Pa.), 67; Brotherline *v.* Swires, 48 Pa. St. 68.

[5] Brotherline *v.* Swires, 48 Pa. St. 68

such property, and not with the purpose of enhancing the price above its real value, employ a by-bidder without avoiding the sale;[1] and whether the employment of the by-bidder is *bona fide*, or for the fraudulent purpose of enhancing the price by a pretended competition, is a *question of fact* for a jury.[2]

§ **1955. Knowledge of the Want of Authority of an Agent to make certain Representations.** — Where the question at issue is whether a sale procured by the representations of an agent of the vendor was fraudulent, it has been said: "That an agent to sell is restricted in the delegation of his authority by his principal, from making any representations of the subject of the contract, whether true or false, has, it is true, a bearing upon the obligatory force of the contract; but it is a *question of fact*, and not a question of law. It may be used in evidence as tending to prove that the representations of the agent, though false and fraudulent, had not the effect of deceiving the purchaser. But this presupposes that the restraint upon the authority of the agent was known to the purchaser; and whether he knew it, and the effect of such knowledge in preventing him from being deluded, deceived and defrauded, are also questions of fact for the consideration of the jury."[3]

§ **1956. Sale of Chattels without Possession.** — In Pennsylvania a sale of personal chattels, unaccompanied by possession, is fraudulent in law and void as to creditors of the vendor; and the *question is one of law* for the court, and not of fact for the jury.[4]

§ **1957. Latent Defects in a Chattel sold.** — Where the evidence tended to show a latent defect in the chattel sold, known to the vendors and unknown to the vendees, which would greatly impair the value of the chattel in the hands of the ven-

[1] Smith *v.* Clarke, 12 Ves. 477, 482.

[2] Reynolds *v.* Deschaums, 24 Tex. 174.

[3] Crump *v.* United States Mining Co., 7 Gratt. (Va.) 352, 369, opinion by Baldwin, J.

[4] Dewart *v.* Clement, 48 Pa. St. 413; *post*, § 2005; *ante*, § 1409, *et seq.*

dees, it was held that the judge properly refused to charge the jury that, if these facts should be found by them, the defendants would be guilty of practicing a fraud; since whether they would or not would be a *conclusion of fact*, and not of law. After reviewing a number of cases, some of which are confessedly opposed to the court's conclusion,[1] the Ohio court say: "We have expressed these views to show, first, that the court properly refused the charge as asked, the facts on which the charge was predicated not constituting fraud as matter of law, but only evidence tending to establish fraud; and, secondly, to strengthen the conclusion before stated, that the charge given was calculated to mislead the jury, and draw their minds from the points really in contest, as shown by the statements of the evidence."[2]

§ 1958. How Jury instructed is such Cases. — The jury must, of course, be instructed as to the law of fraud in its relations to the facts presented by the evidence in each particular case. Where the law imputes fraud to certain acts, the court must, if the case goes to the jury, instruct the jury as to the acts which constitute fraud.[3]

[1] Hoe *v.* Sanborn, 21 N. Y. 552; Early *v.* Garrett, 9 Barn. & Cres. 928; Wilde *v.* Gibson, 1 H. L. Cas. 605; Thom *v.* Bigland, 8 Exch. 725; Evans *v.* Edmunds, 13 C. B. 777; Otis *v.* Raymond, 3 Conn. 413; Polhill *v.* Walter, 3 Barn. & Adolph. 114; Collins *v.* Evans, 5 Ad. & El. (N. S.) 804, 820; Ormod *v.* Huth, 14 Mees. & W. 651; Railton *v.* Matthews, 10 Cl. & Fin. 934, 994; Blydenburg *v.* Welsh, Baldw. (U. S.) 331, 337; Cornelius *v.* Molloy, 7 Pa. St. 293, 299.

[2] Hadley *v.* Clinton County Importing Co., 13 Oh. St. 502, 513, opinion by Gholson, J. It is difficult to sustain this ruling upon principle. Upon such a state of facts the existence of fraud would seem to be an unavoidable conclusion of law, and not a question to be submitted to the loose discretion of a jury. The sound principle is that, where the chattel has a latent defect of such a character that, if the vendor knows that the vendee had knowledge of it, he would not buy it, the selling of the chattel to him, without communicating to him the fact of the defect, is a fraud. No honest man can say, under such circumstances, that the vendee is not cheated. As there can be no room for a just difference of opinion, the law should, in such a case, pronounce the conclusion.

[3] See Flack *v.* Neill, 22 Tex. 253.

Subdivision 2. — Precedents of Instructions.

SECTION

1962. Instruction as to Effect of Negligence of Purchaser.
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1966. Deceit in Exchanging for Wood a Lot of Land which had Previously been sold.
1967. Grounds of Recovery in such a Case Restated.
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1969. Fraud as a Counter-Claim in an Action to Foreclose a Mortgage: Grounds of a Successful Defense Stated.
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1982. The Same Subject: Effect of Negligence.
1983. Same Subject: Note Valid in Hands of Innocent Holder before Maturity.
1984. What Representations Avoid a Contract: Effect of Acquiescence after Discovery.
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1990. False Representations without Knowing whether True or False.
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SECTION
1996. [Continued.] How Evidence to be Considered.
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1999. Circumstances to be considered in determining Negligence.
2000. [Continued.] Elements of Damage in such Cases.
2001. [Continued.] Caution as to Weighing Testimony touching Fraudulent Representations.

§ 1962. INSTRUCTION AS TO EFFECT OF NEGLIGENCE OF PURCHASER. — "It is the duty of every party, in making a contract, to be honest and truthful in his statements and representations; and, although a party to a contract is bound to exercise reasonable care and caution to prevent being defrauded, yet if the party committing the fraud make use of such false statements, representations and acts, with respect to a material inducement to the contract, as are calculated to deceive and mislead a person acting with common prudence and without indiscretion, and he is thereby induced to enter into a contract, or to part with his property, then such party cannot be heard to complain that the person so deceived and misled did not make such inquiries as might have resulted in a discovery of the falsity of the representations." [1]

§ 1963. QUANTUM OF PROOF TO ESTABLISH. — "That a party alleging fraud must prove it to the satisfaction of the jury; but in a civil action, like the one at bar, the party alleging fraud is not bound to prove its existence beyond a reasonable doubt. It will be sufficient if the fact is established in the minds of the jury by the weight and preponderance of the evidence only. It is not necessary that the proof should be of such a character as would warrant the conviction of the defendants in a criminal prosecution for false and fraudulent representations." [2]

§ 1964. JURY CAUTIONED AS TO GROUNDS OF RECOVERY. — "This action is not brought upon the contract given in evidence, and it is not necessary to the recovery of the plaintiffs that they should show performance of the contract by them. The action is based upon fraud and deceit, and loss to the plaintiffs resulting therefrom; and if the jury believe, from the evidence, that the defendants were guilty of the fraud and deceit alleged in the declaration, and that the plaintiffs de-

[1] Approved in Eames *v.* Morgan, 37 Ill. 260, 262.

[2] Approved in Eames *v.* Morgan, 37 Ill. 260, 262.

livered wood of some value to the defendant Eames, and sustained damages in consequence thereof, then they will find the defendants guilty." [1]

§ 1965. Several Liability of Defendants. — "This action is not founded on or brought upon the contract offered in evidence, and it is not necessary to the recovery of the plaintiffs that both of the defendants are shown to have been guilty. The jury may find either of them guilty, if they believe, from the evidence, that the fraud and deceit was practiced upon the plaintiffs by either, as alleged in the declaration, and that the plaintiffs sustained damages in consequence of such fraud and deceit." [2]

§ 1966. Deceit in Exchanging for Wood a Lot of Land which had Previously been Sold. — "If the jury believe, from the evidence, that the defendants falsely and deceitfully represented to the plaintiff that no transfer to the said lot had taken place since the date of the abstract, as alleged in the first count of the declaration, with the intent and purpose as therein alleged, and that the plaintiffs, relying upon such representations, were induced to and did, deliver wood of value to the defendant, Eames, then they will find the defendant guilty." [3]

§ 1967. Grounds of Recovery in such a Case Restated. — "If the jury believe, from the evidence, that the defendants made the representations and statements contained in the declaration, and that the same were made with the intent as therein alleged, and that the plaintiffs, relying upon the said representations and statements, were thereby induced to deliver wood to the defendant Eames, and that the representations and statements were false or fraudulent, as therein alleged, then they will find the defendants guilty." [4]

§ 1968. Measure of Damages in such a Case: Exemplary Damages. — "If the jury find for the plaintiffs, and that the defendants are guilty of the fraud and deceit charged in the declaration, then in estimating the damages, they may give the value of the wood, delivered by the plaintiffs to the defendant Eames, at the place where the same was to be delivered, according to the terms of the contract at the time

[1] Approved in Eames *v.* Morgan, 37 Ill. 260, 263.

[2] Approved in Eames *v.* Morgan, 37 Ill. 260, 263.

[3] Approved in Eames *v.* Morgan, 37 Ill. 260, 263.

[4] Approved in Eames *v.* Morgan, 37 Ill. 260, 263.

the same was delivered, together with interest thereon to this date, together with such sum as will indemnify the plaintiffs for all damages directly sustained by them, by reason of the misconduct of the defendant, including such exemplary damages as the jury may think the circumstances warrant, by way of punishment of the defendants for the fraud and deceit, and of example to the community." [1]

§ 1969. FRAUD AS A COUNTER-CLAIM IN AN ACTION TO FORECLOSE A MORTGAGE: GROUNDS OF A SUCCESSFUL DEFENSE STATED. — "If the jury believe from the evidence in the cause, that plaintiff, at or before the sale of the land in question to the defendant, knowing said land to be subject to overflow, used any artifice to mislead the mind of the defendant, and throw him off his guard, and to prevent him from making as careful an examination of the land in question as a man of ordinary prudence would otherwise have made; and that defendant was thereby misled, thrown off his guard, and prevented from examining said land, and in consequence thereof was and remained ignorant of the fact that said land was subject to overflow, up to the time when he bought said land, then, and in that case, the jury should find for the defendant, and assess his damages according to the measure heretofore stated by the court." [2]

§ 1970. THE SAME SUBJECT STATED FROM THE PLAINTIFF'S STANDPOINT. — "The burden of proof, under the issues in the case, is upon the defendant, and the jury will find for the plaintiff the full amount of balance of principal and interest due on the notes sued on, unless it has been proven to this jury by the evidence in the cause — 1st, that the defendant, Carver, when he bought it of plaintiff, was ignorant that the land in question was subject to inundation or overflow, and that plaintiff knowing that fact, failed to disclose it to defendant; 2d, that defendant was ignorant, when he bought said land of plaintiff, that it was subject to inundation or overflow, and that plaintiff represented to defendant, before said sale was closed, that it was not subject to inundation or overflow, knowing such representation to be untrue." [3]

§ 1971. MEASURE OF DAMAGES UNDER THE COUNTER-CLAIM. — "If the jury find the issues joined on defendant's counter-claim, or either of

[1] Approved in Eames *v.* Morgan, 37 Ill. 260, 264.

[2] Approved in McFarland *v.* Carver, 34 Mo. 195, 196.

[3] Approved in McFarland *v.* Carver, 34 Mo. 195, 197.

such counter-claims, for defendant, the measure of damages is the amount the land was worth in the market, less, if anything, in consequence of its being subject to overflow, than it would have been worth if it had not been subject to overflow." [1]

§ 1972. VERDICT IN SUCH A CASE, HOW FRAMED. — "If the amount of damage so found by the jury be less than the amount of the balance of the principal and interest due on said notes, the verdict should be for the balance due on said notes, after deducting such damage from the principal thereof, at the date of said notes; and if such damage be equal to such balance of principal due on said notes, the verdict should be for the defendant; and if the damages so found, in favor of defendant, exceed the amount of said notes, the verdict should be for the defendant, for such excess." [2]

§ 1973. PLAINTIFF'S KNOWLEDGE, HOW FAR MATERIAL. — "That unless the plaintiff knew, or had reason to believe, that the defendant was ignorant of the fact that the land in question was subject to overflow, he was not bound to state the fact to the defendant." [3]

§ 1974. THAT DEFENDANT'S KNOWLEDGE BARS COUNTER-CLAIM. — "If the jury believe, from the evidence in the cause, that before the defendant bought the land in question from the plaintiff, he was informed by plaintiff, or by any credible man or men, and believed him to be such, and believed by him to be correctly informed on the subject, that the land in question was subject to overflow, then the jury should find for the plaintiff." [4]

§ 1975. FRAUD AS A DEFENSE TO AN ACTION OF REPLEVIN: BURDEN OF PROVING FRAUD AND QUANTUM OF PROOF. — "The burden of proving the truth of the allegations of fraud rests on the defendant. The contract of lease between the plaintiff and Houser is presumed to be a fair and honest contract. Fraud is never to be presumed, but must be clearly proved to the satisfaction of the jury. - - - - The defendant must establish the existence of fraud by a preponderance of the testimony before you can find for the defendant; for unless you are satisfied from

[1] Approved in McFarland *v.* Carver, 34 Mo. 195, 197.

[2] Approved in McFarland *v.* Carver, 34 Mo. 195, 197.

[3] Approved in McFarland *v.* Carver, 34 Mo. 195, 198.

[4] Approved in McFarland *v.* Carver, 34 Mo. 195, 198.

the evidence that the defendant has clearly proved the existence of fraud in the lease from Houser to Prichard, then you must find for the plaintiff. - - - - Fraud is never to be presumed. The allegations of fraud in defendant's answer must be by him affirmatively established by the evidence, and will not be presumed by acts of the parties which may be accounted for on the basis of honesty and good faith. - - - - A party alleging fraud must prove it by satisfactory evidence. Fraud will never be imputed when the facts upon which the charge is predicated are, or may be, consistent with honesty and purity of intention. - - - - The defendant has alleged fraud in the making of the oral lease between Prichard and Houser, and if, in your opinion, he has failed to clearly establish the same, you must find for plaintiff." [1]

§ 1976. FRAUDULENT INTENT MUST BE SHOWN. — "The fraudulent intent alleged in the answer of defendant must have existed at the time the contract of lease was made; and, unless a fraudulent intent did so exist at the making of said contract, you must find that the contract of lease was made in good faith." [2]

§ 1977. BUT MAY BE SHOWN BY SUBSEQUENT CONDUCT. — "You may, however, consider the subsequent conduct of the parties thereto, in determining the fact of the existence of such fraudulent intent at the time of the making of said contract." [3]

§ 1978. FRAUD PROVABLE BY CIRCUMSTANTIAL EVIDENCE. — "The jury are instructed, as matter of law, that fraud may be proved by circumstantial evidence as well as positive proof. Where fraud is charged express proof is not required. It may be inferred by strong presumptive circumstances." [4]

§ 1979. CIRCUMSTANCES FROM WHICH JURY MAY INFER FRAUD. — "If the jury believe, from the evidence, that Buttner got possession of the goods from plaintiffs by fraudulent representations in regard to his

[1] Approved in Prichard *v.* Hopkins, 52 Iowa, 120, 122.

[2] Approved in Prichard *v.* Hopkins, 52 Iowa, 120, 123.

[3] Approved in Prichard *v.* Hopkins, 52 Iowa, 120, 122, 123. See Hamilton *v.* Bishop, 22 Iowa, 211.

[4] Approved in Strauss *v.* Kranert, 56 Ill. 254, 256. The court said: "It is not true that the law will never imply fraud without direct and positive proof. Under a rule so stringent, fraud would rarely be proved. It loves deceit and stratagem; and its inextricable windings can often only be traced by circumstances."

responsibility, and that, upon the arrival of the goods at Aurora, Kranert took a mortgage upon the whole stock for a sum larger than the amount actually owing from Buttner to him, and that Kranert knew that Buttner was insolvent at the time he obtained the goods of plaintiff, and that they were not paid for, and that Kranert knew it when he took the mortgage, — all these facts and circumstances may be taken into consideration by the jury in determining whether Kranert was a *bona fide* mortgagee of the goods." [1]

§ 1980. Grounds of Recovery of Damages for Fraudulent Representations. — "A misrepresentation, to be fraudulent, must be as to a material fact, or to material facts; must be false; must be relied on by the one to whom it is made; must constitute an inducement to enter into a transaction; must work injury or result directly in damages to the party relying thereon, and the party to whom it is made must have a right to rely thereon. If all these circumstances concur, there is fraud, and the party thus injured is entitled to relief." [2]

§ 1981. Fraudulently Inducing an Illiterate Person to Sign a Note for an Excessive Amount.—" If you shall find from the evidence that the defendant Thomas did authorize Jones to sign his name to the note in question, and that, at the time he authorized the same to be signed, it was represented to him and he believed that it was a note for $100, and that he was unable to read or write the English language, and that he was ignorant of the fact that the note had been drawn for $180, and that he had no intention of signing a note for that amount, and was guilty of no negligence in not knowing the exact amount of said note, then he is not bound by it, and is not liable thereon to any one." [3]

§ 1982. The Same Subject: Effect of Negligence.— " If the signature of the defendant Thomas to the note in question was obtained upon a false representation as to the amount thereof, and the defendant signed it without knowing the amount, and under the belief that it was for the sum of $100, and was not guilty of any negligence in so signing it, he is entitled to a verdict in his favor. - - - - If you

[1] Approved in Strauss *v.* Kranert, 56 Ill. 254, 256.

[2] Approved in Jones *v.* Hathaway, 77 Ind. 14, 24.

[3] Approved in Bowers *v.* Thomas, 62 Wis. 480, 482.

shall find that the note in question was misread to the defendant Thomas, and he signed it when he was told and believed that he was signing another and a different one in amount, and he was guilty of no negligence, your verdict must be for the defendant." [1]

§ 1983. THE SAME SUBJECT: NOTE VOID IN HANDS OF INNOCENT HOLDER BEFORE MATURITY. — "If the signature of the defendant to the note was obtained by fraud as to the amount thereof, he believing it to be for the sum of $100, when in fact it was for $180, and the defendant was ignorant of that fact, and he had no intention of signing a note for $180, and was guilty of no negligence on his part, and he was ignorant of the true character of the note, and had no intention of signing a note for $180, then he is not liable therefor, and the note is void, even in the hands of a holder for value before maturity and without notice." [2]

§ 1984. WHAT REPRESENTATIONS AVOID A CONTRACT: EFFECT OF ACQUIESCENCE AFTER DISCOVERY. — "Every false statement made, as to facts in making a contract, does not necessarily vitiate or avoid it; but where the matter of representation relates to a material subject of the contract, and forms an inducement to the making of the contract, it may have the effect wholly to annul and avoid the contract, unless, after the discovery of the fraud, the party who might complain, acquiesces in and adopts the contract, and proceeds to act upon it and recognizes its validity." [3]

§ 1985. APPLICATION OF THIS PRINCIPLE TO A SALE OF A CHATTEL, CONCEALING AN INCUMBRANCE. — "Applying these principles to this case, if you are satisfied, from the evidence, that Seydel made the representations and statements, alleged in the amended answer, to the defendants, and if you also believe that the existence or non-existence of a lien or incumbrance upon the property formed a material inducement or consideration to the defendants in entering into the contract for the purchase of the engine, etc., and that the defendants relied upon the fact that there was either no incumbrance or only a small balance due upon the deed of trust, which could be readily provided against, by satisfying it, such a state of facts would constitute such a fraud as

[1] Approved in Bowers *v.* Thomas, 62 Wis. 480, 482.

[2] Approved in Bowers *v.* Thomas, 62 Wis. 480, 482.

[3] Approved in Griffeth *v.* Hanks, 46 Texas, 217.

would avoid the contract, provided these representations in fact misled defendants into making a contract, which they would not otherwise have made, and provided further, that the representations were in fact untrue and false." [1]

§ 1986. Effect of Information as to Incumbrance to Vendee: Misrepresentation as to its Amount. — If, however, you believe, that before the final consummation of the contract, the defendants were informed that there existed an incumbrance upon the property, upon which a small balance was due, there could exist no fraud in the transaction, unless the amount in fact due, was in truth an amount exceeding considerably that which Seydel meant to imply. The term 'small balance' is indefinite and relative, and you will necessarily, in construing the evidence, endeavor to judge, as best you can, as to the impression sought to be made on defendants, as to the amount due; and if you believe that Seydel meant to create the impression, and did do so, that the balance due was less than he believed the defendants would have been willing to take a risk against in buying, and if the balance due turned out to be in fact not the small balance which the defendant had reason to suppose it to be, you will, in such case, find for the defendants." [2]

§ 1987. In Actions for Damages for Fraudulent Representations as to Financial Condition of Third Party. — "Before the plaintiffs can recover a verdict for anything in this case, you must find from a fair preponderance of the evidence that they have proved substantially the most material allegations of their petition, to wit: that the defendant wrote and sent to J. C. Spangler the letter introduced in evidence as having been written and sent by the defendant to said Spangler; that the defendant wrote and sent said letter with the intent and design to induce the plaintiffs to sell grain on credit to the said Hutley; that the representations made by said letter were false and fraudulent within the knowledge of the defendant, and that they were made intentionally to deceive, and induce the sale of the grain mentioned to said Hutley on credit. In other words, to maintain an action for damages for a false representation and fraud, three circumstances must combine: first, it must appear from the evidence that the representations were contrary to the fact; second, that the party making them knew them to be contrary to the

[1] Approved in Griffeth *v.* Hanks, 46 Tex. 217.

[2] Approved in Griffeth *v.* Hanks, 46 Tex. 217.

fact at the time they were made; and third, that it was the false representations which gave rise to the contracting of the other party. And, of course, before you can find for plaintiffs, you must find, in addition to what is above stated, that the plaintiffs did, by reason of the said representations in said letter, sell the grain mentioned in plaintiff's petition, or some part of the grain mentioned therein, to said Hutley on credit; that they have not been paid therefor; that said Hutley has not sufficient means or property in this part of the country, subject to execution, to make the amount due from him to the plaintiffs for said grain. If you do so find, you must find for the plaintiffs. But if you fail so to find, you must find for the defendant." [1]

§ 1988. IN AN ACTION FOR FRAUDULENT REPRESENTATION IN SALE OF REAL ESTATE. — "If you believe from the evidence that, at the time plaintiff purchased said lot, said defendant knew it was intended as a residence lot; and if you further believe that plaintiff then and there told said defendant where and on what part of said lot he wished to build his house, and what the style of such house should be, and in what direction it should front; and if you believe that said defendant then and there, as an inducement to plaintiff to purchase said lot for a residence, represented to him that there was a street on the east end on the north side of the same; and if you believe that, by said representations, plaintiff was induced to purchase said lot for the sum of $400 for the purpose aforesaid, and that such purposes were known to defendant; if you believe that plaintiff then and there made said purchase and proceeded to build and did build a residence in the northeast corner of said lot, fronting east and north, and that such design was communicated to defendant at and before said sale; and you further believe that said representations of defendant, made about a street on the north, were false, and known to defendant at the time they were made to be false; and if you believe that plaintiff has been damaged thereby,— then you will allow him for the same." [2]

§ 1989. THE SAME SUBJECT: PLAINTIFF SUING FOR DAMAGES. — "You will find for the plaintiff, if you believe from the evidence that her father, acting for her, and as her agent, traded with defendant, or

[1] Approved in Avery *v.* Chapman, 62 Iowa, 144, 147. Citing Holmes *v.* Clark, 10 Iowa, 423; McKown *v.* Furgason, 47 Iowa, 636.

[2] Approved in White *v* Smith, 54 Iowa, 233, 236, 237.

purchased of him for plaintiff the land in the petition described; that, at the time of making said trade or purchase, she and said agent were ignorant as to the value, condition and location of said land; that said agent informed defendant that he had not seen it and did not know its situation, condition or value, and could not then go to examine it; that defendant then told said agent that said land was all good; that it was high, rolling prairie, rich, dry and susceptible of cultivation, except a few acres; that it was situated about seven miles from Olathe, Kansas; that said representations were made by defendant for the purpose of deceiving and inducing said agent to trade for or purchase said land, and that said agent, relying solely on said representations, and believing they were true, was induced to trade for or purchase said land, — provided you further believe from the evidence that said representations were untrue, and that defendant knew that such was their character." [1]

§ 1990. False Representations made without knowing whether True or False. — "Although you may find from the evidence that defendant did not know that said representations were untrue, yet if you believe from the evidence that, pending the negotiations for the purchase of said land, and for the purpose of effecting the trade and inducing said agent to make it, defendant made said representations as of his own knowledge (and they were untrue), but did not know whether they were true or false, and knew or had reason to believe that said agent relied on said representations as true, and said agent did so rely on them, and was thereby deceived and induced to trade for or purchase said land, you will find for plaintiff." [2]

§ 1991. Measure of Damages in such Case. — "You are further instructed that should you find for plaintiff, the measure of damages in such sum or amount as you may, from the evidence, believe was the difference between the actual value of said land at the time it was conveyed to plaintiff and what would have been its value at the time, had it been, in point of quality, condition and location as represented by defendant, not exceeding the amount claimed in the petition; and if you find for plaintiff, you may allow her interest on the amount you may find for her, from the time of the commencement of this action." [3]

[1] Approved in Caldwell *v.* Henry, 76 Mo. 254, 256.

[2] Approved in Caldwell *v.* Henry, 76 Mo. 254, 256.

[3] Approved in Caldwell *v.* Henry, 76 Mo. 254, 256, 257.

§ 1992. Deceit in inducing Purchase of a Worthless Patent. — "Plaintiff claims that he was induced by the defendant's acts, and representations of Hess, to join him in buying a patent wheat screen, for which they were to pay each one thousand dollars, and become partners; that he paid his thousand dollars, and, believing Hess had paid the same amount, had an assignment made to them by Crampton; that afterwards he discovered that he had been deceived; that Hess had paid nothing for said patent, and it was of no value; but that, before making the agreement with plaintiff, he had combined with Crampton to make said pretended agreement with Young, and induce Young to pay Crampton a thousand dollars, which Hess and Crampton were to divide between themselves; that so soon as he learned he had been defrauded, he rescinded the contract; — now, if you believe from the evidence that these facts are true, you should find for the plaintiff for the amount of damages he has sustained." [1]

§ 1993. Grounds of Recovery of Damages for Deceit in inducing Contract. — "Plaintiffs must show by a preponderance of evidence: 1. That in June, 1869, the defendants were copartners in the business of transporting government stores from Fort Harker to Fort Arbuckle. 2. That, in order to induce plaintiffs to enter into a contract for the transportation of freight from Fort Harker to Arbuckle, the defendants, or one of them, acting about a business wherein they were jointly interested as copartners, made the representations as charged in the declaration, and spoke of the matter as within his own knowledge. 3. That the representations charged were made under such circumstances that the plaintiffs were entitled to, and did accept and confide in them as true, and on the faith of them entered into such contract, and that they afterward proceeded to comply, or attempted to comply therewith. 4. That the representations complained of were false, and that injury and damage have occurred to the plaintiffs by reason of the falsity of such representations, and not by reason of the negligence of the plaintiffs or other causes." [2]

§ 1994. Rule applied to a Case where Injury Resulted from Texas Cattle Fever. — "You will first consider whether defendants are or are not guilty of the deceit charged in the declaration. If, in June, 1869, the defendants were jointly interested as copartners in the trans-

[1] Approved in Hess *v.* Young, 59 Ind. 379, 383.

[2] Approved in Sellar *v.* Clelland, 2 Colo. 532, 537.

portation of government stores from Fort Harker to Fort Arbuckle, and in order to induce the plaintiffs to enter into a contract to transport such freight for the defendants from Fort Harker to Fort Arbuckle, the defendant, Kellogg, represented to the plaintiffs, or one of them, that no Texas cattle had been driven over or upon the road, by which plaintiffs, if they should accept such contract, must travel, and that plaintiffs, if they should accept such contract would not travel within twenty-five or thirty miles of the road by and over which Texas cattle were driven, and declared that he knew of this of his own knowledge, or spoke of it as a matter within his own knowledge; and if, in the same circumstances, a man of ordinary prudence would have relied on the same representations, and if plaintiffs did rely thereon, and, relying on these representations, entered into such contract in the faith thereof, and proceeded to perform the same; and if, in fact, the only road between Fort Harker and Fort Arbuckle was one upon which Texas cattle were then being driven, and before had been driven, then the defendants are both liable to the plaintiffs for the damage, if any, shown to have resulted to plaintiffs by reason of the falsity of the representations made by defendant Kellogg, even though the defendant Sellar, had no actual knowledge of the alleged representations at the time, and though neither Sellar nor Kellogg had actual knowledge of whether the facts were or not according to the alleged representations." [1]

§ 1995. [Continued.] Whether Damage Accrued from a Fraudulent Representation. — "If you conclude, upon consideration of all the evidence, that the defendant Kellogg, acting about the business of the defendants, did make the representations sought to be attributed to him as true, of his own knowledge; that the representations were such, and made under such circumstances, that a man of ordinary prudence would, in the same circumstances, have relied upon the same representations as true; and that plaintiffs did rely upon the truth thereof, and on the faith of these representations entered into the contract spoken of; and that in truth the representations said to have been made by Kellogg were false, you will then consider whether the injuries said to have been suffered by the plaintiffs are or are not attributable to the cause to which the plaintiffs have attempted to assign them, *i.e.*, to the fact that the road by which plaintiffs traveled with their train was one over which Texas cattle had before been driven." [2]

[1] Approved in Sellar *v.* Clelland, 2 Colo. 532, 538.

[2] Approved in Sellar *v.* Clelland, 2 Colo. 532, 539.

§ 1996. [CONTINUED.] HOW EVIDENCE TO BE CONSIDERED. — "If from the evidence you are of opinion that, in many instances, American cattle driven over the same road, or feeding upon the same range, over or upon which Texas cattle have before been driven or fed, have been infected with a disease, from which death usually ensues, you will consider the testimony touching this, and the symptoms usually manifested by cattle so affected, and the symptoms said to have been manifested by plaintiffs' cattle, and the result to plaintiffs' cattle of the disease said to have affected them upon the Chisholm trail, in determining whether the alleged sickness and death of plaintiffs' cattle is attributable to the former presence of Texas cattle upon the same road, or to some other cause. You will also consider what was the condition of plaintiffs' cattle prior to starting from Harker, if this appears in evidence, and whether, taking into account the time of their leaving Harker, the fact that plaintiffs' train was loaded, if this is so, and the time at which the sickness is said to have first appeared among them, they were or were not up to that time in apparently good health. If, also, it appears from the testimony that, in many instances, American cattle have been driven or fed upon the same road or range upon which Texas cattle have before been driven, without apparent injury or disease resulting to them, you will also take this into account. If, on considering all the testimony to this point, you are of opinion that the sickness, if any, which affected plaintiffs' cattle, is not attributable to the former presence of Texas cattle upon the trail, you will find for the defendants."[1]

§ 1997. [CONTINUED.] WHETHER INJURY AVOIDABLE BY REASONABLE CARE. — "If, however, considering all the evidence upon this point, you are of opinion that the plaintiffs' cattle sickened and died while on the road to Arbuckle, in pursuance of the contract said to have been concluded between the plaintiffs and defendants, and that this sickness was due to the former presence of Texas cattle upon the road, you will then consider whether or not the plaintiffs might have avoided the injuries of which they complain by the exercise of the same degree of caution, prudence and foresight which a man of ordinary prudence would have exercised if placed in the same circumstances as the plaintiffs were placed."[2]

§ 1998. PLAINTIFF ASSUMING RISK OF DANGER AFTER KNOWLEDGE. — "If the plaintiffs, on reaching the Arkansas crossing, or at any other

[1] Approved in Sellar *v.* Clelland, 2 Colo. 532, 540.

[2] Approved in Sellar *v.* Clelland, 2 Colo. 532, 540.

point of their route before having incurred risk of the injury and damage of which they complain, were informed that the road by which they must proceed to Arbuckle was then thronged with herds of Texas cattle, or that it was the trail or road by which such herds were usually driven, if they then knew the risk, if any, to be incurred by the taking their cattle upon that road, then, if a man of ordinary prudence would, in the like case, in the same circumstances in which plaintiffs were placed, have turned back, the plaintiffs were bound to do so, and, proceeding upon this course, they assumed the risk of all consequent injury to themselves, and the defendants are not chargeable therewith, even though you should find for the plaintiffs upon every other point in the case." [1]

§ 1999. Circumstances to be Considered in Determining Negligence. — "In considering what a man of ordinary prudence and circumspection would have done in the circumstances, you will take into account the season of the year; the distance which plaintiffs had traveled when first informed that the road by which they must travel to Arbuckle was the trail usually traveled by Texas cattle; the distance they still had to go, the person from whom the information in question, if any, came; whether he was an acquaintance of the plaintiffs, or either of them, or not; whether he did or did not profess to have come over the road; whether the plaintiffs had or had not then incurred any risk of the injuries said to have resulted afterward; whether plaintiffs turning back to Harker must have traveled by a road usually pursued by Texas cattle, or might have avoided the trail of such cattle. If, upon considering the testimony touching these matters, and all other testimony touching this question, you are of opinion that a man of ordinary prudence and circumspection, placed in the same circumstances, would have turned back, then you should find the defendants not guilty; otherwise you will find them guilty, provided you find for the plaintiffs upon other points in this case." [2]

§ 2000. [Continued.] Elements of Damage in such Case. — "If you find for the plaintiffs, you will assess and report to the court the amount of damages sustained by the plaintiffs by reason of the wrong complained of. If the plaintiffs' cattle sickened and died, and their sickness and death is attributable to the former presence of Texas cat-

[1] Approved in Sellar *v.* Clelland, 2 Colo. 532, 541.

[2] Approved in Sellar *v.* Clelland, 2 Colo. 532, 541.

tle upon the same trail, you may allow to the plaintiffs the reasonable value of such cattle at the time of the loss. If the plaintiffs were, from the same cause, delayed and hindered in their journey, and so were put to an expense in the employing and boarding of their servants, which they would not otherwise have incurred, you may allow them for this. If, also, they expended money, or transferred and exchanged other property, for cattle in the Indian Nation with which to continue their journey, and, owing to the sparsity of settlements there, or the absence of a market, the plaintiffs were under necessity to pay for the cattle so bought more than the same were worth, and if a man of ordinary prudence would have acted as plaintiffs did, if placed in the like circumstances,— then you may allow the plaintiffs for the difference between the amounts so necessarily expended in the purchase of cattle and the reasonable value of such cattle at the time of the purchase thereof." [1]

§ 2001. [CONTINUED.] CAUTION AS TO WEIGHING TESTIMONY TOUCHING FRAUDULENT REPRESENTATIONS. — "In determining whether the alleged representations were or were not made, you are to consider what weight and credit is due to the witnesses who have spoken in relation thereto, on the part of the plaintiffs and defendants respectively. In considering this you are to take into account the manner and bearing of the several witnesses in testifying, the apparent probability or improbability of the matter related by them respectively, considering the testimony of each by itself and its apparent consistency or inconsistency with the other testimony in the case." [2]

ARTICLE III. — FRAUDULENT CONVEYANCES.

SECTION

2005. When a Conveyance Fraudulent in Law.
2006. An Instruction under this Theory.
2007. When Question of Fraud submitted to Jury.
2008. Cases where this Rule Applied.
2009. Doctrine that Agreement that Grantor remain in Possession of Chattel renders Sale Fraudulent *per se*.
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2011. Instances under this Rule.
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[1] Approved in Sellar *v.* Clelland, 2 Colo. 532, 537, 542.

[2] Approved in Sellar *v.* Clelland, 2 Colo. 532, 539.

SECTION
2015. Instruction as to a Symbolical Delivery.
2016. Badges of Fraud.
2017. Instructing as to Badges of Fraud.
2018. How Jury Instructed as to Fraudulent Intent.
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§ 2005. When a Conveyance Fraudulent in Law. — It being the office of the court to interpret written instruments,[1] in a limited class of cases, where a conclusion of fraud arises on the face of the instrument, of such a nature as to be incapable of explanation upon any hypothesis consistent with an honest or lawful purpose, the court will declare the deed fraudulent and void as a conclusion of law.[2] This happens where the instrument contravenes the express terms of the statute;[3] or where the conveyance is void on its face, as where the deed fails to vest in the grantee any certain, direct or absolute interest in the property;[4] or where there is no such description of the property, by schedules or otherwise, as that it can be identified;[5] or where it contains on its face a reservation of an interest, advantage or benefit to the grantor, inconsistent with the ostensible object of the conveyance,[6] — as where it is made in trust for the maker[7] or his family, and upon no valid consideration;[8] or where the instrument conveys a stock of goods, undertaking to cover future accretions and allowing the grantor to remain in possession with power to sell;[9] or where its necessary effect is to hinder, delay or

[1] *Ante*, § 1065.

[2] American Exchange Bank *v.* Inloes, 7 Md. 380, 393; Oliver *v.* Eaton, 7 Mich. 108, 113.

[3] Baldwin *v.* Peat, 22 Tex. 708, 719. Compare Linn *v.* Wright, 18 Tex. 317; Gazzam *v.* Poyntz, 4 Ala. 374; Gates *v.* Labeaume, 19 Mo. 17; Wise *v.* Wimer, 23 Mo. 237; Zeigler *v.* Maddox, 26 Mo. 575; Johnson *v.* McAllister, 30 Mo. 327; Robinson *v.* Robards, 15 Mo. 459.

[4] Gazzam *v.* Poyntz, *supra*.

[5] Linn *v.* Wright, 18 Tex. 317.

[6] Baldwin *v.* Peet, *supra*.

[7] Zeigler *v.* Maddox, 26 Mo. 575.

[8] Sturdivant *v.* Davis, 9 Ired. L. (N. C.) 365; Goodrich *v.* Downs, 6 Hill (N. Y.), 438 (denying Murray *v.* Riggs, 15 Johns. (N. Y.), 571). See Foster *v.* Woodlin, 11 Ired. L. (N. C.) 339, 344; Gregory *v.* Perkins, 4 Dev. L. (N. C.) 50.

[9] Edgell *v.* Hart, 9 N. Y. 213 (Gardiner, Mason and Johnson, JJ., dissenting); Weber *v.* Armstrong, 70 Mo. 217; Stanley *v.* Bunce, 27 Mo. 269; Billingsley *v.* Bunce, 28 Mo. 547; State *v.* Tasker, 31 Mo. 445; Voorhis *v.* Langsdorf, 31 Mo. 451; State *v.* D'Oench, 31 Mo. 453.

defraud creditors, sa where[1] (in the view of some courts) an assignment ostensibly for the benefit of creditors, but with power to the assignee to sell on credit; [2] or, in general, where the deed is wanting in some of the qualities which, when wanting in any deed, render it inoperative and invalid as a legal conveyance of property.[3]

§ 2006. AN INSTRUCTION UNDER THIS THEORY. — "You are instructed that a chattel mortgage, containing a condition that the mortgager shall remain in possession thereof, and continue to sell the same in the ordinary course of business, is void as to other purchasers, in good faith, and subsequent creditors of the mortgager. But when the mortgage contains no such condition, the presumption of good faith attaches when the mortgagee is in possession, and the burden of proving fraud is upon him who alleges it." [4]

§ 2007. When Question of Fraud submitted to Jury. — Outside of the limited class of cases which fall within the preceding section, there is a large class of cases where the deed, though valid on its face, is assailed upon grounds supported by *extrinsic evidence* in which cases, on ground already stated,[5] the question of its validity goes to the jury.[6] This happens where extrinsic evidence is adduced to show that a deed was made in pursuance of a *fraudulent intent*,[7] — the principle being that, although the conveyance on its face may be lawful, as where a good consideration is stated, and actual possession is taken by the vendee, in the case of a chattel, yet if the sale were made to defraud the creditors of the vendor, and the vendee participated in such fraudulent purpose, then the sale is void as to

[1] Gere *v.* Murray, 6 Minn. 305, 316 (voluntary assignment). See also Greenleaf *v.* Edes, 2 Minn. 264.

[2] Hutchinson *v.* Lord, 1 Wis. 287.

[3] Baldwin *v.* Peet, 22 Tex. 708, 719, per Roberts, J.

[4] Approved in Ahlman *v.* Meyer, 19 Neb. 65.

[5] *Ante*, §§ 1933, 1096, 1097, 1138, 1139.

[6] Johnson *v.* McAllister, 30 Mo. 327, 330; reaffirmed in Weber *v.* Armstrong, 70 Mo. 217, 220; Hewson *v.* Tootle, 72 Mo. 632, 636; Oliver *v.* Eaton, 7 Mich. 108, 113.

[7] See, for instance, Gates *v.* Labeaume, 19 Mo. 17, where this was tacitly assumed throughout the opinion; also Wise *v.* Wimer, 23 Mo. 237.

creditors;[1] and numerous cases emphasize the rule that the existence of this *fraudulent intent* is, in all cases, a *question of fact*, for the jury.[2] Excluding, then, the limited class of cases where the law, on grounds of public policy, annexes to a certain kind of conveyance, or to certain acts, a conclusive presumption of fraud, the rule is that fraud is a question of fact, not to be presumed, but to be affirmatively proved, and, in cases at law, to be submitted to the decision of the jury.[3] This rule exists under statutes in California,[4] Michigan,[5] Indiana,[6] and, it is presumed, in other States.

§ **2008. Cases where this Rule Applied.** — This is the rule in respect of *voluntary conveyances*. Thus, although a conveyance by a husband to his wife is made before the debts in respect of which the conveyance is challenged were contracted, yet if not made *bona fide* and for the benefit of the wife, but with a fraudulent intent, it will be void under the New Jersey insolvent law, and also by the common law; and whether it was so made is a *question of fact* for a jury.[7] So, the question whether a mortgage, given for a greater sum than was due, was given in good faith, either for a present indebtedness or to secure future advances, is, in an action in which such mortgage is assailed as a fraud upon the creditors of the mortgager, a question for the jury, under proper instructions from the court.[8] So, the law permits a debtor in failing circumstances to make an *assignment* of his property for the benefit of his creditors; and if fairly and

[1] Forsyth *v.* Matthews, 14 Pa. St. 100.

[2] Miller *v.* Stewart, 24 Cal. 502; Ewing *v.* Gray, 12 Ind. 64, 67; Ehrisman *v.* Roberts, 68 Pa. St. 308.

[3] Huntzinger *v.* Harper, 44 Pa. St. 204; De Leon *v.* White, 9 Tex. 598; Billings *v.* Billings, 2 Cal. 107; Bagg *v.* Jerome, 7 Mich. 145; Matthews *v.* Rice, 31 N. Y. 457; Foster *v.* Berkey, 8 Minn. 351.

[4] Billings *v.* Billings, 2 Cal. 107, 113; Pico *v.* Stevens, 18 Cal. 376.

[5] Bagg *v.* Jerome, 7 Mich. 143, 157; Oliver *v.* Eaton, 7 Mich. 108, 113. Compare Jackson *v.* Dean, 1 Dougl. (Mich.) 519; Smith *v.* Acker, 23 Wend. (N. Y.) 653.

[6] Stewart *v.* English, 6 Ind. 176; Hubbs *v.* Bancroft, 4 Ind. 388; Maple *v.* Burnside, 22 Ind. 139; Wynne *v.* Glidewell, 17 Ind. 446, 449.

[7] Reford *v.* Cramer, 30 N. J. L. 250.

[8] Tully *v.* Harloe, 35 Cal. 303, 309.

bona fide made, it passes the title in such property to his assignee for their benefit. The question of fairness and *bona fides* of the transaction is a question of fact for a jury, and in general the question is properly left to the jury, under all the circumstances disclosed by the evidence.[1] So, it is held in Texas that, in an action impeaching a conveyance as fraudulent against creditors, the specific, malicious, covinous, guileful intention to hinder, delay, or defraud creditors, is a question of fact, to be ascertained upon evidence, as other facts which are submitted to a jury.[2] So, in Texas, whilst, as already seen,[3] it is conceded that a deed may in some cases be declared fraudulent and void on its face, yet it is also held that the court cannot declare a deed of assignment void, as a matter of law, without the aid of a jury, merely because it authorizes the trustee to sell the property, in his discretion, for cash or upon a credit, at public or private sale, names the attorneys to be employed in executing the trust, and provides that the trustee shall not be answerable for the negligence or misdoings of other persons. These, the court reason, are facts which may tend to establish a fraudulent intent. They are badges of fraud, rather than fraud *per se*.[4] In a case of this kind it is said that, under the system which obtains in Texas, the only means of upholding the principles of equity in respect of these assignments is by setting aside verdicts when they are found contrary to them.[5] So also, where the provisions of such an instrument are, in their nature or under the circumstances of the particular case, *equivocal*, that is, may have been introduced for good or for bad ends, then the law cannot justly infer a dishonest intent, in order to avoid the instrument, but ought rather

[1] Wilson *v.* Pearson, 20 Ill. 81, 87.

[2] Baldwin *v.* Peet, 22 Tex. 708; citing Linn *v.* Wright, 18 Tex. 317; following the New York doctrine as announced in Seward *v.* Jackson, 8 Cow. (N. Y.) 406, and Goodrich *v.* Downs, 6 Hill (N. Y.), 438.

[3] *Ante*, § 2005.

[4] *Ibid.* To this same doctrine is Carlton *v.* Baldwin, 22 Tex. 724, 731. See also Barney *v.* Griffin, 2 N. Y. 365; Abercrombie *v.* Bradford, 16 Ala. 550; Cunningham *v.* Freeborn, 11 Wend. (N. Y.) 240; Ashurst *v.* Martin, 9 Port. (Ala.) 566, 576.

[5] Carlton *v.* Baldwin, 22 Tex. 724, 730. For a case where the evidence was held sufficient to establish fraud in obtaining a release in consideration of an assignment for the benefit of creditors, see Steward *v.* Strippleman, 16 Tex. 173.

to presume good faith; and hence, in such cases, the actual intent is a subject of inquiry by a jury, and not for the decision of the court.[1]

§ 2009. Doctrine that Agreement that Grantor remain in Possession of Chattel Renders Sale Fraudulent per se. — Another very numerous class of cases may be cited, to the effect that the fact of permitting the vendor of the goods to remain in possession renders the sale *fraudulent in law*, whether such permission is inserted in the deed as a condition of the contract, or not.[2] In some jurisdictions the same rule exists under statutes.[3]

[1] Young *v.* Booe, 11 Ired. L. (N. C.) 347, 350; Cannon *v.* Peebles, 4 Ired. L. (N. C.) 204.

[2] Edwards *v.* Harben, 2 T. R. 587 (leading case); Hamilton *v.* Russell, 1 Cranch (U. S.), 309; Wordell *v.* Smith, 1 Camp. 332; Paget *v.* Perchard, 1 Esp. 205; Worsely *v.* De Mottos, 1 Burr. 467, 475; Tifft *v.* Barton, 4 Denio (N. Y.), 171, 174; Hanford *v.* Artcher, 4 Hill (N. Y.), 276; Funk *v.* Staats, 24 Ill. 633, 645 (mortgager remaining in possession contrary to the terms of the deed). Chief Justice Kent, in a learned opinion, in which he reviewed many authorities, reached the result that such a circumstance avoids the deed, *unless in special cases and for special reasons*. Sturtevant *v.* Ballard, 9 Johns. (N. Y.) 336. Among the cases where such deeds have been upheld for special reasons, as Chief Justice Kent understood them, he cited the following: Stone *v.* Grubbam, 2 Bulst. 225; Ryall *v.* Rowles, 1 Atk. 165; *s. c.* 1 Ves. 359; Bucknal *v.* Roiston, Prec. in Chan. 285; Cole *v.* Davies, 1 Ld. Raym. 724; Kidd *v.* Rawlinson, 2 Bos. & P. 59; Maggott *v.* Mills, 1 Ld. Raym. 286; Waters *v.* McClellan, 4 Dall. (U. S.) 208; Haselinton *v.* Gill, 3 T. R. 620, note; Cadogan *v.* Kennett, Cowp. 432. Later it was held, in the same State, that if a debtor execute a bill of sale of personal property, and there is neither a change of possession nor any evidence of a consideration paid, *the law adjudges* the sale fraudulent and void against the creditors; and, in an action by the vendee against the sheriff for seizing the property in execution, there is no question to be left to the jury. Tifft *v.* Barton, 4 Denio (N. Y.), 171, 174; Hanford *v.* Artcher, 4 Hill (N. Y.), 276. Compare Baskins *v.* Shannon, 3 N. Y. 310.

[3] R. S. Mo. 1879, § 2505; Zeigler *v.* Maddox, 26 Mo. 575; Brooks *v.* Wimer, 20 Mo. 503; Robinson *v.* Robards, 15 Mo. 459; Claflin *v.* Rosenberg, 42 Mo. 439, 449; Kuykendall *v.* McDonald, 15 Mo. 416; State *v.* Smith, 31 Mo. 566; State *v.* Rosenfeld, 35 Mo. 472; Lesem *v.* Herriford, 44 Mo. 323; Bishop *v.* O'Connell, 56 Mo. 158; Burgert *v.* Borchert, 59 Mo. 80; Wright *v.* McCormick, 67 Mo. 426; Stern *v.* Henley, 68 Mo. 262; Mills *v.* Thompson, 72 Mo. 367; Stewart *v.* Nelson, 79 Mo. 522; Crane *v.* Timberlake, 81 Mo. 431; State *v.* Donnelly, 9 Mo. App. 519; Winn *v.* Madden, 18 Mo. App. 261, 266; Worley *v.* Watson, 22 Mo. App. 546, 553; Knoop *v.* Nelson Distilling Co., 26 Mo. App. 303; King *v.* Bailey, 6 Mo. 575; Rocheblave *v.* Pot-

§ **2010. Doctrine that Non-Delivery is only Prima Facie Evidence of Fraud.** — A mass of authority may be accumulated in favor of the proposition that, in the case of absolute sales, non-delivery of the goods is only *prima facie* evidence of fraud, changing the burden of proof, and requiring explanation,[1] or creating a *presumption of fraud*, which, unless explained by circumstances, becomes conclusive;[2] leaving it *for the jury to say*

ter, 1 Mo. 561; Sibly *v.* Hood, 3 Mo. 290; Foster *v.* Wallace, 2 Mo. 231. The later of these decisions overrule Milburn *v.* Waugh, 11 Mo. 369, where it was held that such a circumstance is only *prima facie* evidence of fraud. Earlier and confusing decisions in the same jurisdiction are Shepherd *v.* Trigg, 7 Mo. 151; King *v.* Bailey, 8 Mo. 332, and Ross *v* Crutsinger, 7 Mo. 245.

[1] Kidd *v.* Rawlinson, 2 Bos. & P. 59; Latimer *v.* Batson, 4 Barn. & Cres. 652. There is no such presumption, in the case of a *sale of land* without delivery of possession. Steward *v.* Thomas, 35 Mo. 202, 208.

[2] Bryant *v.* Kelton, 1 Tex. 415, 429; Gibson *v.* Hill, 21 Tex. 225; Thompson *v.* Blanchard, 4 N. Y. 303, 306; Foster *v.* Woodfin, 11 Ired. L. (N. C.) 339. See also Askew *v.* Reynolds, 1 Dev. & Bat. (N. C.) 367; Gregory *v.* Perkins, 4 Dec. L. (N. C.) 50; Young *v.* Booe, 11 Ired. L. (N. C.) 347. Nature of this presumption *under the statute of New York:* Randall *v.* Parker, 3 Sandf. (N. Y.) 69; Allen *v.* Cowan, 28 Barb. (N. Y.) 99; Collins *v.* Brush, 9 Wend. (N. Y.) 198; Doane *v.* Eddy, 16 *Id.* 523; Randall *v.* Cook, 17 *Id.* 56. With which compare Smith *v.* Acker, 23 Wend. (N. Y.) 653; Cole *v.* White, 26 Wend. (N. Y.) 511; Hanford *v.* Artcher, 4 Hill (N. Y.), 272. The *Michigan statute*, as originally adopted, was a literal transcript of the statute of New York. The latter statute received, in a leading case in the Court of Errors of that State, the following exposition, given by Lieut.-Gov. Bradish, then president of that tribunal, after an elaborate opinion, and this was quoted and concurred in in an early case in Michigan, and seems to have been the ruling doctrine in that State to the present time: "1. It has abolished the distinction sometimes attempted to be drawn between absolute sales and conditional assignments, and thus avoided the question whether continued possession in the vendor or assignor be consistent or inconsistent with the deed. 2. It declares what shall rebut the evidence of fraud raised by the statute from a want of change of possession, viz.: good faith and absence of intent to defraud. 3. It throws the burden of proof of such good faith and absence of intent to defraud, upon the party claiming under the sale or assignment. It declares the question of fraudulent intent to be a question of fact, and not of law." Hanford *v.* Artcher, 4 Hill (N. Y.), 271. Recognized as a correct construction of the same statute in Michigan in Jackson *v.* Dean, 1 Doug. (Mich.) 519, 525. It was ruled in Smith *v.* Acker, 23 Wend. (N. Y.) 653, that fraud under the statute was a question of fact for the jury and not an inference of law for the court, and this ruling has been steadily adhered to in that State. Vance *v.* Phillips, 6 Hill (N. Y.), 433; Peck *v.* Crouse, 46 Barb. (N. Y.) 151, 157.

whether the circumstances were consistent with good faith in the transaction.[1] The great authority of Lord Elden, when he held the office of Lord Chancellor, may be invoked in support of this proposition. In a greatly cited case, it was ruled by him, that a purchase by a married woman from her husband, through the medium of trustees, for her separate use and appointment, may be sustained against creditors, if *bona fide*, though the husband is indebted at the time, and even though the object is to preserve from his creditors for the family the subject of the purchase, — in the particular instance, ancient family pictures, furniture, and other articles of a peculiar nature and value. He also ruled that the circumstances of the comparative value of the consideration, the continued possession (which necessarily existed in the case of husband and wife dwelling together), the degree of notoriety, the want of an inventory, the satisfaction of some debts out of the property, though circumstances of evidence, were not conclusive as to the nature of the transaction.[2] In a note to this case, Dr. Perkins, the American editor, says that, upon the question whether continued possession in the vendor or mortgager after a sale or mortgage of chattels, is to be deemed fraudulent *per se*, or is to be taken only as *prima facie* evidence of fraud, subject to be explained by circumstances showing fairness in the transaction, there appears to be a great conflict of opinion in the decisions of different States, and he cites many authorities as illustrative of this conflict, but does not undertake to specify what they hold.[3]

[1] Beals *v.* Guernsey, 8 Johns. (N. Y.) 446; Arundell *v.* Phipps, 10 Ves. 145; Kidd *v.* Rawlinson, 2 Bos. & P. 59; Craig *v.* Ward, 9 Johns. (N. Y.) 197, 201; Farrington *v.* Caswell, 15 Johns. (N.Y.) 430; Dickenson *v.* Cook, 17 Johns. (N. Y.) 332; Parker *v.* Barker, 2 Metc. (Mass.) 423, 432; Bissell *v.* Hopkins, 3 Cow. (N. Y.) 166, 186; Briggs *v.* Parkman, 2 Met. (Mass.) 258; Cadogan *v.* Kennett, Cowp. 435; Brooks *v.* Powers, 15 Mass. 244; Benton *v.* Thornhill, 7 Taunt. 149; Runyon *v.* Groshon, 12 N. J. Eq. 86; Badlam *v.* Tucker, 1 Pick. (Mass.) 389; Miller *v.* Pancoast, 29 N. J. L. 250; Brown *v.* Riley, 22 Ill. 45, 52; Neece *v.* Haley, 23 Ill. 416.

[2] Arundel *v.* Phipps, 10 Ves. 145.

[3] Notes to Twyne's Case, 1 Sm. L. C. 1, *et seq.*; note 1 to Wheeler *v.* Train, 3 Pick. (Mass.) 255, 257, and cases there collected; Homes *v.* Crane, 2 Pick. (Mass.) 607, note 1; Ash *v.* Savage, 5 N. H. 545; Lunt *v.* Whitaker, 10 Me. 310; Ulmer *v.* Hills, 8

§ **2011. Instances under this Rule.** — This rule has been applied in the case of a bill of sale, absolute on its face, shown to have been intended as a mortgage merely;[1] where goods were purchased at an execution sale and redelivered to the debtor the circumstances being notorious;[2] where the mortgager of chattels has remained in possession;[3] where an assignment has been made, ostensibly for creditors, and the assignor has thereafter continued in possession;[4] and where the mortgager of goods in course of trade is left in possession, with power to sell in the usual course of business for cash or on credit, and apply the proceeds of the sale to the purchase of other goods to keep up the stock, to the support of himself, and to the payment of debts other than that secured by the mortgage.[5] Nor, under this view of the law, does the fact that some of the goods embraced in the chattel mortgage are *perishable* avoid it as matter of law, though this is a circumstance to be considered by the jury in determining whether it is fraudulent or not.[6] Nor, under this view, does the granting

Me. 326; Robbins *v.* Parker, 8 Met. (Mass.) 117; Summerville *v.* Horton, 4 Yerg. (Tenn.) 541; Bank of Alabama *v.* M'Dade, 4 Port. (Ala.) 252; Gould *v.* Ward, 4 Pick. (Mass.) 104; Adams *v.* Wheeler, 10 Pick. (Mass.) 199; 2 Kent. Com. (5th ed.) 518, 532, and notes and cases there cited.

[1] Hunter *v.* Corbett, 7 Up. Can. Q. B. 75. Compare Horn *v.* Baker, 9 East, 215; Barrow *v.* Paxton, 5 Johns. (N. Y.) 258, 261. See also Cadogan *v.* Kennett, Cowp. 432.

[2] Leonard *v.* Baker, 1 Maule & S. 251; Kidd *v.* Rawlinson, 2 Bos. & P. 59; Watkins *v.* Birch, 4 Taunt. 823; Jezeph *v.* Ingram, 8 Taunt. 838; Latimer *v.* Batson, 4 Barn. & Cres. 652. Where a deed of trust for the benefit of creditors conveyed a cotton factory, machinery, materials, etc., with the provision that the maker of the deed should remain in possession for eleven months, and that, during this time, his family should be supported out of the proceeds of the factory, — it was held that these provisions did not make the deed fraudulent in law, but, as they might have been for the benefit of the creditors as well as of the debtor, the question of fraudulent intent was to be submitted to a jury under all the evidence. Young *v.* Booe, 11 Ired. L. (N. C.) 347.

[3] Googins *v.* Gilmore, 47 Me. 9; Pierce *v.* Stevens, 30 Me. 184; Melody *v.* Chandler, 12 Me. 282; Gleason *v.* Drew, 9 Me. 79; Holbrook *v.* Baker, 5 Me. 309; Steward *v.* Lombe, 1 Brod. & B. 506; Torbert *v.* Hayden, 11 Iowa, 435, 440.

[4] Wilson *v.* Forsyth, 24 Barb. (N. Y.) 106.

[5] Oliver *v.* Eaton, 7 Mich. 108; Briggs *v.* Parkman, 2 Metc. (Mass.) 258.

[6] Googins *v.* Gilmore, 47 Me. 9, 15.

of a power to sell on credit, in a deed of assignment, ostensibly for creditors, avoid the deed as matter of law, although it is evidence to be considered by the jury on the question of fraud.[1] Nor is a deed of personal property fraudulent in law, because it is conditioned to take effect at some future time, the grantor in the meantime retaining possession.[2]

§ 2012. How Jury Instructed in such a Case. — It has been held proper, under circumstances, to instruct the jury that, if they believe from the evidence that the goods assigned were never delivered to the assignee, they must find for the defendant, he being the party assailing the assignment.[3] In a case in Pennsylvania, where the judgment was affirmed, the jury were thus directed: "To constitute a valid sale of personal property, the possession must pass at the time of the sale. If there is no change of possession, any creditor may levy upon and sell it. Thus, if I sell any one of you a horse, and you pay me the price agreed upon, if the horse is left in my possession, any one of my creditors may levy upon and sell him, and the purchaser at the sale would hold the horse, because, no possession having been delivered, the sale is deemed fraudulent in law." [4] According to a view expressed in the New York Court of Appeals, where a sale of chattels is challenged for fraud on the ground that the seller was to remain in possession and there was some evidence, in the form of a good consideration, tending to show good faith, it was proper to refuse to instruct the jury that the transaction was fraudulent and void as against the plaintiff because not accompanied with a delivery and an actual and continued change of possession. The learned judge said: "In reference to the question of fraud, arising upon that ground, it would have been proper to have charged, that the law presumed the transfer of the property, unaccompanied by delivery and continued change of possession, to be fraudulent and void as against the creditors and subsequent purchasers in good faith of the vendor, mortgager, or assignor; that is, that the law, under such circumstances presumed that the transfer was without consideration, or without a sufficient one, and also that there was some

[1] Baldwin *v.* Peet, 22 Tex. 708; Carlton *v.* Baldwin, 22 Tex. 731. *Contra*, Hutchinson *v.* Lord, 1 Wis. 287. See also Barney *v.* Griffin, 2 N. Y. 365; LeRoy *v.* Beard, 8 How. (U. S.) 451.

[2] Dawes *v.* Cope, 4 Binn. (Pa.) 258.

[3] Howerton *v.* Holt, 23 Tex. 52.

[4] Chase *v.* Ralston, 30 Pa. St. 539.

secret trust or an intent to defraud purchasers or creditors; and that the plaintiff could not recover on that ground unless he had rebutted that presumption by proof, satisfactory to them, that the transfer was made, not only in good faith, but that it was without any intent to defraud purchasers or creditors."[1] In another jurisdiction, the question for decision, where this rule prevails, is said to be, what was the intention of the parties at the time of the sale? Was it fair and *bona fide*, or was it fraudulent? And it is for the jury to determine, from the facts and circumstances developed by the testimony, whether it was the one or the other. It is also held to be the duty of the judge to instruct the jury, what acts create a legal presumption of fraud; but the office of the jury to determine, whether or not those acts, if proved to exist, have been fairly explained, and the presumptions created by them removed.[2]

§ 2013. Voluntary Conveyances. — A well defined distinction exists in respect of voluntary conveyances — that is, conveyances which are made without the passing of a valuable consideration — in respect of the rights of *prior* and *subsequent creditors* or *purchasers*. Such a conveyance is void only as to *antecedent*, and not as to *subsequent creditors*, unless made with a fraudulent intent.[3] It is not void, even as against *existing creditors*, on the ground that the grantor is indebted at the time, if it be shown that the *residue of his property* is amply sufficient to pay his debts.[4] In other words, it is not, as to such debts, fraudulent in law.[5]

[1] Thompson *v.* Blanchard, 4 N. Y. 303, 307.

[2] Bryant *v.* Kelton, 1 Tex. 415, 429.

[3] Sexton *v.* Wheaton, 8 Wheat. (U. S.) 242; Hinde's Lessee *v.* Longworth, 11 Wheat. (U. S.) 199, 211; Boatmen's Savings Bank *v.* Overall, 16 Mo. App. 510; Payne *v.* Stanton, 59 Mo. 159; Hurley *v.* Taylor, 78 Mo. 238; Fisher *v.* Lewis, 69 Mo. 629; Salmon *v.* Bennett, 1 Conn. 525.

[4] Jackson *v.* Post, 15 Wend. (N. Y.) 588; Hinde's Lessee *v.* Longworth, 11 Wheat. (U. S.) 199.

[5] Verplanck *v.* Sterry, 12 Johns. (N. Y.) 556, 557; Jackson *v.* Town, 4 Cow. (N. Y.) 599; Seward *v.* Jackson, 8 Cow. (N. Y.) 406 (overruling, it seems, Reader *v.* Livingston, 3 Johns. Ch. (N. Y.) 500, and Bayard *v.* Hoffman, 4 Johns. Ch. (N. Y.) 450). So, under a later New York statute (2 Rev. Stat. N. Y., part II., chap. 1, § 137): Thus, where a conveyance is made to a *child* in consideration of love and affection, without any fraudulent intent, at a time when the grantor is free from embarrassment, the gift constituting but a small part of his estate and being a reasonable provision for a child, — it is valid against his existing creditors. Salmon *v.* Bennett, 1 Conn. 525 (doctrine discussed and reasons stated at length by Swift,

In all such cases, the fact of the conveyance being voluntary, is at most presumptive evidence of fraud, and the question of fraudulent intent is, in actions at law, a *question of fact* for the jury.[1]

§ 2014. Whether Possession has been Delivered: When a Question of Law and when of Fact. —The decisions justify the conclusion that the question whether there has been a delivery of possession may be decided as a *question of law*, where the facts are undisputed and the inferences deducible therefrom indisputable;[2] but where the facts are in dispute, or where the inferences to be drawn from them are doubtful, it is a *question for the jury*.[3] Where the question of the *bona fides* of the change of possession is involved, it will generally be a question of fact for the jury, on the principle, already explained,[4] that *intent* and *motive* are questions of fact.[5]

§ 2015. Instruction as to a Symbolical Delivery. — In an action of replevin by a vendee, of timber against one who had purchased it at a constable's sale under an execution against the vendor, the jury were thus instructed, as to symbolical possession, and the judgment was affirmed: "But the possession of some personal property cannot thus be delivered. Such, for example is timber made in the woods. It is

C. J.). As to the effect of such a deed upon the rights *of subsequent purchasers*, see Stiles *v.* Lightfoot, 26 Ala. 443; Gardner *v.* Boother, 31 Ala. 187, 189.

[1] Dygert *v.* Remerschnider, 32 N. Y. 629; Babcock *v.* Eckler, 24 N. Y. 623, 633; Hinde's Lessee *v.* Longworth, 11 Wheat. (U. S.) 199; Wait *v.* Day, 4 Den. (N. Y.) 439; Graham *v.* Smith, 25 Pa. St. 323; Pomeroy *v.* Bailey, 43 N. H. 118, 122. See also Smith *v.* Parker, 41 Me. 452; Robinson *v.* Stewart, 10 N. Y. 190; Creed *v.* Lancaster Bank, 1 Oh. St. 1; Hollister *v.* Loud, 2 Mich. 312. Compare Gere *v.* Murray, 6 Minn. 305; Greenleaf *v.* Edes, 2 Minn. 264. It is, therefore, error to exclude evidence to rebut the presumption of fraud by showing that the grantor had *other means* sufficient to pay his debts at the time. Hinde's Lessee *v.* Longworth, 11 Wheat. (U. S.) 199, 213.

[2] Burrows *v.* Stebbins, 26 Vt. 659, 663 (explaining Stephenson *v.* Clark, 20 Vt. 624, and Hall *v.* Parsons, 17 Vt. 271); Hodgkins *v.* Hook, 23 Cal. 581, 584; Knoop *v.* Nelson Distilling Co., 26 Mo. App. 303, 310; Chase *v.* Ralston, 30 Pa. St. 539, 541.

[3] Forsyth *v.* Matthews, 14 Pa. St. 700; Burrows *v.* Stebbins, 26 Vt. 659, 663 (ruled as a matter of law); Howe *v.* Keeler, 27 Conn. 538.

[4] *Ante*, § 1333 *et seq.*

[5] Hall *v.* Wheeler, 13 Ind. 371.

not pretended that Ralston [the plaintiff] has not complied with his contract; that he has not made the payments as he agreed to do. Did he take such possession of it as he could? As we have said, timber made and lying in the woods is not the subject of manual delivery; but everything in the power of the parties should be done, to indicate the change of possession. A symbolical delivery of a ship at sea has been held to be sufficient. In this case, if you believe the evidence, the symbolical possession was given, and the plaintiffs exercised acts of ownership over the timber, by marking it. Was there such a delivery and change of possession as the nature of the property was capable of? * * * Your verdict will depend on the evidence as to the delivery and change of the possession. If the plaintiffs took such possession as the nature of the property was capable of, they are entitled to your verdict; if they did not, then you will find for the defendant." [1]

§ **2016. Badges of Fraud.** — Certain *evidentiary facts*, which tend to characterize the transaction as fraudulent, have received, in legal parlance, the designation of *badges of fraud*. Among these may be noted the following, upon which the courts have frequently dwelt: — A transfer of property, made by a debtor, upon a *secret trust*, is *prima facie* fraudulent as against creditors, such as casts the *burden of proof* upon the party claiming under the transfer, to show adequacy of consideration and good faith in the transaction.[2] Another badge of fraud is *inadequacy in the purchase price* in the case of a sale, or a deficiency in the sum professedly secured in the case of a mortgage. Thus, the circumstance that the actual amount paid under a mortgage and secured by it is far less than the sum mentioned as the consideration in the mortgage deed, is *presumptive evidence* of fraud. But it is presumptive evidence only; it may be rebutted, and whether it is rebutted in a given case, is a *question for the jury*.[3] If this were not the correct rule, as was well said by Walker, J., "the slightest mistake, however honest the purposes of the par-

[1] Chase *v.* Ralston, 30 Pa. St. 539.

[2] Ferguson *v.* Gilbert, 16 Oh. St. 88, 96. See also Langley *v.* Berry, 14 N. H. 82; Kimball *v.* Fenner, 12 N. H. 248; Clapp *v.* Tirrell, 20 Pick. (Mass.) 247.

[3] Parker *v.* Barker, 2 Metc. (Mass.) 423. See Stern Auction Co. *v.* Mason, 16 Mo. App. 473; Robinson *v.* Robards, 15 Mo. 459; Curd *v.* Lackland, 49 Mo. 454; Ames *v.* Gilmore, 59 Mo. 549; Ross *v.* Crutsinger, 7 Mo. 249.

ties, if made in favor of the mortgagee, would be attended with all the consequences of the grossest fraud, deliberately perpetrated, with the design to hinder and delay creditors." Whereas, it is a rule of almost uniform application, that, in order to constitute a fraud such as the law recognizes, the act producing the wrong must have been intentionally done.[1] Another badge of fraud consists in the *transfer*, by a debtor in failing circumstances, of all or most of his property, to his *near relatives*. But such a transfer cannot be pronounced fraudulent as matter of law; whether it is so or not, is a question of fact for a jury.[2]

§ 2017. Instructing as to Badges of Fraud. — The court may properly, in such a case, decline to instruct the jury that particular facts are badges of fraud, without reference to their being subject to explanation, if there are circumstances tending in some degree to explain them. Such a charge might, it has been justly held, mislead the jury.[3] So, it was held error to tell the jury that possession by the vendor after the sale raised a presumption of fraud, without explaining to them in the same connection that the presumption might be rebutted.[4] In such a case the court does not adequately expound the law to the jury, by merely telling them that it is lawful for a debtor to prefer a particular creditor; that, for the purpose of paying or securing such creditor, the debtor may turn over to him all of his property at a fair valuation, and that this is not a fraud upon other creditors, although the known effect of it may be to hinder and delay other creditors in the collection of their just debts. In a case in Missouri these propositions were conceded to be the undoubted law, but the court said: "There are some antithetical propositions which ought always to be stated to the jury in such a case. One of these, stating it with reference to the defendants' hypothesis in this case, is that, if the indebtedness is in part fictitious, whereby a larger amount of property is conveyed than is reasonably necessary to pay or secure what is in fact due, the whole conveyance

[1] Wooley *v.* Fry, 30 Ill. 158, 160, 162.

[2] Thus, it has been held that the transfer by a son in failing circumstances, of his personal property to his father, may excite suspicion of raud, but is not fraudulent *per se;* and whether fraudulent or not is to be determined by the jury. Forsyth *v.* Matthews, 14 Pa. St. 100; *post*, § 2018; State ex rel. *v.* True, 20 Mo. App. 176, 181.

[3] Howerton *v.* Holt, 23 Tex. 52, 61

[4] Earle *v.* Thomas, 14 Tex. 583.

is void as to other creditors.[1] Another is that, although the amount of property conveyed may not exceed in value the debt which is owing by the failing debtor to the particular creditor, yet if it is not the intention of the parties to the conveyance to pay or secure the debt at all — if they merely intend to get his property beyond the reach of his other creditors and have it held for his use (a suspicion of which often arises where such a conveyance is made to a near relative), — then the conveyance is void as to other creditors.[2] These propositions direct the minds of the jury to something definite, and explain to them under what circumstances a conveyance is to be deemed fraudulent in such a case as the one under discussion. But it is manifest that, after already instructing the jury, as the court properly instructed them, in all of the plaintiff 's instructions given except the first, the giving of an instruction which should merely have the effect of telling them that, if they should find from the evidence that the conveyance was made by the parties to it for the purpose of hindering, delaying, or defrauding other creditors of the failing debtor, they should find for the defendant, would contradict the instructions already given, would tend to confuse and mislead them, and would hence be erroneous.[3] It would be, of course, contradictory to tell the jury that they might find a conveyance good, the known and only *effect* of which is to hinder and delay other creditors, and yet they might find it bad because it was *intended* to hinder and delay other creditors." [4]

§ 2018. How Jury Instructed as to Fraudulent Intent. — In a case in Pennsylvania it was held that the jury were properly instructed, where the judge said to them: "If there was such a transfer, and the said assignment was made for the purpose of defrauding the creditors of the assignor, and the assignee participated in such fraudulent purpose, then the plaintiff cannot recover. You are the judges, under the evidence, whether such fraudulent purpose existed. An assignment of all a man's property, when he is largely in debt, naturally excites suspicion of fraud, and is therefore evidence of fraud. If there be a judgment just ripening for

[1] To this point the court cited McNichols *v.* Rubelman, 13 Mo. App. 515, and St. Louis Coffin Co. *v.* Rubelman, 15 Mo App. 280.

[2] To this proposition the court cited Kaykendall *v.* McDonald, 15 Mo. 416.

[3] Citing Gaff *v.* Stern, 12 Mo. App. 115, 119; State *v.* Laurie, 1 Mo. App. 371.

[4] State *v.* Excelsior Distilling Co., 20 Mo. App. 21, 27, 28; reaffirmed in Estes *v.* Fry, 22 Mo. App. 80, 89.

execution at the time of the assignment, this increases the suspicion, and adds weight to the evidence. That the transaction is between a father and son makes the transaction still more suspicious, because the father is supposed to be better acquainted than other people with the embarrassed circumstances of his son. Yet you may think it not unreasonable that a father should buy out a son who is succeeding badly in the business in which he was engaged, and apply the consideration of such purchase to pay the debt of said son." [1] - - - - In another such case it has been held proper to instruct the jury that, " if they believe from the evidence, that the sale was made by C., or by his wife with his assent, for the purpose of hindering, delaying or defrauding his creditors, and that the plaintiff paid no money, but gave his notes, * * * none of which were negotiated, then D. was not such a purchaser under all the circumstances, as the law would protect against C.'s execution creditors." [2] - - - - Where a sheriff was sued for taking goods under an attachment, which goods had previously been assigned under circumstances which were alleged to be fraudulent, and which the evidence tended to show were fraudulent, it was held proper for the court to charge the jury that " if they believed from the evidence, that the sale was made for the purpose of hindering, delaying or defrauding creditors, it was invalid as against the defendant; and that, whether the sale was or was not fraudulent, was a question of fact, to be determined by the jury under all the circumstances of the case; that if the sale were secret, and no means taken to apprise the public of the sale, these were facts which threw suspicion upon the transaction, but did not make the sale fraudulent in law as against the defendant." [3]

§ 2019. Another Precedent. — " Fraud is never presumed, but must be proved by the party asserting it. It is very seldom that fraud can be established by direct evidence, and it is usually shown, if at all, by circumstantial evidence. There are certain facts or things which the law denominates badges of fraud; for instance, if a party in failing circumstances or largely indebted should make a sale of his goods to a near relative; or, if he should sell for a price greatly inadequate in value; or, if a sale should be made on an unusually long credit or to an irresponsible person without being secured; or, if made in unusual

[1] Forsyth *v.* Matthews, 14 Pa. St. 100, 102.

[2] Deakers *v.* Temple, 41 Pa. St. 234.

[3] Warner *v.* Norton, 20 How. (U. S.) 448, 451.

haste and not made in the manner in which men of ordinary care and prudence usually transact their own affairs — these and similar acts are badges of fraud. They are not fraud, but may be considered, when they exist, by the jury, as facts and circumstances which may tend to show fraud. A person greatly indebted and in failing circumstances may sell and give a good title to his property. It would be a great misfortune if such persons could not, as that is often the only means they have of paying honest debts. The law forbids such sales only as are made for the purpose of and with the intent of either hindering, delaying or defrauding creditors." [1]

[1] Approved in Moon *v.* Helfer, 25 Kan. 140, 141. In Arthur *v.* Wallace, 8 Kan. 270, there is an instruction on the theory that the conveyance, though voluntary, passed no property subject to execution, and was therefore valid. In Wright *v.* Grover, 27 Ill. 428, there are instructions on the theory that the vendee must have had knowledge of the fraudulent purpose. In Oliver *v.* Town, 28 Wis. 329, there is a series of instructions applicable to the case where the mortgagee of a stock of merchandise remains in possession, selling the same in the usual course of trade. In Eicks *v.* Copeland, 53 Tex. 584, there is a series of instructions applicable to the question under what circumstances an assignment, ostensibly for creditors, is void under the Texas statute. In Estes *v.* Fry, 22 Mo. App. 80, 88, it was held error to instruct the jury that if the defendant made the sale of chattels in question "for an honest or *legitimate* purpose, and not for the purpose of hindering, delaying or defrauding his creditors, then the verdict of the jury, as to the issues submitted, must be for the defendant, so far as the sale of the property is concerned;" since this submitted a question of law to them.

CHAPTER LVIII.

LIBEL AND SLANDER.

ARTICLE I.—WHAT QUESTIONS FOR THE COURT AND WHAT FOR THE JURY.
ARTICLE II.—PRECEDENTS OF INSTRUCTIONS IN SUCH ACTIONS.

ARTICLE I.—WHAT QUESTIONS FOR THE COURT AND WHAT FOR THE JURY.

SECTION

2025. Question of Libel or no Libel: Influence of Fox's Libel Act.
2026. Fox's Libel Act not in Force in Maryland.
2027. Statutory Rule in Georgia: Jury to determine Meaning of the Words.
2028. Sense in which Juries are Judges of the Law, etc.
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§ 2025. **Question of Libel or no Libel: Influence of Fox's Libel Act.** — In England, by the statute known as Fox's Libel Act,[1] it was provided that, on the trial of an *indictment or in-*

[1] Stat. 32 Geo. III. c. 60, *Anno* 1792.

formation for a libel, the jury may give a general verdict, and shall not be required or directed by the court to find the defendant guilty merely on proof of publication, and "of the sense ascribed to the same in such indictment or information;" that the presiding judge may give directions to the jury, as in other criminal cases, and the jury may, in their discretion, find a special verdict; and the defendant, if found guilty, may move in arrest of judgment. The well known purpose of this act was to protect defendants in criminal prosecutions for libels from the power of the judges. That it has had some influence upon the law in *civil cases* is shown by several English decisions. In one such case it was said by Chief Baron Kelly that, "it is only when the judge is satisfied that the publication cannot be a libel, and that, if it is found by the jury to be such, their verdict will be set aside, that he is justified in withdrawing the question from their cognizance."[1] In the same case Baron Channel seems to have been of opinion that, in every civil case, the question of libel or no libel ought to be submitted to the jury. But that this is not the law of England, is shown by a number of modern decisions.[2] Yet, as stated by Baron Parke, it has been the constant practice in recent times for the judge to define what is a libel, and then leave it to the jury to find, first, whether the writing complained of was published by the defendant; and, secondly, whether it fell within the definition of the offense."[3] In another case Lord Abinger left it to the jury to find whether the publication was a libel; and, on motion for a new trial, Lord Denman said that he had always followed the practice adopted by

[1] Cox *v.* Lee, L. R. 4 Exch. 284, 288.

[2] Mulligan *v.* Cole, L. R. 10 Q. B. 549; Hart *v.* Wall, 2 C. P. Div. 146; Hunt *v.* Goodlake, 43 L. J. C. P. 54; Capital &c. Bank *v.* Henty, 5 C. P. Div. 514; *s. c.* 7 App. Cas. 741.

[3] Parmiter *v.* Coupland, 6 Mees. & W. 105. In this case Coleridge, J., instructed the jury that there was a difference with reference to censures on public and private persons; and, having told them what, in point of law, constituted a libel, left it to them to say whether the publications in question were calculated to be injurious to the character of the plaintiff. The jury having found a verdict for defendants, a new trial was granted in the Court of Exchequer Chamber, not on the ground of misdirection, for it was held that the jury were properly directed, but on the ground that the verdict was wrong.

Lord Abinger, leaving the jury to find, under all the circumstances, whether the publication amounted to a libel.[1]

§ 2026. Fox's Libel Act not in Force in Maryland. —Although Fox's Libel Act has been reënacted, in form or in substance, in many of the American States, either in their constitutions or statutes, it is said that it is not in force in Maryland. "Here," said Robinson, J., "the court has always decided whether the publication is in law a libel, leaving to the jury to find the fact of publication, and such other facts as may be pertinent to the issue; and we see no good reason for changing the practice. In actions of slander, the question whether the words spoken are in themselves actionable is a question of law for the court; and, for the same reason, when the slanderous words are published, if the publication be free from ambiguity, the question whether they are libelous is a question of law for the court."[2]

§ 2027. Statutory Rule in Georgia: Jury to Determine Meaning of the Words. — Under the Georgia code the rule seems to be narrowed down to this: "That the court can only say that the words which were published were libelous where they imputed a distinct charge of crime to the plaintiff." "In matters of slander and libel especially," says Jackson, C. J., "while the court must pass upon the libelous nature of the words spoken or written, on demurrer to the declaration, or the necessity of evidence to show actual damage, — it is for the jury to determine what proof is sufficient to establish the libelous effect of the words spoken or written, except, if at all, where crime is distinctly charged."[3] In an earlier case it was said by Warner, J.: "Whether the language of the publication did or did not charge the plaintiffs with having embezzled the defendant's money, or whether it charged them with having fraudulently appropriated the defendant's money, were questions of fact for the jury to determine from the plain unambiguous language of the publication itself, without any intimation or expression of opinion by the court as to what offense that publication charged against the plaintiffs, or whether it charged any offense against them."[4]

[1] Baylis *v.* Lawrence, 11 Ad. & El. 920.

[2] Negley *v.* Farrow, 60 Md. 158, 180; *s. c.* 45 Am. Rep. 715.

[3] Beazley *v.* Reid, 68 Ga. 380, 383.

[4] Park *v.* Piedmont &c. Ins. Co., 51 Ga. 510, 514.

§ 2028. Sense in which Juries are Judges of the Law, etc.—The Missouri statute provides that "in all prosecutions for libel or verbal slander, the truth thereof may be given in evidence to the jury, and shall constitute a complete defense; and the jury, under the direction of the court, shall determine the law and the fact."[1] The meaning of this is held to be that the jury shall receive from the court the law applicable to the testimony, and find the issues of fact thereunder, as in other cases.[2]

§ 2029. Words Actionable Per Se, or as Matter of Law.—Certain kinds of defamation are actionable *per se;* in other words, certain imputations upon character are of such a nature that the law presumes that damage has flowed from them to the person against whom they were directed. For a catalogue of these, the reader is referred to the standard works on slander and libel. In those trades or professions in which, ordinarily, credit is essential to their successful prosecution, as, for example, that of a merchant, language is actionable *per se* which imputes a want of credit or responsibility, or insolvency, past, present, or future. Such language naturally and presumptively causes pecuniary loss to the person of whom it is published.[3] In these and other like cases, the question of libel or no libel is to be pronounced by the judge as a *question of law*, and is not to be submitted to the jury.[4] Accordingly, it was error, in an action, for slander, to instruct the jury "that if the plaintiff had proved the speaking of any of the slanderous words charged in the petition, they should find for him."[5] As the meaning of the words employed in writings is a question for the court, when they are not ambiguous so as to require explanation by extrinsic evidence[6] it is error in actions for damages for libel, where statutes have not created a different rule, to leave it to the jury to say whether the defendant *intended* by the publication of the words,

[1] Rev. Stat. Mo. 1879, § 1564.
[2] State *v.* Hosmer, 85 Mo. 553.
[3] Newell *v.* How, 31 Minn. 235.
[4] Estahan *v.* Card, 15 B. Mon. (Ky.) 102; Green *v.* Telfair, 20 Barb. (N. Y.) 11.
[5] Green *v.* Telfair, *supra.*
[6] *Ante*, § 1065.

to injure the plaintiff, — the rule being that the law imputes to the plaintiff in such a case the natural and probable consequences of his own act.[1]

§ 2030. If Words Ambiguous, their Sense a Question for the Jury. — As already seen,[2] where the meaning of words in writings present what is termed a patent ambiguity which requires explanation by means of extrinsic evidence, the employment of such evidence to aid in the interpretation of the writing, as a general rule, carries the whole question of its meaning to the jury. This rule is applicable in actions for libel and slander. Where the language imputed to the defendant is not actionable *per se*, but may be shown by extrinsic evidence to have had an actionable meaning, the declaration or complaint must allege such extrinsic matter as, when coupled with the language published, affects its meaning and shows that it conveyed the actionable import which the plaintiff ascribes to it.[3] In all such cases it is supposed, on principle, that the question of libel or no libel will be a *question of fact* for the jury; since it will be for them to decide whether the circumstances alleged were proved. So, in an action for slander, if the application or meaning of the words is ambiguous, or if the sense in which they were used is uncertain, but they are nevertheless capable of the defamatory meaning charged, — it is for the jury to determine, from all the circumstances, whether they were applied to the plaintiff, and whether they were used in the defamatory sense alleged.[4] The general rule, therefore, is that where the words are of *doubtful import*, or reasonably susceptible of *two meanings*, the one harmless and the other defamatory, it will be for the jury to say in what sense they were used and understood.[5] The court can-

[1] Haire *v.* Wilson, 9 Barn. & Cres. 634.

[2] *Ante*, § 1076.

[3] Newell *v.* How, 31 Minn. 235.

[4] Blakeman *v.* Blakeman, 31 Minn. 396.

[5] Lucas *v.* Nichols, 7 Jones L. (N. C.) 32; McBrayer *v.* Hill, 4 Ired. L. (N. C.) 136; Fisher *v.* Clement, 10 Barn. & Cres. 472; Simmons *v.* Morse, 6 Jones L. (N. C.) 6; Lewis *v.* Chapman, 16 N. Y. 369, 371. Compare Woolnoth *v.* Meadows, 5 East, 463; Twombly *v.* Monroe, 136 Mass. 464, 468; Simmons *v.* Mitchell, 6 App. Cas. 156; Pratt *v.* Pioneer Press Co., 30 Minn. 41.

not, in such a case, assume the interpretation of the language and non-suit the plaintiff.[1] It is equally clear that if, upon an examination of the whole writing and comparison of its different parts, it appears to admit of no just construction except one which is injurious to the plaintiff, its meaning is to be determined by the court.[2] "It is only when the court can say that the publication is *not reasonably capable* of any defamatory meaning, and cannot reasonably be understood in any defamatory sense, that the court can rule, as matter of law, that the publication is not libelous, and withdraw the case from the jury, or order a verdict for the defendant.[3]

§ 2031. Innuendo Presents Question of Fact for a Jury.— The office of an *innuendo*[4] in a declaration or complaint for slander or libel is to explain the meaning of doubtful words or phrases or to annex to them their proper meaning. It follows from the foregoing that, whether the meaning was such as charged in the *innuendo*, is a fact for the jury,[5] as where the words imputed to the defendant charged that the plaintiff, a married woman, *kept* a man other than her husband, and the *innuendo* alleged that this was intended to impute to the plaintiff the crime of adultery.[6]

§ 2032. Question not one of Intent but of Tendency.—The rule being that a person who publishes matter injurious to the character of another must be considered, in point of law, to have intended the consequences resulting from that act, it has been held, in an action for libel, that where the language is *ambiguous* and it is doubtful whether it imputes any injurious matter to the plaintiff, the proper question for the jury is, not whether the *intention* of the publisher be to injure the plaintiff, but whether the *tendency* of the matter published was in fact injurious to him.[7]

[1] Simmons *v.* Morse, *supra.*

[2] Lewis *v.* Chapman, 16 N. Y. 369.

[3] Twombly *v.* Monroe, 136 Mass. 464, 469.

[4] *Innuo*, to nod; to wink.

[5] Heinicke *v.* Griffith, 29 Kan. 516.

[6] *Ibid.*

[7] Fisher *v.* Clement, 10 Barn. & Cres. 472. Compare Bromage *v.* Prosser, 4 Barn. & Cres. 247. In Studdard *v.* Linville, 3 Hawks (N. C.), 474, the court charged the jury that

§ 2033. Illustrations: Question for Jury. — An article published in a newspaper was headed, "The Locust Street Brutality Explained," and signed, "The Landlord." It stated that "the woman" came to the house of the signer of the article on a certain day, engaged rooms at a price named, and left at a certain time, having paid a certain sum; that, about three months previously she decided not to come down stairs at all, and was consequently a great deal of trouble; that he told her if she would leave at a time named and give him a certain sum, he would give her a receipt in full, which she refused to do; and that she kept her door locked, and would not give any satisfaction. The article then concluded as follows: "She is not a stranger here, — she never made friends. Can find out all about her by taking a little trouble." It was held, in an action by the woman referred to against the signer of the article for a libel that it was error to rule, as a matter of law, that the publication was not libelous and actionable; the question should have been submitted to the jury.[1] - - - - So, where it appeared that the plaintiff had purchased from a furniture company a table and had afterwards returned it as unsuitable, and that the defendant then exposed it in front of the shop with this placard upon it: "Taken back from Dr. Woodling, who would not pay for it; to be sold at a bargain;" and that the plaintiff removed the same, whereupon he was told by one of the defendants that he (the defendant) "could put on a better one than that," and, within a half hour afterwards, a second placard was placed upon the table, reading: "This was taken back from Dr. Woodling, as he would not pay for it; for sale at a bargain," — and also about two feet distant the following: "Moral, beware of dead beats;" — it was held that it was for a jury to say whether this was libelous, and that the court erred in withdrawing the case from them. In the opinion of the court by Gilfillan, C. J., it was said: "These two, read together, as they were undoubtedly intended to be, constitute a gross libel. They are clearly defamatory on their face. * * * What meaning, whether injurious or not to the plaintiff, they would convey to ordinary men, who read them without a knowledge of the transaction to which they referred, was for the jury to determine, in view of the circumstances under which they were exposed to the public perusal; and whether they were libelous or not ought to have been left to the jury to say.[2]

they were the exclusive judges of the intention of the defendant in speaking the words in the present case, and the judgment was affirmed.

[1] Twombly *v.* Monroe, 136 Mass. 464.

[2] Woodling *v.* Knickerbocker, 31 Minn. 268, 270.

§ 2034. **Meaning of the Words On Demurrer.** — If the declaration or complaint contains no *colloquium*, and is demurred to, the court must, of course, determine whether it sets out a good cause of action.[1]

§ 2035. **Doctrine of Implied Malice in such Actions.** — The circumstances under which malice is implied in law from a given state of facts, and is therefore not a question for a jury, opens up a wide field of inquiry. The question most frequently, perhaps, arises in actions for slander and libel. It may be said, as a general rule, that, where a person utters, on an *occasion not privileged*, whether by verbal speech or by writing or printing, a false charge concerning another or the property of another, which actually results in damage to that other, the law will imply malice in the utterer.[2] Thus, it was said by Baron Parke: "In general, an action lies for the malicious publication of statements which are false in fact, and injurious to the character of another (within the well known limits as to verbal slander), and the law considers such publications as malicious, unless it is fairly made, by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs, in matters where his interest is concerned. In all such cases, the occasion prevents the inference of malice, which the law draws from unauthorized communications, and affords a qualified defense, depending upon the absence of actual malice. If fairly warranted by any reasonable occasion or exigency, and honestly made, such communications are protected, for the common convenience and welfare of society, and the law has not restricted the right to make them within any narrow limits."[3]

[1] Goodrich *v.* Davis, 11 Met. (Mass.) 473; Chenery *v.* Goodrich, 98 Mass. 224; Homer *v.* Engelhardt, 117 Mass. 539. Compare Shattuck *v.* Allen, 4 Gray (Mass.), 540. For the law in criminal prosecutions for libel see Com. *v.* Anthes, 5 Gray (Mass.), 185, 212, *et seq.*, and the cases cited in the dissenting opinion of Thomas, J.

[2] Swan *v.* Tappan, 5 Cush. (Mass.) 104. See as supporting the doctrine of the text in a general way, Adcock *v.* Marsh, 8 Ired. L. (N. C.) 360.

[3] Toogood *v.* Spyring, 4 Tyrwh. 582, 595. Quoted with approval in Swan *v.* Tappan, 5 Cush. (Mass.) 104, 110.

Continuing the same line of reasoning, it was said by Mr. Justice Fletcher: "If the plaintiff can show that the publication was false in any material respect, and can also show special damage, done to himself by means of it, that will make a *prima facie* case for the plaintiff, and, as standing thus, malice would be presumed. But if the defendant can show that the publication was honestly made by him, believing it to be true, and that there was a reasonable occasion or exigency in the conduct of his own affairs, in matters where his interest was concerned, which fairly warranted the publication, such proof would rebut the presumption of malice, and bring the publication within the class of privileged publications, and form a good defense to the action, unless the plaintiff can show express malice, or malice in fact, which will of course be a question for the jury."[1] Accordingly, in an action for a libel against the editors of a newspaper, grounded upon the publication by them of an article criticising the conduct of the plaintiff as a public officer, it was held: 1. That if the article was *per se* libelous, and its publication established, the only question before the jury, on the general issue raised by a plea of not guilty, was the amount of damages which, under all the circumstances, the plaintiff was entitled to recover. 2. That, in estimating the damages, the jury were to consider whether the article was published maliciously and wantonly, for the purpose of injuring the character and reputation of the plaintiff; or, by the defendants as editors of a newspaper, honestly commenting upon the official acts and conduct of the plaintiff, and in the belief of the truth of their comments.[2] This holding necessarily assumes that the occasion of the publication was not privileged; the rule being that, in an ordinary action for defamation (*i.e.*, not a case of privileged communication), it is error to submit to the jury the question of malice, for that the law implies, though it has been held that evidence of malice may be given to increase the damages.[3]

[1] Swan *v.* Tappan, 5 Cush. (Mass.) 104, 111.

[2] Negley *v.* Farrow, 60 Md. 159, 178; *s. c.* 45 Am. Rep. 715.

[3] Chaffin *v.* Lynch, 11 Va. Law Jour. 598, 606. The court cite Bromage *v.* Prosser, 4 Barn. & C. 247; *s. c.* 10 E. C. L. 321; Clark *v.* Molyneux, 26 Week. Rep. 104; Hamilton *v.* Eno, 81 N. Y. 116

§ 2036. **Malice in Fact.** — The jury may then consider the *motive* with which the words written or spoken were uttered, because the publication of defamatory matter without express malice is not to be punished with the same damages as if it were wantonly and maliciously done.[1]

§ 2037. **Whether the Occasion was Privileged.** — The question whether the words were written or spoken upon an occasion which was privileged, within the meaning of the rule already spoken of,[2] is a *question of fact* for the jury, under proper instructions as to what occasions are privileged and what not.[3] Thus, it has been held, under particular circumstances developed in an action by one *military officer* against another for a libel which was made in reporting the condition of the corps which the plaintiff had commanded, that the judge ought not to have told the jury, as a matter of law, that the communication was relevant to the inquiry which the defendant had been commanded to make, but that it was properly left to the jury.[4] So, where the words imputed to the defendant were delivered by him as a witness in a *judicial proceeding* and the judge instructed the jury that, if they found that the defendant believed that his answers were pertinent and relevant to the question at issue when the words were uttered, their verdict should be for the defendant, and that if, on the other hand, they found that the defendant was actuated by malice and used the words for the mere purpose of defaming the plaintiff, the law withdrew its protection from him, it was held that there was no ground for a new trial.[5] So, where the words spoken were that the plaintiff, a *banker*, had failed, it was held that the judge ought to have left it to the jury to say whether the defendant understood the person to whom he had

[1] Thomas *v.* Dunaway, 30 Ill. 373, 388; Cummerford *v.* McAvoy, 15 Ill. 311; Sloan *v.* Petrie, 15 Ill. 425; Chaffin *v.* Lynch, 11 Va. Law Jour. 598, 606; Negley *v.* Farrow, 60 Md. 159, 178; *s. c.* 45 Am. Rep. 715.

[2] *Ante*, § 2035.

[3] Beatson *v.* Skene, 5 Hurl. & N. 838, 855; Pearce *v.* Brower, 72 Ga. 243; White *v.* Carroll, 42 N. Y. 161, 166. But see Wenman *v.* Ash, 22 L. J. C. P. 190.

[4] Beatson *v.* Skene, 5 Hurl. & N. 838, 855.

[5] White *v.* Carroll, 42 N. Y. 161, 166.

spoken the works as asking for information, and whether he had uttered the words merely by way of honest advice to such person to regulate his conduct; and if they were of that opinion to say, secondly, whether in so doing the defendant was guilty of any malice in fact.[1]

§ **2038. Whether the Communication, although Privileged, was Malicious.** — But there are cases where, although the occasion is ordinarily privileged, yet if the utterance is nevertheless malicious in fact, the word malice being here used in the sense of evil motive, — if in other words, the defendant availed himself of the privilege for the mere purpose of aspersing the character of the plaintiff, instances of which have been already given,[2] the utterer may be liable in damages. In such cases the question whether the utterance was made, notwithstanding the privilege, upon express malice, that is, with the motive and design of injuring the plaintiff, becomes a *question of fact* for the jury. "It is their province to say whether the defendant in making the communication, has acted *bona fide*, intending honestly to discharge a duty, or whether he has acted maliciously, intending to do an injury to the plaintiff."[3]

§ **2039. View that an Unsuccessful Attempt at a Justification Aggravates Damages as Matter of Law.** — In some jurisdictions it is held proper to instruct the jury, in actions for slander or libel, that a failure on the part of the defendant, who has pleaded the truth of the charge in justification, to make out such justification, is *in law* an aggravation of the offense.[4] Upon the same grounds, it is held error, in such a case, to leave it to the jury to say whether the words were not spoken without malice; since in this view, if the truth of the words were not proved, then the falsity of them implies malice on the part of

[1] Bromage *v.* Prosser, 4 Barn. & Cres. 247.

[2] *Ante*, § 1009.

[3] Adcock *v.* Marsh, 8 Ired. L. (N. C.) 360, 365. To the same doctrine is Swan *v.* Tappan, 5 Cush. (Mass.) 104, 111; Toogood *v.* Spyring, 4 Tyrwh. 582; and Pearce *v.* Brower, 72 Ga. 243 (under a statute, but here the same as the common law).

[4] Fero *v.* Rusco, 4 N. Y. 162.

the defendant in repeating them.[1] So, where the defendant pleads the general issue in one plea, and in another pleads the truth of the words in justification, it is proper to instruct the jury that, if they find for the plaintiff upon the plea of justification, they must also find for the plaintiff upon the issue raised by the general issue; because, if the words were untrue, the confession that the defendant had uttered them, the persisting in the charge after the action was commenced, and the repeating it on the record with an averment of its truth, is in itself a sufficient proof of malice necessary to maintain the action, and is an aggravation of the injury.[2] It has also been held proper in such a case, for the judge to charge the jury that a defendant, by pleading justification, and by repeating the slander, or putting it upon record by plea, is adding aggravation to injury, because it is evidence of continued malice.[3]

§ 2040. View that such an Attempt is merely a Circumstance which the Jury may Consider in Aggravation of Damages. — Other courts hold that a plea of justification, which is not sustained by proof, does not necessarily go in aggravation of damages; but that the jury are to determine, from the circumstances of the case, whether the attempt to justify forms any ground for increasing the damages.[4] Where the actionable words imputed perjury to the plaintiff, and the defendant pleaded the truth of the charge in justification, the court charged the jury that the only issue was whether the plaintiff was guilty of perjury or not, and added that "if the defendant has failed to prove that his plea is true, and that the plaintiff was guilty of perjury, it is a great aggravation of the slander to have the truth

[1] Farley *v.* Ranck, 3 Watts & S. (Pa.) 554. In this case it was held error to instruct the jury that, if the words were spoken "in terms of admonition, without malice, and with a view to prevent any repetition of the offense, — then the jury may find for the defendant upon the plea of not guilty."

[2] Jackson *v.* Stetson, 15 Mass. 48.

[3] Wilson *v.* Nations, 5 Yerg. (Tenn.) 211.

[4] Byrket *v.* Monohon, 7 Blackf. (Ind.) 83; Chubb *v.* Flannagan, 6 Carr. & P. 431; Swails *v.* Butcher, 2 Ind. 84; Shank *v.* Case, 1 Ind. 170; Sloan *v.* Petrie, 15 Ill. 425.

of the charge alleged and placed on the record by the plea; and the jury should take it into consideration in assessing the damages against the defendant," — it was held that this instruction was erroneous.[1] The same court has gone so far as to hold that, in such a case, an instruction that if the pleas of justification are not sustained by the evidence, they may be considered by the jury in aggravation of the damages, is erroneous.[2] In an action for libel before Mr. Justice Park and a jury, the learned judge charged the jury that they would say whether a justification put on the record, and not substantiated by evidence (unless they thought it proved by the evidence on the part of the plaintiff), was not an aggravation of the original offense, — thus submitting it, not as a rule of law, but as a question addressing itself to the discretion of the jury.[3] In an early case of this kind in Illinois, the trial court instructed the jury "that, the defendant, having justified the speaking of the slanderous words, if the jury believe that the proof has failed to sustain that defense, such plea of justification is, in law, an aggravation of the original slander, and the jury should consider the fact in estimating damages." It was held that this was error. In giving the opinion of the court, Treat, J., said: "Our statute authorizes a defendant to plead as many pleas as he may deem necessary for his defense. He has, therefore, as much right to file a plea of justification as that of not guilty. And if he acts *bona fide*, he is no more censurable in the one case than in the other. He is but exercising a right secured to him by the law. If he pleads a justification in honest belief that he will be able to sustain it on the trial, he ought not to be punished for so doing, though he fail to establish it to the satisfaction of the jury. He may be innocently mistaken in the evidence; or he may be unable to make full proof of the defense by reason of the death, absence, or corruption of the witnesses. His mere failure to justify the speaking of the words, should not, as a matter of course, aggravate the damages.

[1] Byrket *v.* Monohon, 7 Blackf. (Ind.) 83, 85.

[2] Swails *v.* Butcher, 2 Ind. 84. See also Shank *v.* Case, 1 Ind. 170.

[3] Chubb *v.* Flannagan, 6 Carr. & P. 431.

But if he pleads a justification, with the view of injuring the plaintiff, or without any expectation of supporting it by proof, the jury may properly consider the plea as a reiteration of the slanderous charge, and as a good ground for enhancing the damages. It is a question for the jury to decide in each case, whether the justification was interposed in good faith." [1]

§ 2041. Doctrine that Attempted Justification in Good Faith Mitigates Damages. — There is another class of cases which hold that, where justification is attempted and not fully established, if it appears that it has been done in good faith, and consequently that the publication was made in good faith, believing it to be true, the circumstances may be considered in mitigation of damages.[2] It is possible that an analysis of the cases may show that this doctrine is stated too broadly. Where the words imputed the crime of perjury, and the defendant pleaded a justification and proved that the plaintiff upon a former trial made statements as a witness from the place where witnesses usually stand in testifying, while this was not conclusive evidence that he was under oath, and the plaintiff was not thereby estopped from denying that he was sworn, — yet, it was held that such evidence might properly be taken into consideration by the jury in determining whether he was sworn, at least for the purpose of mitigating damages if the justification was not wholly made out.[3] Again, it has been ruled and this is the general doctrine, — that, in an action for libel, to support a plea of justification which states that the plaintiff had forged and uttered, knowing it to be forged, a certain bill of exchange, in order to justify a verdict for the defendant, the same evidence must be given as would be necessary to convict the plaintiff in a criminal prosecution for this offense; but it has nevertheless been held, in such a case that

[1] Sloan *v.* Petrie, 15 Ill. 425, 426. Compare Cummerford *v.* McAvoy, 15 Ill. 311.

[2] McAllister *v.* Sibley, 25 Me. 474; Chalmers *v.* Shackell, 6 Car. & P. 475; Morehead *v.* Jones, 2 B. Mon. (Ky.) 210; Shoulty *v.* Miller, 1 Ind. 544.

[3] McAllister *v.* Sibley, *supra.*

although the evidence may fall short of satisfying the jury that the strict legal offense of forgery was committed, they may take the facts proved into consideration in estimating the damages.[1] Under this view, where the defendant pleads in justification the truth of the words spoken or written, and fails to establish his plea, it is proper to instruct the jury that, if the plea of justification is not sustained, they should consider whether the publication is made by the appellant in the honest belief that it was true.[2]

§ 2042. **Contrary View that Evidence in Justification cannot be Received in Mitigation.** — Those courts which take the view already stated,[3] that an unsuccessful attempt at justification aggravates the damages, necessarily deny the view stated in the last section, and hold that if the plaintiff fails in his attempt at justification he is entitled to no benefit from the evidence which he may have introduced and which tended in that direction.[4] In some jurisdictions, the rule is so severe that where the defendant pleads the truth of the fact in justification, he will not be heard to give evidence in mitigation of damages, because such evidence is regarded as inconsistent with his plea.[5] Thus, where the judge directed the jury that, considering the circumstances which had been proved, the manner of speaking the words and especially the justification by the defendant by record no evidence whatever could be considered in mitigation of damages,— it was held that, in the state of facts disclosed by the evidence, there was no error in this direction. Chief Justice Parsons said: "We are satisfied that evidence of certain facts and circumstances may be received under the general issue, which ought to be rejected under this justification. In the former case the

[1] Chalmers *v.* Shackell, *supra.*

[2] Thomas *v.* Dunaway, 30 Ill. 373, 387.

[3] *Ante* § 2040.

[4] Fero *v.* Ruscoe, 4 N. Y. 162.

[5] Larned *v.* Buffinton, 3 Mass. 546; Alderman *v.* French, 1 Pick. (Mass.) 1, 18; Wolcott *v.* Hall, 6 Mass. 514, 518; Root *v.* King, 7 Cow. (N. Y.) 613; Matson *v.* Buck, 5 Cow. (N. Y.) 499; Bodwell *v.* Swan, 3 Pick. (Mass.) 376; Lewis *v.* Niles, 1 Root (Conn.), 346; Leister *v.* Smith, 2 Root (Conn.), 24; Waithman *v.* Weaver, 11 Price, 257, note.

defendant may prove that the words were spoken through heat or passion, and not from malice; or that they were spoken with an honest intention, through mistake, and not with a design to injure the plaintiff, But if the defendant, when called upon to answer in a court of law, will deliberately declare in his plea that the words are true, he precludes himself from any attempt to mitigate the damages by any of those facts or circumstances, because his plea of justification is inconsistent with them." [1] It has often been held that, in such an action, evidence tending to prove that the words spoken or written were true, or that there were reports in circulation, of particular instances of impropriety in the plaintiff's conduct, will not be admitted under the general issue, in order to show that defendant believed what he said to be true.[2]

§ 2043. Knowledge of the Defendant in Publishing. — Where the publication consisted merely in selling a few copies of a periodical, in which, among other things, the libelous matter

[1] Larned *v.* Buffinton, 3 Mass. 546, 553.

[2] Bodwell *v.* Swan, 3 Pick. (Mass.) 376. See the following cases: Bailey *v.* Hyde, 3 Conn. 463; Cook *v.* Barkley, Penn. (2 N. J. L.) 169; Barnes *v.* Webb, 1 Tyler (Vt.), 17; Wormouth *v.* Cramer, 3 Wend. (N. Y.) 395; Shepard *v.* Merrill, 13 Johns. (N. Y.) 475; Van Ankin *v.* Westfall, 14 Johns. (N. Y.) 233; Henson *v.* Veach, 1 Blackf. (Ind.) 370; Vessey *v.* Pike, 3 Car. & P. 512; East *v.* Chapman, 2 Car. & P. 570; *s. c.* Mood. & M. 46. In an early case in Massachusetts there is this *dictum* by Chief Justice Parsons: "We are not prepared to declare that there are no facts or circumstances from which the jury may mitigate the damages under a special justification of the truth of the words, in which he shall fail. When, through the fault of the plaintiff, the defendant, as well at the time of speaking the words, as when he pleaded his justification, had good cause to believe they were true, it appears reasonable that the jury should take into consideration this mistake of the plaintiff, to mitigate the damages." Larned *v.* Buffinton, 3 Mass. 546, 553. This language was quoted with approval by the Court of Appeals of Kentucky. Morehead *v.* Jones, 2 B. Mon. (Ky.) 210, 213. But in a subsequent case in Massachusetts it was said: "We do not find this *dictum* supported by any authority; and therefore whenever such evidence is admitted, it will be when the defendant, instead of making it a ground of defense, under the pretense of mitigating the damages, will admit that he was mistaken, and thus afford all the relief he can against calumny which he has published." Alderman *v.* French, 1 Pick. 1, 18.

was contained, it was held a question for the jury whether the defendants knew what it was that they were selling.[1]

ARTICLE II.—PRECEDENTS OF INSTRUCTIONS IN SUCH ACTIONS.

SECTION

2047. That the mere Speaking of words in the Presence of Third Persons Charging the plaintiff with Crime entitles him to a Verdict.
2048. Presumption of Malice from the Speaking of Actionable Words
2049. How much of the words laid in the Declaration must be Proved.
2050. Anger not a Justification: When a Mitigation of Damages.
2051. Libelous Matter Published in due Course of Judicial Procedure.
2052. That the Jury may Consider an unsuccessful Attempt at Justification in Aggravation of Damages.
2053. Repeating a Slanderous Rumor not a Justification, but a Mitigation.
2054. What Constitutes a Newspaper Publication.

§ 2047. THAT THE MERE SPEAKING OF WORDS IN THE PRESENCE OF THIRD PERSONS CHARGING THE PLAINTIFF WITH CRIME ENTITLES HIM TO A VERDICT.—"If the jury believe from the evidence that the defendant spoke of and concerning the plaintiff, in the presence and hearing of H. H. Tupker, or others, as mentioned in the petition, the words in the petition, alleged to wit: 'John Thompson killed my hogs, and I can prove it, and he is the biggest thief on this creek, and I can prove by Val. Mitchell and his boys that he has stolen my hogs,' or that enough of the words stated in the petition have been proven to substantially constitute the charge imputed to plaintiff, then the jury must find for the plaintiff."[2]

[1] Chubb *v.* Flannagan, 6 Carr. & P. 431. Compare Chubb *v.* Westley, 6 Carr. & P. 436.

[2] Approved in Lewis *v.* McDaniel, 82 Mo. 577, 583. For another instruction on the same theory, see Clements *v.* Maloney, 55 Mo. 352, 355. In addition to the precedents of instructions given in this article, others, approved on appeal, will be found in the following cases: In Durrah *v.* Stillwell, 59 Ind. 139, 142, submitting to the jury whether the defendant spoke the words, intending to charge larceny and (contrary to the usual form) submitting to them whether he spoke them maliciously (the court citing and relying on Wheeler *v.* Robb, 1 Blackf. (Ind.) 330). In Georgia *v.* Kepford, 45 Iowa, 48, 52, on the theory that the confession or admission of the plaintiff, that he had committed the crime charged, would not amount to a justification. (The court citing Iowa Code, 1873, § 4427; Forshee *v.* Abrams, 2 Iowa, 571, 579; Fountain *v.* West, 23 Iowa, 9; Ellis *v.* Lindley, 38 Iowa, 461. In Bays *v.* Hunt, 60 Iowa, 252—submitting to the jury the question whether the words which the evidence tended to prove were intended to impute to the plaintiff the fact of having com-

§ 2048. Presumption of Malice from the Speaking of Actionable Words. — "That if in this case the jury find that defendant spoke the slanderous words as charged in the second and third counts of plaintiff's petition,[1] then the law presumes they were spoken maliciously, and it is not necessary to prove any express malice in order to warrant a verdict for plaintiff." [2]

§ 2049. How much of the Words Laid in the Declaration Must be Proved. — "The jury are further instructed, that all the words laid in the declaration need not be proven to maintain the action, unless it takes them all to constitute the slander; and if they believe from the evidence that a sufficient number of the words laid in the declaration to amount, in their common acceptation, to a charge of fornication against the plaintiff, have been proved to have been spoken by the defendant Caroline Baker, then they must find for the plaintiff." [3]

§ 2050. Anger not a Justification: When a Mitigation of Damages. — "You are further instructed that anger is no justification for the use of slanderous words, and it ought not to be considered even in

mitted the crime of larceny, or were merely intended to convey an expression of the defendant's opinion of his character (the court citing Townshend on Slander and Libel (2d ed.), 192; Cornelius *v.* Van Slyck, 21 Wend. (Ind.) 70). In Belo *v.* Wren, 63 Tex. 686, 712, a long charge in an action against the publishers of a newspaper, for publishing matter imputing to the plaintiff the crime of forgery, where the defense was privilege in reporting the proceedings of a committee of the legislature.

[1] The words imputed larceny to the plaintiff.

[2] Approved in Lewis *v.* McDaniel, 82 Mo. 577, 583. In Clements *v.* Maloney, 55 Mo. 355, there is another well drawn instruction approved on appeal, on the same theory.

[3] Approved in Baker *v.* Young, 44 Ill. 42, 44. The court said: "In actions for slander the plaintiff must prove the language laid in the declaration, or so much, at least, as fully proves the charge. Equivalent words in meaning will not be sufficient. It is true, that all of the words in the sentence need not be proven, if those which are proved fully establish the slander. If, however, other words not laid are proved, which limit or change the meaning of those counted on, the action will not be sustained. If all the words laid are necessary to constitute the slander, then they must be proved as laid. Sanford *v.* Gaddis, 15 Ill. 228; Patterson *v.* Edwards, 7 Ill. 720; Wilborn *v.* Odell, 29 Ill. 456." In Boldt *v.* Budwig, 19 Neb. 739, 743, there in a fairly drawn instruction submitting to the jury the question whether enough of the words charged in the petition had been proved to amount to a charge that the plaintiff was a whore.

mitigation of damages, unless the anger is provoked by the person against whom the slanderous words were used, and in this case, if the jury believe from the evidence that the defendant Hannah Boldt, spoke of the plaintiff any of the slanderous words charged in the petition, then it matters not who commenced the conversation, and that the defendant was angry at the time, unless her anger was wrongfully provoked, in whole or in part, by the acts or language of the plaintiff herself." [1]

§ 2051. Libelous Matter Published in Due Course of Judicial Procedure. — "If the jury believe, from the evidence, that the libelous matter, complained of by the plaintiff, was composed and published only in the due course of judicial procedure by the defendants, and that said defendants had reasonable cause for believing, and did actually believe, that the said matter was pertinent to the case they sought to make and the relief they prayed for, then the jury will find for the defendants. - - - - That if the jury believe from the evidence, that the libelous matter complained of by the plaintiff, was regularly composed and published by the defendants in the due course of judicial procedure, they will find for the defendants, unless they are satisfied from the evidence, that such composing and publishing was done by the defendants with actual malice towards the plaintiff." [2]

§ 2052. That the Jury may Consider an Unsuccessful Attempt at Justification in Aggravation of Damages. — "The jury are instructed that, if a material part of a plea of justification fails, the plea fails altogether; and if a defendant in an action of libel interposes a plea of justification, and abandons or fails to prove his plea, such failure to prove, or abandonment of the plea, may be taken into consideration by the jury in estimating damages. It is evidence tending to show malice and continued malice." [3]

[1] Approved in Boldt *v.* Budwig, 19 Neb. 739, 742.

[2] Approved in Johnson *v.* Brown, 13 W. Va. 71, 149, 150. See *ante*, § 1009.

[3] Approved in Downing *v.* Brown, 3 Colo. 571, 596. The court said (p. 595): "This instruction correctly states the law, and was warranted by the evidence. When the defendant republishes a criminal charge by putting it on the records of the court, he does it at his own risk. If at the trial he fails to prove its truth, he intensifies the injury originally done to the plaintiff. In such case, the failure of proof may be properly considered in estimating damages. Updegrove *v.* Zimmerman, 13 Penn. (N. J.) 619, 621; Fero *v.* Ruscoe, 4 N. Y. 162, 165; Jackson *v.* Stetson, 15 Mass. 48; Wilson *v.* Nations, 5 Yerg. (Tenn.) 211; Spencer *v.* McMasters, 16 Ill. 405." See *ante*, § 2041.

§ 2053. Repeating a Slanderous Rumor not a Justification, but a Mitigation. — "If defendant, at the time he spoke the words complained of, stated that he had heard such a report from others, and gave it as a matter of rumor, and he has proved that he heard it, then while it would not amount to a justification, for no one has a right, even through idle wantonness, to keep a slanderous report afloat against another, yet it may be considered as tending to show that he did not originate the story in malice, and given its due weight in mitigation of damages." [1]

§ 2054. What Constitutes a Newspaper Publication. — "In regard to what will constitute a publishing, the law of libel is that the publication is made wherever the matter is made known and communicated; and if you find that the paper called the *Galveston Daily News* was edited, printed and sent out to their subscribers through the mails, to be delivered through the post-office at Austin to subscribers here by due course of mail; and that the said paper was so sent by defendants, or by their procurement, to this county to be read and circulated by the people of this county; and that the paper containing said article was so by them sent to this county, to be read by its subscribers generally and for general circulation here, and it was so and by that means read and circulated in Travis county; then, for the purposes of this trial, the said matter, statements, etc., was as to this plaintiff published in Travis county." [2]

[1] Approved in Hinkle *v.* Davenport, 38 Iowa, 355, 364.

[2] Belo *v.* Wren, 63 Tex. 686, 713.

CHAPTER LIX.

MEASURE OF DAMAGES.

ARTICLE I.—WHAT QUESTIONS FOR COURT AND WHAT FOR JURY.

ARTICLE II.—PRECEDENTS OF INSTRUCTIONS.

ARTICLE I.—WHAT QUESTIONS FOR COURT AND WHAT FOR JURY.

SECTION

2060. Court Declares Rule of Damages, but leaves Amount to Jury.
2061. What Instructions are Proper.
2062. In Actions of Contract where the Damages are not liquidated.
2063. Inquiry of Damages after Default.
2064. In Actions "Sounding in Damages."
2065. Vindictive, Punitive or Exemplary Damages.
2066. Interest in Lieu of Damages.
2067. Setting aside Verdicts or Enforcing *Remittiturs* on the Ground of Excessive Damages.

§ 2060. Court Declares Rule of Damages, but leaves Amount to Jury. — Whether the plaintiff is entitled to recover *any* damages, is a question for the court: because this question is a compound of two questions of law, namely: 1. Whether he has, in his pleadings, shown an actionable injury. 2. Whether he has adduced *any* evidence to support the claim thus made. The *measure*, or the proper elements of his damages are also questions for the court; that is, it is the duty of the judge to state to the jury the rules of law which are to govern them in estimating the damages in the particular case.[1] The meaning of the phrase "*measure* of damages" must be distinguished from what is meant when we use the phrase "*quantum* of damages." The *measure* of damages means the *rule* of damages which is to

[1] Knight *v.* Egerton, 7 Exch. 407; St. 60; Parker *v.* Jenkins, 3 Bush Pennsylvania R. Co. *v.* Ogier, 35 Pa. (Ky.), 587.

apply in a given case. This is always a *question of law*, and it is incumbent upon the court in every case, when so requested, to instruct the jury in respect of it.[1] But the quantum of damages is always a question for the jury, subject to the power of the court to set aside their verdict, where the damages awarded are so great or so little as to indicate passion or prejudice on their part.[2] Where there is an established rule of law as to the measure of damages applicable to a particular case, it is extremely important that the judge should inform the jury what that rule is; for to leave the jury without any definite rule to guide them, will manifestly lead to injustice. A failure so to direct the jury is ground for a new trial;[3] and this has been held, even where the specific instruction was not asked.[4]

§ 2061. What Instructions are Proper. — It is accordingly right for the judge to tell the jury, in a proper case, that the plaintiff is entitled to no more than nominal damages,[5] or how large a verdict will carry costs.[6] With respect to the amount of his recovery, the plaintiff is limited to the sum demanded in his pleadings; and an instruction which permits the jury to award a greater amount is error.[7] In a suit on a promissory note, an instruction directing the jury, in case they find for the plaintiff,

[1] Matney *v.* Gregg Brothers Grain Co., 19 Mo. App. 107. It was therefore a misuse of terms to say, as was done in a case in Missouri in an action for a breach of promise of marriage that "the measure of damages is a question for the sound discretion of the jury in each particular instance." Wilbur *v.* Johnson, 58 Mo. 600, 604. The court should have said the "quantum of damages."

[2] Mobile &c. R. Co. *v.* Ashcraft, 48 Ala. 15; Danville &c. R. Co. *v.* Stewart, 2 Metc. (Ky.) 119, 122; Kimball *v.* Bath, 38 Me. 219, 222; Drake *v.* Palmer, 4 Cal. 11; Archibald *v.* Davis, 4 Jones L. 133; Hall *v.* Gale, 20 Wis. 292; *post*, § 2067.

[3] Hadley *v.* Baxendale, 6 Exch. 341; *s. c.* 18 Jur. 358; 23 L. J. (Exch.) 179; Blake *v.* Midland R. Co., 21 L. J. (Q. B.) 237.

Knight *v.* Egerton, 7 Exch. 407.

[5] Twyman *v.* Knowles, 13 C. B. 222.

[6] *Ibid.*; Levy *v.* Milne, 12 Moore, 418; *s. c.* 4 Bing. 195. And see Mears *v.* Griffin, 2 Scott (N. R.), 15; *s. c.* 1 Man. & G. 796; Kilmore *v.* Abdoolah, 27 L. J. (Exch.) 307. In Pool *v.* Whitcombe (3 Fost. & Fin. 70; *s. c.* 6 L. T. (N. S.) 783), it was held at *nisi prius* that, in making up their verdict, the jury has no right to take into consideration what amount of damages will carry costs. To the same point is Waffle *v.* Dillenbeck, 39 Barb. (N. Y.) 123.

[7] Wright *v.* Jacobs, 61 Mo. 19, 23.

what amount they should allow, is improper in Missouri; but the judgment will not, for this reason, be reversed where the sum was correctly calculated.[1]

§ 2062. **In Actions of Contract where the Damages are not Liquidated.** — Where the damages are not liquidated by the instrument sued on, as in the case of a promissory note, bill of exchange, bill single, contract of guaranty, and the like, — in other words, where, in ascertaining the damages, something remains to be done beyond the mere computation of interest, — the question must regularly be submitted to a jury.[2] For instance, the question of the amount of damages resulting from a *breach of warranty* is one peculiarly for the determination of the jury, and where they have passed upon it, and their verdict has been approved by the trial court, it will not ordinarily be disturbed on appeal.[3]

§ 2063. **Inquiry of Damages after Default.**—It is well said that "a judgment by default, if regularly entered, is as binding as any other, as far as respects the power and jurisdiction of the court in declaring that the plaintiff is entitled to recover, though the amount of the recovery, in some cases, remains to be ascertained by the jury."[4] This was done under the old law by issuing a *writ of inquiry*, which directed the sheriff to summon a jury and make an inquiry of the damages; and the sheriff, having done this, made his *return* to the writ, stating the manner in which he had *executed* it. In some of the States the use of the ancient expression, writ of inquiry, is still kept up, although in practice no such writ ever issues, — the court, after a judgment by default, summoning a jury to assess the damages, either at the same or at a succeeding term, according to the practice of the court.[5]

[1] Wells *v.* Zallee, 59 Mo. 509.

[2] So held where the action was upon a covenant to pay in current bank notes. Williamson *v.* McGinnis, 11 B. Mon. (Ky.) 74, 76. This would not be the rule in regard of bank-notes which are legal tender or lawful money.

[3] Dill *v.* O'Ferrell, 69 Ind. 500.

[4] Green *v.* Hamilton, 16 Md. 317, 329; Mailhouse *v.* Inloes, 18 Md. 328, 333.

[5] See Mailhouse *v.* Inloes, *supra*

§ 2064. In Actions Sounding in Damages. — In certain actions, generally actions of tort, and always actions which "*sound in damages*," the law is unable to prescribe any precise rule or measure of damages, and the jury are authorized to give what is sometimes termed "*a round sum*," that is, such a sum as, in the exercise of a sound *discretion*, under all the circumstances of the case, they may deem sufficient to compensate the injured party. Such are actions for *slander*, *libel*, *malicious prosecution*, *criminal conversation*, *seduction*, *assault and battery* and other *physical injuries*, and also actions for *breach of promise of marriage*.[1] In such cases the court will not control the discretion of the jury, unless the award of damages is so great or so little as to be manifestly the result of passion or prejudice on the part of the jurors.[2]

§ 2065. Vindictive, Punitive or Exemplary Damages. — In the case of injuries wantonly and maliciously done, the jury may, if they think proper, give damages by way of punishment or example, which are variously termed vindictive, punitive or exemplary damages.[3] It is not the purpose of the writer to attempt an exposition of the cases in which such damages may or may not be given. It may be stated that, in cases in which such damages *may* be given, whether they will be given or not, is a question within the *discretion* of the jury.[4] Many judgments have been reversed because the jury were allowed to give such

[1] That this is the rule in actions for breaches of promise of marriage, see Wilbur *v.* Johnson, 58 Mo. 600. It has been said, in an action for damages for negligence, where the plaintiff, in the prime of life, lost the lower portion of both legs, that in such a case "the amount of damages must be left largely to the reasonable discretion of the jury. They are not, however, to give any amount they please." Waldhier *v.* Hannibal &c. R. Co., 87 Mo. 38, 49.

[2] *Post*, § 2067, and cases cited. So, in a prosecution, by indictment, under the Maine statute against a railroad company for negligently causing the death of a person, the amount of the forfeiture, between the minimum and maximum sums fixed by the statute, is to be assessed by the jury. State *v.* Maine Cent. R. Co., 76 Me. 357, 369.

[3] Wylie *v.* Smitherman, 8 Ired. L. (N. C.) 236; Duncan *v.* Stalcup, 1 Dev. & Bat. (N. C.) 440.

[4] Wylie *v.* Smitherman, 8 Ired. L. (N. C.) 236.

damages; but no case is recollected where a judgment was reversed because such damages were not given, though possibly such cases may be met with in the recent books of reports.

§ 2066. **Interest in Lieu of Damages.** — Where an action arises *ex contractu*, and the contract is one to which the statute ascribes interest, as where it calls for interest on its face, or under the governing statute draws interest from the date of demand, — then interest is *matter of law*, and in an action on such a contract the court should instruct the jury what interest to allow. But where the action is for a tort or for some failure of duty in the nature of a tort, the law not in terms giving interest, the jury are at liberty, in their *discretion*, to allow interest as damages, and the court should so instruct them and not direct them in peremptory terms either to allow or refuse interest,[1] — as in an action against a carrier for the non-delivery of goods.[2]

§ 2067. **Setting aside Verdicts or enforcing Remittiturs on the Ground of Excessive Damages.** — The general rule is that the jury are exclusive judges of the amount of damages, except in those cases where they follow as matters of law from facts proved and are the result of a mere computation. In all actions for injuries to the person, to family rights or to the reputation, in which the jury are allowed to give what is sometimes termed a round sum, the law prefers the judgment of twelve men in the jury box to the judgment of one man on the judicial bench. It is therefore the settled rule, enforced by many decisions, though couched in various forms of expression, that, in cases of this character, a new trial will not be granted, unless the damages are such as to strike every one with the enormity and injustice of them, and such as induce the court

[1] Richmond *v.* Bronson, 5 Denio (N. Y.), 55; Watkinson *v.* Laughton, 8 Johns. (N. Y.) 213 (distinguishing Lush *v.* Druse, 4 Wend. (N. Y.) 313; Robinson *v.* Corn Exchange Ins. Co., 1 Rob. (N. Y.) 14, 20. See also Dox *v.* Dey, 3 Wend. (N. Y.) 356, where the jury were instructed on this principle.

[2] Richmond *v.* Bronson, *supra*. And their discretion will not be interfered with on appeal, unless it appear that it has been abused. Rogers *v.* West, 9 Ind. 400, 403.

to believe that the jury must have acted from prejudice, partiality or corruption.[1]

Article II. — Precedents of Instructions.

Subdivision 1.— In Actions for Injuries to Person and Character.
Subdivision 2. — In Actions for Injuries to Property Rights.

Subdivision 1.— In Actions for Injuries to Person and Character.

Section

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2086. [Iowa Statute.] Injuries Resulting in Death.

[1] Williams *v.* Currie, 1 C. B. 841; Sharpe *v.* Brice, 2 W. Bl. 942; Leith *v.* Pope, 2 W. Bl. 1327; Edgell *v.* Francis, 1 Man. & G. 222; Louisville &c. R. Co. *v.* Falvey, 104 Ind. 409, 430; Hoagland *v.* Moore, 2 Blackf. (Ind.) 167; Guard *v.* Risk, 11 Ind. 156; Yater *v.* Mullen, 23 Ind. 562; Alexander *v.* Thomas, 25 Ind. 268; Reeves *v.* State, 37 Ind. 441; Ohio &c. R. Co. *v.* Collarn, 73 Ind. 261; *s. c.* 38 Am. Rep. 134; Lake Erie &c. R. Co. *v.* Fix, 88 Ind. 381; *s. c.* 45 Am. Rep. 464; Indiana Car Co. *v.* Parker, 100 Ind. 181; Loyd *v.* Hannibal &c. R. Co., 53 Mo. 509; Berry *v.* Da Costa, L. R. 1 C. P. 331; *s. c.* 35 L. J. (C. P.) 191; Creed *v.* Fisher, 9 Exch. 472; Gough *v.* Farr, 1 Younge & J. 477; Tullidge *v.* Wade, 3 Wils. 18. When a verdict is so grossly excessive that it cannot be so cured: Doty *v.* Steinberg, 25 Mo. App. 328.

SECTION
2087. Injuries Resulting in Death: Excluding Consideration of Pecuniary Circumstances.
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§ 2071. ASSAULT AND BATTERY. — "If you find for the plaintiff, you will assess in her favor such damages, within the amount claimed, as you think she has sustained, and which will be a compensation to her for any loss and injury occasioned, which are the direct results of said defendant's conduct." [1]

§ 2072. ANOTHER PRECEDENT. — "While the jury are not authorized by the law to give exemplary or punitive damages in this case, in the event a verdict is found for the plaintiff,[2] yet, if the jury find for the plaintiff, full compensatory damages should be awarded; and in arriving at compensatory damages, the jury are not necessarily restricted to the naked pecuniary loss; for, besides damages for pecuniary loss and injury, the jury may allow such as are the direct consequence of the act complained of, for injury to Mrs. Trinkle's good repute, her social position, for physical suffering, bodily pain, anguish of mind, sense of shame, humiliation and loss of honor." [3]

[1] Approved in Wolf *v.* Trinkle, 103 Ind. 355.

[2] This part of the instruction would not be applicable in many cases of aggravated assault and battery; since in such cases, on well settled grounds, exemplary damages may be given.

[3] Approved in Wolf *v.* Trinkle, 103 Ind. 355, 357. In approving the above two instructions the court, speaking through Zollars, J., say: "It is well settled that in a case of the character of this, damages may be awarded for for physical suffering, for mental trouble — as anguish of mind, sense of shame, or humiliation, loss of honor and good name; all of which are considered compensatory, and not exem-

§ 2073. Another Precedent: Exemplary Damages. — "If you find from the evidence that the defendant assaulted, beat, and bruised the plaintiff in an ignominious manner, openly in the public highway, with intent to injure her person, and for the purpose of gratifying a malicious purpose, then you may allow her additional exemplary or vindictive damages in any amount, in your discretion, proper or necessary to restrain the defendant and others from the commission of like acts in the future; but your verdict will not exceed the amount claimed." [1]

§ 2074. Another Precedent: Exemplary Damages: Malice. — "If you find for the plaintiff under the instructions heretofore given, you will allow him such damages, not exceeding the amount claimed in the petition, as seems to you to be right and proper under all the facts and circumstances in the evidence. In estimating the damages you have a right to consider the bodily and mental pain, if any, endured by plaintiff, and his diminished capacity for labor resulting directly from defendant's wrongful act, if the evidence shows the circumstances to exist. You may also take into consideration the surgical and medical bills which he has incurred or paid, and the probable future injury, if any, that will result to him. You may also consider the injuries to his feelings by reason of any insult and indignity inflicted upon his person. It was not necessary to prove by witnesses the amount of damages re-

plary or punitive damages." To this point the following cases were cited: Stewart *v.* Maddox, 63 Ind. 51; Cox *v.* Vanderkleed, 21 Ind. 164; Taber *v.* Hutson, 5 Ind. 322; Fisher *v.* Hamilton, 49 Ind. 341; Lake Erie &c. R. Co. *v.* Fix, 88 Ind. 381; *s. c.* 45 Am. Rep. 464; State ex rel. *v.* Stephens, 103 Ind. 55.

[1] Approved in Ward *v.* Ward, 41 Iowa, 687. The court said: "It is the settled rule in this State that, in cases of this kind, where the proper facts are shown, and it appears that the act complained of is punishable under the criminal statutes, punitive or exemplary damages may be allowed. Guengerich *v.* Smith, 36 Iowa, 587; Garland *v.* Wholeham, 26 Iowa, 185; Hendrickson *v.* Kingsbury, 21 Iowa, 379. Among the objects attained by the allowance of exemplary damages are the punishment of the wrong-doer and the example whereby others are deterred from the commission of like wrongs; and, it is often said, such damages are allowed for these purposes. Sedgwick on Measure of Damages, p. 587, note; 1 Hilliard on Torts, p. 251, note *a;* Anthony *v.* Gilbert, 4 Blackf. (Ind.) 348; Taylor *v.* Church, 8 N. Y. 452–460; Bailey *v.* Dean, 5 Barb. (N. Y.) 297–303; Roberts *v.* Mason, 10 Ohio St. 277–280. Indeed, it appears that one of the objects of punishment in all cases is to prevent the repetition of the crime by the culprit and others. The example of punishment, it is presumed, will deter others from the commission of the offense in the future."

sulting from personal injuries, but these are to be determined by you from your general knowledge and experience. - - - - The damages above spoken of are known as actual damages. If malice has been shown by the evidence, or may be reasonably inferred from the conduct of defendant, as shown in evidence, you may, in your discretion, give exemplary damages by way of punishing the defendants, and for the purpose of setting a wholesome example to others. If you find both actual and exemplary damages, you will find separately in your verdict the amount of each, stating what amount is actual and what amount is exemplary damages. - - - - The term malice, used in this charge, does not necessarily imply hatred or ill-will, but any improper or unworthy motive, and, it may be reasonably inferred, from brutality of conduct, wantonness or recklessness." [1]

§ 2075. False Imprisonment, including the Element of Exemplary Damages. — "The court instructs the jury that, if they find for the plaintiff, they will, in assessing the damages, allow plaintiff such amount as they think will compensate him for his loss of time and any other damages he may have actually suffered, and, in addition thereto, if the jury believe that the trespass was committed willfully and maliciously, as heretofore defined, they may also allow such further damages as they see fit, as smart money or exemplary damages, not exceeding the amount of $5,000; and in estimating the damages, they may take into consideration the standing of the parties in the community, and also the mental anguish and pain which plaintiff suffered from such arrest and incarceration." [2]

§ 2076. Malicious Prosecution: Exemplary Damages. — "If the jury find for the plaintiff, he will be entitled to recover such damages as the jury shall believe from the evidence that he suffered from his arrest and imprisonment; and the jury may add such further sum, by way of smart money, as, in their opinion, will sufficiently punish the defendant Caffarata for the wrong and injury done to plaintiff." [3] - - - - "If the jury find for the plaintiff, in estimating the damages sustained by him, they are bound by law to consider the jeopardy in which the liberty of plaintiff was placed; the distance that plaintiff was compelled

[1] Approved in Newman *v.* Dodson, 61 Texas, 94.

[2] Approved in Cooper *v.* Johnson, 81 Mo. 483, 486, on the authority of McMannis *v.* Lee, 43 Mo. 208, and Brown *v.* Perkins, 1 Allen (Mass.) 89.

[3] Approved in Callahan *v.* Caffarata, 39 Mo. 136, 137.

to walk; his age and physical condition at the time of his arrest; the bodily suffering, mental anxiety and pain caused thereby, — and they are to find for him in such sum as will reasonably compensate him for all these things." [1]

§ 2077. In Actions for Negligent Injuries. — "If the plaintiff is entitled to recover, the measure of his recovery is what is denominated compensatory damages — that is, such sum as will compensate him for the injury he has sustained. The elements entering into damage are the following: 1. Such sum as will compensate him for the expenses he has paid or incurred in effecting his cure and caring for and nursing him during the period that he was disabled by the injury. 2. The value of his time during the period that he was disabled by the injury. 3. If the injury has impaired the plaintiff's power to earn money in the future, such sum as will compensate him for such loss of power. 4. Such reasonable sum as the jury shall award him on account of pain and anguish he has suffered by reason of his injury. The first two of these elements are the subjects of direct proof, and are to be determined by the jury on the evidence they have before them. The third and fourth elements are, from necessity, left to the sound discretion of the jury." [2]

§ 2078. Other Precedents — "The court instructs the jury that, if they find the defendant guilty, they are, in estimating the damages, at liberty to consider the health and condition of plaintiff before the injury complained of, as compared with his present condition in consequence of said injury, and whether the injury is in its nature permanent, and how far it is calculated to disable the plaintiff from engaging in those pursuits and employments for which, in the absence of the injury, he would have been qualified; and also the physical and mental suffering to which he has been subjected, or may be subjected, by reason of the injury; and to allow such damages as, in the opinion of the jury, will be a fair and just compensation for the injury which the plaintiff has sustained." [3] - - - - "If you find for the plaintiff you will be required to determine the amount of her damages. On this subject I in-

[1] Approved in Ahern *v.* Collins, 39 Mo. 146.

[2] Approved in Morris *v.* Chicago &c. R. Co., 45 Iowa, 30.

[3] Approved in Riley *v.* West Virginia &c. R. Co., 27 W. Va. 145, 151; citing Shearm. & Red. on Neg., § 606; Ransom *v.* New York &c. R. Co., 15 N. Y. 415; Memphis &c. R. Co. *v.* Whitfield, 44 Miss. 466; Masters *v.* Warren, 27 Conn. 293; Holyoke *v.* Grand Trunk R. Co., 48 N. H. 541; Wade *v.* Leroy, 20 How. (U. S.) 34; Wilson *v.* City of Wheeling, 19 W. Va. 323.

struct you that, in estimating the damages, you will consider her bodily pain and suffering occasioned by the injury, or any sickness resulting from the injury; and, in case you find that the plaintiff has not yet recovered from her alleged injuries, or that by such injury she has to any extent been permanently disabled, then you should take such facts also into consideration in estimating her damages, to which you may add such an amount as you, in the exercise of a sound discretion, may think will be a just compensation for her anxiety and distress of mind, as are fairly and reasonably the plain consequences of the injury complained of." [1] - - - - "If you find, under the evidence, that the plaintiff is entitled to recover, it will be your duty to assess the amount of damages which, in your judgment, she should recover. In estimating this amount you may take into consideration expenses actually incurred, loss of time occasioned by the immediate effect of her injuries, and physical and mental suffering caused by and arising out of her injuries. In addition you may consider the professional occupation, if any, of the plaintiff and her ability to earn money, and she will be entitled to recover for any permanent reduction of her power to earn money by reason of her injuries; and the amount assessed should be such sum as, in your judgment, will fully compensate her for her injuries or any of them, thus sustained." [2] - - - - "In determining the amount of damages the plaintiff is entitled to re-

[1] Approved in Cincinnati & St. Louis R. Co. *v.* Spanier, 85 Ind. 171; citing Wright *v.* Compton, 53 Ind. 337; Indianapolis *v.* Scott, 72 Ind 196.

[2] Approved in Louisville &c. R. Co. *v.* Falvey, 104 Ind. 409, 429. In approving this instruction the court say that there is no force in the objection that it does not require the jury to assess the damages *from the evidence in the case*, since no juror of average intelligence would fail to understand that the court directed him to be guided by the evidence. The court cite on this point: Indianapolis *v.* Scott, 72 Ind. 196, and on motion for rehearing distinguish Chicago &c. R. Co. *v.* Sykes, 96 Ill. 162, and North Chicago &c. Co. *v.* Morrissey, 18 Am. & Eng. R. Cas. 47. The court say: "If those cases did place the intelligence of jurors upon a plane as low as that which counsel would have us do, we should decline to follow them; for the cases in our own state, as well as elsewhere, declare that jurors are to be treated as men of average intelligence." Citing Union Mut. Life Ins. Co. *v.* Buchanan, 100 Ind. 63, 74; McDonel *v.* State, 90 Ind 320. 327. See *post*, § 2313. The court also say that the instruction properly enumerates the elements to be considersd in estimating the damages. "If the capacity of the plaintiff to earn money was diminished by the injury, she is entitled to be compensated, and the impairment of her ability is an element to be considered in computing the amount of the recovery." Carthage Turnp. Co. *v.* Andrews, 102 Ind. 138; Indiana Car. Co. *v.* Parker, 100 Ind. 181, 195, and authorities cited; Indianapolis *v.* Gaston, 58 Ind. 224.

cover in this case, if any, the jury have a right to, and they should, take into consideration all the facts and circumstances in evidence before them, the nature and extent of the plaintiff's physical injuries, if any, testified about by the witnesses in this case, her suffering in body and mind, if any, resulting from such injuries, and also such prospective suffering and loss of health, if any, as the jury may believe, from all the evidence before them in this case, she has sustained or will sustain by reason of such injuries." [1] - - - - "If the jury find the issues for the plaintiff, in determining the measure of damages, they may take into consideration the mental and physical pain and suffering endured by plaintiff since said injury, in consequence thereof; the character and extent of said injury and its continuance, if permanent, together with his loss of time and service and his inability, if any, resulting from said injury, to earn a livelihood for himself and family; and his necessary expenses for medicines and medical attention; and may find for him such sum as in the judgment of the jury, under the evidence, will be a round compensation for the injury, not to exceed the sum of five thousand dollars." [2]

§ 2079. Effect of Pre-existing Tendency to Disease Enhancing Damages. — "A common carrier of passengers is bound to carry and transport for hire persons who are sick, weak, debilitated or predisposed to disease, as well as those who are healthy and robust; and if you find from the evidence that plaintiff received the injuries complained of, or any of them, in the manner alleged in the complaint, and that, at the

[1] Approved in Hannibal &c. R. Co. *v.* Martin, 111 Ill. 219, 227.

[2] Approved in Loewer *v.* Sedalia, 77 Mo. 431 439. *Other useful instructions* in cases for personal injuries, generally through negligence, embracing all, or most all the elements in the preceding instructions, will be found in the following cases: Lincoln *v.* Walker, 18 Neb. 260; Hannibal &c. R. Co. *v.* Fox, 31 Kan. 591; Smith *v.* Warden, 86 Mo. 382, 396; Wilson *v.* Trafalgar &c. Co., 93 Ind. 287, 289; Winters *v.* Hannibal &c. R. Co., 39 Mo. 469, 470; Horner *v.* Nicholson, 56 Mo. 222; Indianapolis *v.* Scott, 72 Ind. 201; Wall *v.* Livezay, 6 Colo. 465, 475; Maxwell *v.* Hannibal &c. R. Co., 85 Mo. 95, 101; Clotworthy *v.* Hannibal &c. R. Co., 80 Mo. 220, 222; Neilon *v.* Kansas City &c. R. Co., 85 Mo. 599, 609; Sheel *v.* Appleton, 49 Wis. 129; Rice *v.* Des Moines, 40 Iowa, 642; Tuller *v.* Talbot, 23 Ill. 358; Lemon *v.* Chanslor, 68 Mo. 342; St. Louis &c. R. Co. *v.* Cantrell, 37 Ark. 521, 522. See also Goodno *v.* Oshkosh, 28 Wis. 300; Wooster *v.* Proprietor Canal Bridge, 16 Pick. (Mass.) 547; Ransom *v.* Railroad Co., 15 N. Y. 415; Curtis *v.* Railroad Co., 18 N. Y. 535; Holyoke *v.* Railroad Co., 48 N. H. 541; Wheaton *v.* Railroad Co., 36 Cal. 591.

time of the reception of said injuries, or any of them, the plaintiff was predisposed to malarial, scrofulous or rheumatic tendencies, but otherwise in good health, and you further find that said injuries, or any of them solely, caused or developed such predisposition to malarial, scrofulous or rheumatic tendencies, so that thereby, without the fault of the plaintiff, her present condition, whatever you may find that to be, has directly resulted, — then I instruct you that the plaintiff is entitled to recover to the full extent of whatever you may find her present condition to be."[1] - - - - "Even should the jury believe from the evidence, that plaintiff may have had syphilis or other disease latent in his system, yet if they believe that he was unlawfully and willfully put off of a car on defendant's railroad while the train was in motion, by the servant or agent of defendant, and that he thereby received injuries which directly caused or developed pains in the small of the back and a sore upon his right leg, then the defendant is responsible for all the ill effects which naturally and necessarily followed the injuries, in the condition of health in which plaintiff was at the time, and it is no defense that the injuries may have been aggravated and rendered more difficult to cure, by reason of plaintiff's state of health, or that by reason of the latent disease, the injuries were rendered more serious to him than they would have been to a person in robust health."[2]

§ 2080. Defendant's Counter-instruction as to the Burden of Proof on the Same Subject. — "The court further instruct the jury that the plaintiff must show, by a preponderance of the evidence, that any injuries, ailments or diseases from which she is now suffering, if any such there be, are the result of her injuries sustained at the time of the accident in evidence. And the court further instructs the jury that, unless they find the facts to be so established, by a preponderance of the evidence, they cannot assume that such injuries, ailments or diseases have resulted from said accident."[3]

[1] Approved in Louisville &c. R. Co. *v.* Falvey, 104 Ind. 409, 426.

[2] Approved in Brown *v.* Hannibal &c. R. Co., 66 Mo. 588, 591, 592; citing Littlethale *v.* Dix, 11 Cush. (Mass.) 364; State *v.* Morphy, 33 Iowa, 270; *s. c.* 11 Am. Rep. 125.

[3] Approved in Louisville &c. R. Co. *v.* Falvey, 104 Ind. 409, 427. The Supreme Court of Indiana held that the first instruction in the preceding section, standing alone contained nothing of which the defendant could justly complain, and that that and this, taken together, express the law quite as favorably as the defendant had any right to ask. The proposition of law embodied therein was discussed by the court at considerable length and approved, on the authority of the follow-

§ 2081. Expulsion from Railway Train: Compensatory Damages.— "In estimating the damages, which the plaintiff is entitled to recover, the jury may take into account not only the loss of time, but pain of body, pain of mind, and injury to the feelings of the plaintiff. They may award damages, in their discretion, as a compensation for the ill treatment to which the plaintiff was subjected in ejecting him from the cars." [1]

§ 2082. Another Precedent: Exemplary Damages. — "If the jury believe from the evidence, that the plaintiff was a passenger on the car of defendant, and had duly paid his fare, and that the agent and employé of defendant, being then engaged in his business as conductor and driver of said car, threatened to put plaintiff off the said car, on the ground that his fare was unpaid, they will find for plaintiff, and, in estimating the damages, the jury are not confined to the mere corporal injury, if any, done plaintiff, but may take into consideration the wounded feelings of plaintiff, the insulting character and circumstances of the conduct of defendant's driver and conductor, and all the circumstances of life and health of plaintiff, and the circumstances of the

ing cases: Terre Haute &c. R. Co. *v.* Buck, 96 Ind. 346; *s. c.* 49 Am. Rep. 168, and cases therein cited and reviewed; and Jeffersonville &c. R. Co. *v.* Riley, 39 Ind. 568; Baltimore &c. R. Co. *v.* Kemp, 61 Md. 74 (case of a railroad injury developing into a cancer); Stewart *v.* Ripon, 38 Wis. 584; Oliver *v.* La Valle, 36 Wis. 592; Kellogg *v.* Chicago &c. R. Co., 26 Wis. 223; *s. c.* 7 Am. Rep. 69. The court denies the authority of Pullman &c. R. Co. *v.* Barker, 4 Colo. 344; *s. c.* 34 Am. Rep. 89. The authority of this last case was also denied in Cincinnati &c. R. Co. *v.* Eaton, 94 Ind. 474; *s. c.* 48 Am. Rep. 179, and in Terre Haute &c. R. Co. *v.* Buck, 96 Ind. 346, 352. See, also, in support of the doctrine embodied in the above instruction, 2 Wood Railw. Law, 1232. On a motion for a rehearing the court also cited on the same point, McNamara *v.* Clintonville, 62 Wis. 207; *s. c.* 51 Am. Rep. 722; Ehrgott *v.* Mayor, 96 N. Y. 264; *s. c.* 48 Am. Rep. 622.

[1] Approved in Du Laurens *v.* First Div. St. Paul &c. R. Co., 15 Minn. 49, 58. The court said: "The rule of damages, as laid down by the court in charging the jury as requested by the plaintiff, embraces only such as are in themselves compensatory damages, and such as are alleged in the complaint, or implied by law, and in this case we think was entirely correct. * * * In cases of this kind the jury are the proper judges of the amount of damages to be allowed, and unless there is something in the case showing that the jury, in their determination, were influenced by passion, prejudice, or some improper motive, the court will not interfere. City of St. Paul *v.* Kuby, 8 Minn. 154, 171; Chamberlain *v.* Porter, 9 Minn. 260, 269; Chapman *v.* Dodd, 10 Minn. 350.

alleged outrage, and thereupon award such exemplary damages as the circumstances may, in their judgment, require." [1]

§ 2083. Another Precedent: Loss of Time, Expense, Inconvenience, Injury to Feelings, Attorney's Fee. — "If the plaintiff purchased a ticket from Cleveland to Meadville, and gave it up to the conductor, and the conductor ordered him to leave the cars, honestly supposing that he had not paid his fare beyond Warren, using no personal violence or unnecessary severity in setting him off, the plaintiff is still entitled to recover for the loss of time, expense and inconvenience, necessarily and unavoidably suffered by him in consequence of being put off at the time and place, when and where he was ordered to leave the train. If the conductor treated him in an insolent and insulting manner, he may recover sufficient to compensate him, not only for the loss of time, expense, and inconvenience occasioned by being put off, but you may go farther, and give him such damages as you in your judgment may think proper to compensate him for the injury to his sensibilities, as well as to compensate him for the loss of time, expenses, and labor resulting to him from being put off. And if you find from the evidence there were such circumstances of indignity and insult upon the part of the conductor, in expelling him from the cars, you may, in making up your verdict as to what will compensate the plaintiff, take into consideration and allow him what, in your judgment, is a fair and reasonable attorney's fee for procuring and paying counsel to prosecute his case against the defendant." [2]

§ 2084. Another Precedent: Damages Enhanced by Negligence: Exemplary Damages: Medical Attendance, etc. — "The court instructs the jury that this is an action by the plaintiff for a breach of contract by defendant to transport and carry plaintiff as a passenger from St. Louis to Knob-Noster, and if they find the issue for the plaintiff, then the plaintiff can only recover whatever damages he may show he has actually sustained, and which he could not have averted by reasonable exertion, care and prudence on his part, unless plaintiff was ejected

[1] Approved in Malecek *v.* Tower Grove R. Co., 57 Mo. 17, 19, 20. Another similar precedent will be found in Perkins *v.* Missouri &c. R. Co., 55 Mo. 201, 208.

[2] Approved in Atlantic &c. R. Co. *v.* Dunn, 19 Ohio St. 162, 164, 165; citing Roberts *v.* Mason, 10 Ohio St. 277; New Orleans &c. R. Co. *v.* Bailey, 40 Miss. 391, 443; 1 Bl. Com. 431; Story on Agency, § 452; Philadelphia &c. R. Co. *v.* Quigley, 21 How. (U. S.) 202; Hopkins *v.* St. Lawrence R. Co., 36 N. H. 9.

in a wanton, rude or aggravated manner, indicating oppression, malice or desire of revenge. - - - - Although they may believe, from the evidence, that defendant was guilty of a breach of contract in ejecting plaintiff from its car, yet, if they further believe, that the conductor in putting him off was acting in obedience to the orders of his superior officers, or what he honestly believed such orders to be, and, so believing, refused to carry plaintiff any further, and caused him to leave the cars at a depot or usual stopping place, or near any dwelling house, or at any other suitable stopping place, and that the conductor, in so doing, did not act in a rude, wanton or aggravated manner, indicating oppression, malice or a desire to injure,— the plaintiff cannot recover punitive or vindictive damages, and cannot recover any damages beyond a compensation for the money actually expended by him during his detention, and the subsequent passage home, and for the reasonable value of his time necessarily lost in consequence of said ejection, and other expenses necessarily incurred. - - - - Unless the jury are satisfied from the evidence that plaintiff, soon after his ejection, was taken and affected with a bad cold and ill-health, and that such cold and ill-health was the immediate cause or result of his ejection, and not produced by any subsequent and unnecessary act of plaintiff, they will disregard and not take into consideration any expenses for medicine or loss of time which plaintiff may have incurred, if any, on account of the same, nor will they assess any damages on account of such cold or ill-health."[1]

§ 2085. [Missouri Statute.] Injuries Resulting in Death. — "If, under these instructions, you will find the issues for the plaintiffs, you will assess their damages in the sum of $5,000."[2]

§ 2086. [Iowa Statute.] Injuries Resulting in Death. — "If you find for the plaintiff in any sum, then you will allow her only a fair compensation for the loss of service which she has sustained, as shown by the evidence, taking into consideration the age, health and habits of the deceased, his capacity for labor, the probability of his living to the age of majority, and the fair and probable cost of his clothing, maintenance and care, and such matters as are inseparably connected with his bringing up by his mother."[3]

[1] Approved in Graham *v.* Pacific R. Co., 66 Mo. 536, 542, 543.

[2] Approved in Farris *v.* Cass Avenue &c. R. Co., 8 Mo. App. 588; s. c. affirmed 80 Mo. 325.

[3] Approved in Benton *v.* Chicago &c. R. Co., 55 Iowa. 496, 506.

§ 2087. [Illinois Statute.] Injuries Resulting in Death: Excluding Consideration of Pecuniary Circumstances. — "The pecuniary circumstances of the plaintiff and her infant daughter, at the time of and since the death of said Jacob Baches, cannot increase or diminish the amount of damages which the plaintiff is entitled to recover in this suit, in case the jury find the issue for her; and if the jury so find, they are instructed, in the assessment of damages, to disregard all the testimony as to the pecuniary circumstances of said plaintiff and her infant daughter, at the time of and since the death of said Jacob Baches."[1]

§ 2088. [Kansas Statute.] Injury resulting in Death. —"You should not take into consideration the pain suffered by deceased, or the wounded feelings of the surviving relatives, nor give punitive damages, unless said accident was the result of gross carelessness, and reckless indifference to the rights of passengers. But you should give what you deem a just compensation to them for such loss. And in determining the same, you may take into consideration all the circumstances attending his death; the relations between him and his children and next of kin; the amount of his property; the character of his business, and the prospective increase of wealth likely to accrue to a man of his age, with the business and means which he had, or the possibility of a decrease of the same. Damages in a case of this kind, must depend very much upon the good sense and sound judgment of the jury, upon all the facts and circumstances of the case."[2]

§ 2089. [Illinois.] Statutory Action for Death of Husband by Selling Intoxicating Liquor to him: Vindictive Damages given as Compensation. — "The plaintiff, if entitled to actual damages, is not entitled to vindictive damages as a punishment to the defendants, even though the jury may believe, from the evidence, that the liquor sold or

[1] Approved in Illinois &c. R. Co. *v.* Baches, 55 Ill. 388.

[2] Approved in Kansas &c. R. Co. *v.* Cutter, 19 Kan. 83, 90. In Gill *v.* Rochester &c. R. Co., 37 Hun (N. Y.), 108, in an action for damages for the death of a minor son, it was held that an instruction allowing the jury to take into consideration the value of the *prospective counsel and advice* which the parents would have been likely to have received from the son, had he lived, was erroneous, because such damages were involved in mere speculation. As to the elements of "pecuniary damages" *under the New York statute* giving damages for injuries resulting in death, see McIntyre *v.* New York Central R. Co., 37 N. Y. 287; Tilley *v.* Madison River R. Co., 24 N. Y. 471; Ill *v.* Forty-Second St. R. Co., 47 N. Y. 219.

given to said Smelsley may have caused the death of said Smelsley. And the jury are further instructed, the law is, that vindictive damages cannot be allowed as a punishment to the defendants; still the statutes of this State expressly declare that, if the plaintiff has been injured in her means of support in the manner alleged in the declaration, and by the wrongful act of the defendants, and that by reason of such wrongful acts, she has sustained actual and real damages to her means of support, that then the jury are permitted, under the statute, in addition to such actual damages (if any such are shown), to also give the plaintiff vindictive damages, if the jury shall believe from all the circumstances, that the plaintiff ought to recover vindictive damages. But unless the plaintiff proves actual damages, then she cannot recover at all for any kind of damages. But the jury are not bound to give the plaintiff vindictive damages. And if the jury believe, from the proof and all the circumstances, that the plaintiff ought not to have vindictive damages, then the jury should not award vindictive damages." [1]

§ 2090. EXEMPLARY DAMAGES: CONFINING RECOVERY TO ACTUAL DAMAGES IN A CASE WHERE MALICE WAS NOT AVERRED.— "It is not averred in the petition that defendants acted willfully and maliciously, and unless the court [jury] shall believe from the evidence that property of plaintiff was actually injured by defendants, the finding should be for defendants; and plaintiff, if entitled to recover at all, is entitled to recover only such actual damages as the testimony shows he has sustained, if any." [2]

§ 2091. INJURY TO PASSENGER THROUGH KNOWN DRUNKEN DRIVER. EXEMPLARY DAMAGES.— "That if they believe from the evidence that Emil J. Sauer, while a passenger on defendant's stage coach was injured on account of the negligence of defendant by the employment of a known drunken driver, that they, the jury, are not confined in fixing the damages proven, but will be justified in giving exemplary damages." [3]

[1] Approved in Hackett *et al. v.* Smelsley, 77 Ill. 109, 120; citing and relying on Schneider *v.* Hosier, 21 Ohio St. 98.

[2] In Bruce *v.* Ulery, 79 Mo. 322, 325, it was held error to refuse this instruction.

[3] Approved in Sawyer *v.* Sauer, 10 Kan. 466, 470; Brewer, J., said: "In Wiley *v.* Keokuk, 6 Kan. 94, it was decided that 'whenever the elements of fraud, malice, gross negligence, or oppression mingle in the controversy, the law allows the jury to give what is called exemplary or vindictive damages.' It is needless to re-examine the question here. That decision settles the correctness of this

§ 2092. Slander.— "If, from the evidence and the instructions of the court, the jury find for the plaintiffs, then the jury are to determine from all the evidence and the circumstances as proved on the trial, what damages ought to be given to the plaintiffs, and find your verdict accordingly, but not exceeding the amount claimed. In finding the amount of damages, the jury may take into consideration the mental suffering produced, if any, by the uttering of the slanderous words, if they believe from the evidence that such suffering has been endured by the plaintiff, and the present or probable future injury, if any, to the plaintiff 's character, which the uttering of the words was calculated to inflict. If you find for the plaintiff, she will be entitled to at least nominal damages without proof of actual damages." [1] - - - - "The jury are further instructed that in actions for slander the law implies damages from the speaking of actionable words, and also that the defendant intended the injury the slander is calculated to effect, and the jury, in case they find a verdict of guilty, are to determine from all the facts and circumstances in the case, what damages ought to be given, and are not confined to mere pecuniary loss or injury." [2]

§ 2093. Another Precedent: Smart Money. — "If the jury find for the plaintiff, they will assess his damages at any amount to which they may believe from the evidence that he is entitled, not exceeding the sum of one thousand dollars. The jury, in making their verdict, may take into consideration all the facts and circumstances as detailed by the witnesses, and in estimating the damages which they may think plaintiff has sustained, may take into consideration his circumstances and the injury to his feelings, and may add thereto as compensation for the injury, smart money." [3]

§ 2094. Seduction: Action by Father. — "The jury in computing the damages suffered by plaintiff, will take into consideration, not only

instruction; for it hardly admits of doubt that the employment by a stage coach proprietor of a drunkard, and entrusting to his care the lives and limbs of passengers, is the grossest of negligence. The traveling community have a right to expect that the drivers of coaches, like the engineers of locomotives, are men, not only competent, but of sobriety; and whenever a known drunkard is placed in such positions of trust, the party so placing him should pay smartly for such reckless indifference to human life."

[1] Approved in Boldt *v.* Budwig, 19 Neb. 739, 743.

[2] Approved in Baker *v.* Young, 44 Ill. 44.

[3] Approved in Clements *v.* Maloney, 55 Mo. 352, 356.

the loss of the services of Kate Morgan by plaintiff, and the expense incurred by him by reason of her seduction, pregnancy and confinement, but will also take into consideration the anxiety and suffering of mind of plaintiff caused by the loss of the virtue of his daughter, the corrupting influence upon the morals of his other children, and the disgrace of his family, and will render their verdict accordingly." [1]

§ 2095. CRIMINAL CONVERSATION. — "Should you find for the plaintiff, the measure of damages will be the amount of actual damages sustained by reason of the plaintiff 's being deprived of the society, services, comfort of his wife, if he was so deprived of any of them, and the distress and anxiety of mind occasioned thereby, in such amount as you may think from all the evidence the plaintiff is entitled, to compensate him for such matters, to which you may add such amount of exemplary or punitive damages as you think right." [2]

§ 2096. BREACH OF PROMISE OF MARRIAGE. — "In making this assessment you are to consider the pecuniary advantage which a marriage with the defendant would have been to her. You are also to consider the personal pain and mortification, if any, which she has sustained by reason of her disappointment; and you are to allow her such sum, as in your judgment, will compensate her for her loss and injury." [3]

§ 2097. BREACH OF PROMISE OF MARRIAGE: AGGRAVATION OF DAMAGES BY ALLEGATION THAT DEFENDANT IS UNCHASTE. — "While the defendant may, in a proper case, plead and show by competent evidence, a want of chastity in the plaintiff before the cause of action arose, yet, if the defendant wantonly, with an intention to injure the plaintiff, alleges that she is unchaste, or that she has had sexual intercourse with other men, without reasonable belief or expectation that he will be able to establish the same by proof, it may be considered by the jury in aggravation of damages. But it should not be considered when the allegations are made in good faith, under circumstances which would

[1] Approved in Morgan *v.* Ross, 74 Mo. 318, 322. Citing 2 Gr. Ev., § 679; Phillips *v.* Hoyle, 4 Gray, 568; Clark *v.* Fitch, 2 Wend. (N. Y.) 461; Grable *v.* Margrave, 3 Scam. (Ill.) 372; Felkner *v.* Scarlett, 29 Ind. 154; Wilhoit *v.* Hancock, 5 Bush (Ky.), 567; Field on Dam., § 698; Rollins *v.* Chalmers, 51 Vt. 592; Badgley *v.* Decker, 44 Barb. (N. Y.) 577, 589.

[2] Approved in Wales *v.* Miner, 89 Ind. 118, 127.

[3] Approved in Royal *v.* Smith, 40 Ia. 615, 618; citing Holloway *v.* Griffith, 32 Ia. 409.

warrant a cautious attorney in the belief that they could be established by evidence on the trial." [1]

§ 2098. Seduction and Breach of Promise of Marriage. — "If you find that plaintiff was seduced and debauched by defendant, under the promise of marriage, as alleged in the complaint, you may also award her such damages as flow from the wrongful act; any loss of peace and happiness, injury from the disgrace cast upon her, any dishonor, pain or humiliation that is shown to be the result of the wrongful act." - - - - "While this is an action for damages for breach of a marriage contract, it is competent for the plaintiff to plead and show that the defendant seduced her under the promise of marriage, and if this is shown, in connection with the other allegations of the complaint, it would enhance the damage of the plaintiff, and enlarge her rights of recovery." [2]

Subdivision 2. — In Actions for Injuries to Property Rights.

Section

2101. Attachment Bond: Action Upon.
2102. [Continued.] How much Awarded for Injury to Property.
2103. Trespass and Conversion.
2104. For Injury to a Chattel, Value Admitted.
2105. Trespass by an Officer: Excluding Exemplary Damages.
2106. Trespass upon Land: Exemplary Damages.
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2108. Non-delivery by Carrier.
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2110. Action for Purchase Price of Goods: Defense, Breach of Warranty.
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2112. Non-delivery of Logs by Boom Company.
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2115. Breach of Contract to Deliver Personal Property.
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2117. Railway Negligence: Killing Domestic Animals.
2118. Breach of Warranty of Chattel.
2119. Eminent Domain: Benefits Considered: Consequential Damages Excluded.
2120. Eminent Domain: Depreciation in Market Value.
2121. Eminent Domain: Effect of Severing Land on its Value.

[1] Approved in Haymond *v.* Saucer. 84 Ind. 3, 7 (Hunter *v.* Hatfield, 68 Ind 416, distinguished).

[2] Haymond *v.* Saucer, 84 Ind. 11.

SECTION
2122. Eminent Domain: Value of Land Taken: Damages by Severing Farm, Additional Fences, etc.
2123. Eminent Domain: Assessment of Benefits.
2124. Eminent Domain: Injury to Market Value, Excluding Consequential Damages, etc.
2125. Eminent Domain: Consequential Damages, Injury to Adjacent Buildings, Danger of Destruction, etc.
2126. Eminent Domain: Actual Damage Enhanced in View of Kind of Use, Excluding Injury to Stock, Damage from Noise, Fires, Liability to Fence, Crossing, etc.
2127. Municipal Corporations: Changing Grade of Streets.

§ 2101. ATTACHMENT BOND: ACTION UPON.— "It is admitted by the defendants in this case, that they executed the bond, etc. The only thing for the jury to determine is, the amount of damages actually sustained by the plaintiff, by reason of his property having been attached. The jury will, in assessing damages, allow him for all money necessarily expended in traveling to and from his house to the place of trial, as well as expenses for hotel bills for himself while in attendance on the court defending said attachment, and a reasonable compensation for his time and attorney's fees, as they may find from the evidence, in defending said attachment; and will also allow plaintiff such damages as they may think, from the evidence, he has sustained for the loss of the use of his property, or any injury or loss of the same or any part thereof, from the time it was taken on the attachment until the attachment was dissolved.[1]

§ 2102. [CONTINUED.] HOW MUCH AWARDED FOR INJURY TO THE PROPERTY. — "The measure of damages in this case, so far as injury to the property is concerned, should be estimated by the actual injury done to the mill and machinery, by reason of carelessness and negligence and bad usage of the same by defendant Beauchamp [the attaching party], and the officers and those having charge of the same, by his or their direction, not including in the estimate any damage for natural wear and tear, or damage by the elements which were unavoidable and not the result of any fault of the defendant or those having charge of the same; together with the reasonable value of the use of said mill, machinery and property under all the facts and circumstances, and the condition in which it was, making allowance for expenses of feeding,

[1] Approved in Kelly *v.* Beauchamp, 59 Mo. 178, 179.

keeping and preserving same, and necessary repairs from the time it was attached until the attachment was dissolved." [1]

§ 2103. TRESPASS AND CONVERSION. — "If you find for the plaintiff, the measure of his damages will be the value of the goods at the time they were taken by the defendants, at the place they were taken, with seven per cent. interest on such amount from the time of conversion." [2]

§ 2104. FOR INJURY TO A CHATTEL, VALUE ADMITTED. — "That, if the jury find for plaintiff, they will assess his damages at the sum of $175, the defendant admitting that to be the value of the mule." [3]

§ 2105. TRESPASS BY AN OFFICER: EXCLUDING EXEMPLARY DAMAGES. — "The plaintiff is not entitled to exemplary damages, unless it appears from the evidence that defendants acted wantonly, maliciously, violently or oppressively, in their proceedings under said writ." [4]

§ 2106. TRESPASS UPON LAND: EXEMPLARY DAMAGES. — "If the the jury believe, from the evidence, that the plaintiff was in possession of the land described in the declaration, and had the same fenced, and that the defendant willfully and forcibly broke the fence and entered upon the said land, the jury may allow, as damages, any sum not exceeding

[1] Approved in Kelly *v.* Beauchamp, 59 Mo. 178, 179.

[2] Approved in Simpson *v.* Alexander, 35 Kan. 227. The court said: "The theory of the law is that the party whose property has been taken and converted shall receive full indemnity, citing Shepard *v.* Pratt, 16 Kan. 209; Andrews *v.* Durant, 18 N. Y. 496; Chapman *v.* Chicago &c. R. Co., 26 Wis. 295; McCormick *v.* Pennsylvania &c. R. Co., 49 N. Y. 303; Hamer *v.* Hathaway, 33 Cal. 117; 1 Sutherland on Dam. 174. For another instruction (approved but not recommended) in an action for the destruction of a crop by trespassing animals, see Gripton *v.* Thompson, 32 Kan. 367, 371.

[3] Approved in Halferty *v.* Wabash &c. R. Co., 82 Mo. 90, 96.

[4] In Bruce *v.* Ulery, 79 Mo. 322, 326, the court held it error to refuse this instruction, — citing Franz *v.* Hilterbrand, 45 Mo. 121; Engle *v.* Jones, 51 Mo. 316; Seibel *v.* Siemon, 72 Mo. 526, 531; Morgan *v.* Durfee, 69 Mo. 469. The court also approved the proposition laid down in Burton *v.* Fulton, 49 Pa. St. 151 that: "Public officers acting within the scope of their authority are not answerable in damages for their acts, unless done maliciously." The application of this proposition to the case in judgment was, that the action was for alleged trespass, committed by a constable and a private person assisting him, in making a search for a deed under a writ of replevin.

the amount sued for, even though the sum allowed may exceed the amount of damages actually proven, provided the entry was not for the purpose of building a railroad or its fixtures, if it had proper authority to build and operate such railroad." [1]

§ 2107. OTHER PRECEDENTS ON THE SAME SUBJECT.—"That if they believe from the evidence that the defendants entered the premises of the plaintiff, and willfully injured and damaged the personal property of the plaintiff therein, the jury, in assessing the plaintiff's damages, are not confined to the actual injury to the property, but, in addition to the actual damages, may assess such exemplary damages as they may, in their discretion, deem just." [2] - - - - "If the jury believe, from the evidence, that a trespass in this case, was committed by the defendant, or his servants by his direction, in a wanton, insulting, willful and reckless manner, the jury are authorized to find exemplary or punitive damages, that is, such damages as will compensate the plaintiff for any wrong to her, and to punish the defendant, and to furnish an example to deter others from like practices." [3]

§ 2108. NON-DELIVERY BY CARRIER. — "If the jury find for the plaintiffs, they are instructed that the measure of damages to be allowed the plaintiffs is the value of the grain at Kansas City at the time the grain should have arrived, with interest at six per cent. from said time, after deducting freight and other expenses of transportation." [4]

§ 2109. REPLEVIN BY PLEDGOR WHERE DEBT TENDERED AND REFUSED. — "If you find for the plaintiff, you will assess the damages plaintiff has

[1] Approved in Indianapolis &c. R. Co. *v.* Cobb, 68 Ill. 64; citing Ously *v.* Hardin, 23 Ill. 404; Best *v.* Allen, 30 Ill. 34; Farwell *v.* Warren, 51 Ill. 468.

[2] Approved in Best *v.* Allen, 30 Ill. 31, 32.

[3] Approved in Cutler *v.* Smith, 57 Ill. 256. In approving this instruction the court said: "This instruction states a correct and undeniable principle of law; one that has long been recognized and enforced. It is based upon sound policy. The experience of past ages demonstrates a tendency on the part of many, in every community, to take the law into their own hands, and to oppress, insult and abuse others, even in pursuing their rights. And inasmuch as such conduct is not indictable, the law has, for the repose of society, authorized the jury to give exemplary damages, where a trespass is wanton, willful or malicious, or where it is accompanied with such acts of indignity as to show a reckless disregard of the rights of others, as a punishment for the wrong, and to deter others from the perpetration of such acts."

[4] Approved in Kirkpatrick *v.* Kansas City &c. R. Co., 86 Mo. 341, 343.

sustained, according to the evidence, by reason of its detention since the time the tender was made, if any, and for any injuries thereto, if any are shown by the evidence, and you will also find the value of said property, and state it in your verdict." [1]

§ 2110. Action for Purchase Price of Goods: Defense, Breach of Warranty. — "The jury are instructed that the true measure of damages (if you find such damages) is the difference between the value which the furniture sold would have had at the time of the sale and delivery in Denver, if it had been such as corresponded with the guaranty, and its actual value, with the defects shown in the quality, kind of material and finish of the furniture, if you find such defects, and the sum when so found by you (if you shall find any), you shall deduct from the contract price, in making up your verdict." [2]

§ 2111. In Actions for Real Estate Brokers' Commissions. — If you find for plaintiff, then he is entitled to recover such sum as you believe, from the evidence, his services were reasonably worth, according to the usual or customary mode of charging for such services, among real estate agents, at the time and place such services were rendered, together with interest on such sum, at the rate of seven per cent per annum from the time the same was done." [3]

§ 2112. Non-delivery of Logs by Boom Company. — "If the defendants wanted their logs to manufacture into lumber, and had the facilities for doing so, and depended upon getting their logs for that purpose, and did not have other logs, and could not get a sufficient supply from other sources to manufacture, and these facts were known to the plaintiff when notified to turn them over the falls, then, if the plaintiff was in fault in not delivering the logs, and defendant could have manufactured them if delivered, the defendants are entitled to damages, to the difference between the market value of the manufactured lumber from the logs at defendant's mills and the market value of the logs in plaintiff's boom at the time they should have been turned out, adding thereto the cost of manufacturing the same into lumber,

[1] Approved in Ingle *v.* Mudd, 86 Mo. 216, 217.

[2] Approved in Smith *v.* Mayer, 3 Colo. 209. Citing Sedgw. Dam. 286* 291*; Benj. on Sales, § 903, *n. d.*

[3] Approved in Lansing *v.* Johnson, 18 Neb. 175. Citing 2 Sutherland on Dam. 451; Ham *v.* Goodrich, 37 N. H. 185.

and the boom charges, and the cost of getting the logs to defendant's mill if they had been duly turned out." [1]

§ 2113. For Injury to Property in Hands of Common Carrier. — "Where property is injured by a common carrier, by reason of the negligence of the carrier, the rule of damages is, the difference between the value of the property as delivered at the time and place of the delivery and the value at the same place at the time and in the condition that such property should have been delivered; and this will be the rule, notwithstanding the fact that the shipping contract may contain a clause stating that the value of the property does not exceed a certain sum. But in the present case the damages cannot, in any event, exceed the sum of $300, which is the amount claimed in the petition." [2]

§ 2114. Another Precedent: Excluding Damages for Loss of Use. — "The court instructs the jury that no damages can be recovered by the plaintiff in this action, except such damages as should either be, fairly and substantially considered, as arising naturally — that is, according to the usual course of things — from the breach of the contract entered into by the defendant to safely carry the jack from Burlington to Monmouth, or such damages as may reasonably be supposed to have been in contemplation of both parties at the time they made the contract, as the probable result of the breach of it. Therefore, if the jury believe, from the evidence, that the jack in controversy was shipped from Burlington to Monmouth on a contract made between plaintiff or its agent, and defendant or an agent of defendant, and that at the time such contract was made, nothing was said or done to cause the defendant or its agent to know the purpose for which said jack was being shipped, then and in that case, no damages could be recovered from the defendant in this action for loss of the use of the jack during any portion of time for breeding purposes." [3]

§ 2115. Action for Breach of Contract to Deliver Personal Property. — "In an action for breach of an executory contract to deliver personal property, in the absence of fraud or stipulation to the contrary, the rule is actual compensation. The injured party may re-

[1] Approved in Mississippi &c. Boom Co. *v.* Prince, 34 Minn. 71, 75.

[2] Approved in Kansas City, &c. R. Co. *v.* Simpson, 30 Kan. 645, 648, 649.

[3] Approved in Chicago &c. R Co. *v.* Hale, 83 Ill. 361, 362.

cover his loss sustained. In such case, if the value of the property sold has advanced, the damage is the difference between the contract price and market price at the time and place of delivery, and in case of payment by the buyer of all or part of the purchase price, he is entitled to such difference between the contract and market prices, in addition to the sum paid on the contract and seven per cent. interest on the sum paid on the contract from the breach thereof." [1]

§ 2116. Another Precedent. — "If the jury should believe, from the evidence, that said defendant unconditionally bargained with said plaintiffs on the 13th day of January, 1871, for the delivery to them on Saturday, the following day, at Pecatonica, his, the said defendant's, twelve fat hogs, and that the defendant without any legal excuse therefor, failed to deliver the same at the time and place agreed upon, then the measure of damages would be the difference between the contract price and the fair market value of said hogs at said Pecatonica on said Saturday." [2]

§ 2117. Railway Negligence: Killing Domestic Animals. — "The measure of damages in the event of recovery, is actual market value of the hogs killed, including any depreciation in the market value on account of injuries inflicted by defendant's locomotive and machinery." [3]

§ 2118. Breach of Warranty of Chattel. — "If, at the time the trade was made, the defendant, or the agent of the defendant, acting by the authority of the defendant, warranted the horse that the plaintiff got to be sound, when the horse was unsound at the time of such warranty, then the plaintiff is entitled to recover, and the measure of damages should be the difference between the value of the horse as he then was, and what his value would have been if he had been sound." [4]

§ 2119. Eminent Domain: Benefits Considered: Consequential Damages Excluded. — "The jury are instructed that, from all the facts and circumstances of this case, it is for you to determine what, if any, damages the said Waldo sustained by reason of the appropriation

[1] Approved in Post *v.* Garrow, 18 Neb. 682, 687, 688.

[2] Approved in Kitzinger *v.* Sanborn, 70 Ill. 146, 149.

[3] Approved in Hudson *v.* St. Louis &c. R. Co., 53 Mo. 525, 532.

[4] Approved in Wallace *v.* Wren, 32 Ill. 147; distinguishing Crabtree *v.* Kile, 21 Ill. 180.

of a part of his said lands for a railroad. And such damages are to be his actual damages to said lands through which the road is located, estimated at the time of taking the same; and such inconveniences, if any, as are common to other persons and lands in the same neighborhood are not to be taken into such estimate; and if, from the evidence, you believe that a part of Waldo's lands, over which the road is located, are wet, low or swampy lands, and that by reason of the location of the railroad over the same, the same or a part were drained or thereby made more valuable, then such advantages should be taken into consideration and in diminution of the damages to be awarded. - - - - The court instructs the jury that in estimating the amount of damages, if any, to be awarded by them to the defendant, Waldo, they will not consider such inconveniences to him as are the consequence of the lawful and proper use of the plaintiff's railway and are common to the other landowners in the neighborhood, portions of whose lands are not taken, such as the blowing of whistles, the noise of trains and the liability of either to frighten farm animals and the like. - - - - In estimating the damages to the land in controversy, the jury will consider the quantity and value of the land taken by the railroad company for a right of way, and the damages to the whole tract by reason of the road running through it, and deduct from these amounts the benefits, if any, peculiar to the said tract of land, arising from the running of the road through the same. And by peculiar benefits to that land is meant such benefits as that land derives from the location of the road through it as are not common to the other land in the same neighborhood." [1]

§ 2120. Eminent Domain: Depreciation in Market Value. — "The interruption of plaintiff in the use and cultivation of his land, or any inconvenience he may have been put to in its cultivation and use as a live stock farm, or otherwise, according to his peculiar taste in farming, since the appropriation of the right of way, if any, cannot be considered by the jury in forming the elements of damages in his favor, and your inquiry must be confined to the market value of plaintiff's land before and after the right of way was appropriated, taking into the account, in this connection, the number of acres taken for right of way, the manner of its location, the way his land is cut by the railroad and the like; so as to be able to estimate the true market value of the land,

[1] Approved in Wyandotte &c. R. Co. *v.* Waldo, 70 Mo. 629, 631. Citing and relying upon Quincy &c. R. Co. *v.* Ridge, 57 Mo. 601; Pacific R. Co. *v.* Chrystal, 25 Mo. 544; Lee *v.* Tebo &c. R. Co., 53 Mo. 178.

affected by the location of the railroad before and after such location, the difference in the market value of the land affected by the appropriation of the strip for right of way before, and then again after, the right of way is asserted, will form or constitute his true measure of damages. - - - - Nevertheless, if you find from the evidence that the plaintiff's farm consisted of near five hundred acres of improved lands, and the right of way of defendant cut the same in such a manner as to injure the value of the same by throwing it open and dividing into pieces, you are at liberty to consider all the circumstances and effects upon the lands and lots, if any, by reason of the location upon the lands of the railroad, and all the inconveniences directly caused by the railway, in determining the effect the same would have upon the market value of the lands; and it is the depreciation in market value of the premises which is the true measure of damages, and which you are to allow for, and not the matters which would cause such depreciation." [1]

§ 2121. Eminent Domain: Effect of Severing Land on its Value. — "If the jury find from the evidence, that the part of the lot proposed to be taken in this case is of greater value when considered as a part of the entire lot than it would be as a separate and distinct piece of property entirely disconnected from the residue of the lot, then the jury, in order to make the owner of the lot just compensation for the part of the lot taken, may allow to him the fair cash or market value of the part of the lot taken, when considered in its relations to and as a part of the entire lot, and not simply what may appear to be its value as a separate and distinct piece of property entirely disconnected from the residue of the lot." [2]

§ 2122. Eminent Domain: Value of Land Taken: Damage by Severing Farm, Additional Fencing, etc. — "One item of damage to which the defendant is entitled is the value of the land actually appropriated and taken by the company; and you may add to this any injury to the residue of the land from which it is taken, naturally resulting from the appropriation and construction and operation of the road thereon, such as cutting the fields into an inconvenient and ill shape and destroying means of communication between one portion and another, as the company is under no legal obligation to afford the defendant any crossing other than highway crossings, and is entitled to the exclusive possession

[1] Approved in Hartshorn v. Burlington &c., 52 Ia. 613, 616, 617.

[2] Approved in Chicago &c. R. Co. v Blake, 116 Ill. 168.

of the strip of land over which the right of way has been obtained. - - - - You may also consider as damages any additional amount of fencing necessary to a safe and proper use of the defendant's improved farm or fields already enclosed, as the law does not impose on the company any obligation to fence their right of way, except so far as they may choose to do so for the protection of their own interests, the law simply imposing on them the obligation to pay for animals killed by them on their track, where it is not, but might be securely fenced." [1]

§ 2123. EMINENT DOMAIN: ASSESSMENT OF BENEFITS. — "The court instructs the jury for the defendant, that in estimating the benefits to the claimant from the construction and use of said railroad, it is not proper for them to take into consideration such benefits as are sustained by claimant, in common with owners of land adjacent, through which the said road does not run; but only such as result to the claimant over and above such common benefit." [2] - - - - "In estimating the damages to the land in controversy, the jury will consider the quantity and value of the land taken by the railroad company for a right of way and the damages to the whole track by reason of the road running through it; and deduct from these amounts the benefits, if any, peculiar to the said tract of land, arising from the running of the road, through the same. And by peculiar benefit to that land, is meant, such benefits as that land derives from the location of the road through it, as are not common to the other lands in the same neighborhood." [3]

§ 2124. EMINENT DOMAIN: INJURY TO MARKET VALUE, EXCLUDING CONSEQUENTIAL DAMAGES, ETC. — "You are not to consider the land as an entire tract, but merely as the commissioners themselves looked upon it as they went upon the several tracks and determined the amount they were injured. The railroad company does not agree to increase

[1] Approved in Baltimore &c. R. Co. *v.* Lansing, 52 Ind. 229, 232, 233. The court said: "It is settled in this State that damages may be given for cutting fields into inconvenient shapes, destroying the convenience and advantages of water for stock to a portion of the farm, and rendering an additional amount of fencing necessary to a safe and proper use thereof. Whitewater Valley R. Co. *v.* McClure, 29 Ind. 536; Montmorency &c. R. Co. *v.* Rock, 41 Ind. 263; Montmorency &c. R. Co. *v.* Stockton, 43 Ind. 328; Logansport *v.* McMillen, 49 Ind. 493; Grand Rapids &c. R. Co. *v.* Horn, 41 Ind. 479."

[2] Approved in Railroad Co. *v.* Black, 58 Ill. 34, distinguishing Railroad Co. *v.* Carpenter, 14 Ill. 190.

[3] Approved in Quincy &c. R. Co. *v.* Ridge, 57 Mo. 599, 601.

the plaintiff's land in value, but does agree to compensate for any injury or depreciation, and they (the commissioners) take the value as it was the moment before the right of way was appropriated, and then how much it is depreciated or injured, upon the same market. In determining this you have a right to look at all matters that injure or deteriorate the value of the premises in market. In doing this you can, of course, look at the manner in which the road runs through the several tracts or quarter sections. How does it divide the tracts into regular or irregular, salable or unsalable portions? And how the aggregate of these pieces compared with the appraised value of the whole tract? You are not to allow consequential or speculative damages to the plaintiff, as the necessity to build fences that may never be required, or for any other purpose not certain. The damages that you can consider are actual damages, not imaginary; such as affect the value of the premises in the market, and such as are established by proof." [1]

§ 2125. Eminent Domain: Consequential Damages: Injury to adjacent Buildings: Danger of Destruction, etc.—"The question for you to determine is what injury to the premises of the plaintiff as they were at the time of the taking them from the road, is caused by such taking. The buildings of the appellant may be reduced in value by the contiguity of the road and the use of engines upon it. Her buildings and lands before adapted and used for particular purposes, may from the same cause, become less fitted for such purposes. The owner may, be incommoded by high embankments or deep excavations on the line of the road, her buildings subjected to greater hazard from fire, her household to injury or destruction, unless guarded with more than ordinary care." [2]

§ 2126. Eminent Domain: Actual Damage Enhanced in View of Kind of Use, Excluding Injury to Stock, Damage from Noise, Fires, Liability to Fence, Crossing, etc. —"In securing the owner of the land just compensation for taking a right of way through the same, the jury should give in addition to the actual value of the land taken, a further indemnity for damages resulting from the use to which the land taken is to be applied, this is if the balance of the tract is damaged. - - - - The jury are instructed that in estimating the damages due the plaintiff for right of way appropriated by the railroad company,

[1] Approved in Atchison &c. R. Co. v. Blackshire, 10 Kan. 477, 488.

[2] Approved in Curtis v. St. Paul &c. R. Co., 20 Minn 28, 38.

you will not allow anything for the noise and confusion incident to the operation of trains, nor any damages that may arise by reason of the negligent or the improper construction or management of the road. - - - - The jury will not allow any damages that arise or may arise from fires set out by the engines on the road, nor for the danger to stock and children or persons, or damages that may arise by injury to stock, property or persons. - - - - The plaintiff being the owner of lands on both sides of the track, is entitled, upon proper application, to have a good and sufficient roadway crossing. Whether such crossing has or has, not been made, is not to be considered by you in this case, and no damages can be allowed by you for the want of crossing or for its insufficiency. That is a question that cannot be determined in the award of damages for right of way as in the present case." [1]

§ 2127. Municipal Corporations: Changing Grade of Streets.— "In determining the market value of the property before the change, if any you find, you will carefully weigh all the evidence introduced as to that subject, the location of the property, its surroundings and desirability and situation as to grade before the changes and when you have done this in the light of what you yourselves have seen, fix its market value before the change of grade. - - - - "You will then as carefully weigh the evidence in the light of your inspection of the premises as it is after the change in grade of streets, and in doing so you will consider what it will cost to raise the improvement, if anything, and all the facts and circumstances given in evidence, and from this proof fix the market value of the property after the change in grade. The difference between these sums, if in favor of the plaintiffs, is the true measure of damages." [2]

[1] Approved in Railroad Co. *v.* Lam, 15 Neb. 234, 241, 242.

[2] Approved in Thompson *v.* Keokuk, 61 Iowa, 187, 189.

CHAPTER LX.

OF THE POWER OF JURIES AS JUDGES OF THE LAW.

SECTION
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2147. Charge of Mr. Justice Field on the Trial of Greathouse.
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2149. No Power to Direct a Verdict of Guilty.

§ **2132. Preliminary.** — This subject has already been considered in connection with the inquiry whether and to what extent counsel are permitted to argue questions of law to the jury and to read to them from books of the law;[1] and what is there said will not be here repeated. The second branch of inquiry there suggested will now be taken up, namely, What instructions shall the court give to the jury touching their authority as judges of the law? Again reminding the reader that in civil actions, as a general rule, the jury are not judges of the law in any sense, but are bound to follow the instructions of the court,[2] we now proceed to inquire what the rule is, —

[1] *Ante*, § 940, *et seq.*

[2] *Ante*, § 941.

§ **2133. In Criminal Cases.** — Although the question to what extent juries are judges of the law in criminal cases and in actions for defamation of character has drawn forth a great deal of casuistic discussion,[1] it is believed to be a question of extreme simplicity. The result of the modern doctrine on the subject is that juries are not judges of the law in criminal cases or in actions for defamation in any proper sense. They have not the power to decide any question of law which incidentally arises in the course of such a trial. The judge is bound, *ex officio*, to decide all questions of law; the proper office of the jury is to decide questions of fact.[2] The judge is bound, when called upon by a party so to do, to instruct them upon the questions of law presented by the facts in evidence before them.[3] In so instructing them he does not merely submit to them his opinion of the saw for their revision and correction.[4] Though there is a difference of opinion upon the question, it has been held, in a modern

[1] Hargrave's Notes, 1 Inst. 155 *b*; Montee *v.* Commonwealth, 3 J. J. Marsh. (Ky.) 132, 149; Montgomery *v.* State, 11 Ohio, 424, 427; views of Mr. Justice Story, in United States *v.* Battiste, 2 Sumn. (U. S.) 240, 243; of Mr. Justice Campbell, in Hamilton *v.* People, 29 Mich. 173, 189; of Chief Justice Parsons, in Coffin *v.* Coffin, 4 Mass. 2, 25; of President Addison, in Pennsylvania *v.* Bell, Add. (Pa.) 156, 160; of Mr. Justice Putnam, in Commonwealth *v.* Knapp, 10 Pick. (Mass.) 477, 496; of Mr. Justice Samuel Chase, in his defense on the trial of his impeachment, 1 Chase Tr. 34; of Chief Justice Vaughan, in Bushell's Case, Vaugh. 135, 143; of Mr. Chief Justice Lewis in People *v.* Croswell, 3 Johns. Cas. (N. Y.) 337, which was a criminal prosecution for libeling Thomas Jefferson, President of the United States; opinion of Mr. Justice Kent in the same case, *Ibid.* Devizes *v.* Clark, 3 Ad. & El. 506; Mosley *v.* Walker, 7 Barn. & Cres. 53, 56; Macclesfield *v.* Pedley, 4 Barn. & Ad. 403; Fuller's Case, 14 How. St. Tr. 517 [case 422], (*anno* 1702); Rex *v.* Owens, 18 How. St. Tr. 1203, case 525 (*anno* 1752); Francklin's Case, 17 How. St. Tr. 625, [case 489; *anno* 1731]; Rex *v.* Wilkes, 4 Burr. 2527 (*anno* 1764, 1770); Rex *v.* Woodfall, 5 Burr. 2661; Rex *v.* Withers, 3 T. R. 428; Com. *v.* Porter, 10 Metc. (Mass.) 263, 283.

[2] Co. Litt. 155, 156; Fost. Cr. L. 255, 256.

[3] Coffin *v.* Coffin, 4 Mass. 2, 25; Montee *v.* Commonwealth, 3 J. J. Marsh. (Ky.) 132, 149; Montgomery *v.* State, 11 Ohio St. 424, 427; Nels *v.* State, 2 Tex. 280; Commonwealth *v.* Porter, 10 Metc. (Mass.) 263. In Missouri he is bound to do it without request. State *v.* Matthews, 20 Mo. 55; State *v.* Stonum, 62 Mo. 596; *post*, § 2347.

[4] Hamilton *v.* People, 29 Mich. 173, 193.

and very ably reasoned case, that it is error to instruct them, in a prosecution for felony, that they are the exclusive and paramount judges of all questions of law arising in the case.[1] It is error, both in civil and criminal cases, for the court, in instructing them, to submit questions of law to them for their decision.[2] They have no right to undertake, in the jury-room, an independent investigation of the law of the case,[3] and it is error to allow them to take books of the law — even the statute-book of the State — to their room for that purpose when they retire for deliberation.[4] Aside from this, it is familiar law that the court must rule authoritatively upon every question of law which incidentally arises in the course of every trial, civil or criminal, including questions touching the admissibility of evidence,[5] the construction of the pleadings,[6] the legal sufficiency of the evi-

[1] Hamilton *v.* People, 29 Mich. 173, 189. *Contra*, that the court is bound to give such an instruction upon request: State *v.* Snow, 18 Me. 346, 348; Warren *v.* State, 4 Blackf. (Ind.) 150.

[2] United States *v.* Carlton, 1 Gall. (U. S.) 400; Fugate *v.* Carter, 6 Mo. 267, 273; Hickey *v.* Ryan, 15 Mo. 63, 67; Thomas *v.* Thomas, 15 B. Mon. (Ky.) 178; *ante*, § 1017.

[3] Harrison *v.* Hance, 37 Mo. 185; Merrill *v.* Nary, 10 Allen (Mass.), 416; State *v.* Smith, 6 R. I. 33; Newkirk *v.* State, 27 Ind. 1; *post*, § 2605.

[4] State *v.* Kimball, 50 Me. 409, 418; Harrison *v.* Hance, 37 Mo. 185 (overruling, in part, Hardy *v.* State, 7 Mo. 607); Merrill *v.* Nary, 10 Allen (Mass.), 416; Burrows *v.* Unwin, 3 Car. & P. 310; *post*, § 2586. But circumstances may exist under which the fact that the jury have had books of the law in their room will not afford ground for a new trial. State *v.* Hopper, 71 Mo. 425; Gandolfo *v.* State, 11 Ohio St. 114, 118; People *v.* Gaffney, 14 Abb. (N. Y.) Pr. (N. S.) 37. Compare Wilson *v.* People, 4 Park. Cr. (N. Y.) 619, 632. *Contra*, if taken out secretly: State *v.* Smith, 6 R. I. 33; People *v.* Hartung, 4 Park. (N. Y.) Cr. 256; Newkirk *v.* State, 27 Ind. 1.

[5] Opinion of the twelve judges, Rex *v.* Atwood, 2 Leach C. C. 522; Robinson *v.* Ferry, 11 Conn. 460; Carter *v.* Bennett, 6 Fla. 214; Scott *v.* Coxe, 20 Ala. 294; Garton *v.* Hadsell, 9 Cush. (Mass.) 508; Claytor *v.* Anthony, 6 Rand. (Va.) 285; Carrico *v.* McGee, 1 Dana (Ky.), 6; Campbell *v.* State, 23 Ala. 45, 75. The jury cannot reject testimony admitted by the court, although they may disbelieve it, and the court should so instruct them. Commonwealth *v.* Knapp, 10 Pick. (Mass.) 477, 496. And it is error to submit such questions to the jury. Robinson *v.* Ferry, *supra*; Ratliff *v.* Huntley, 5 Ired. (N. C.) L. 545; Thomason *v.* Odum, 31 Ala. 108; Degraffenreid *v.* Thomas, 14 Ala. 681; *ante*, §§ 318, 1023.

[6] Dasler *v.* Wisley, 32 Mo. 489; Missouri Coal and Oil Co. *v.* Hannibal &c. R. Co., 35 Mo. 84; *post*, § ; *ante*, § 1027.

dence,[1] the legal effect of the evidence,[2] the construction of written instruments,[3] the construction of written laws,[4] of foreign laws,[5] the definition of words and phrases,[6] and the like. The jury cannot *reject* testimony, but they may *disbelieve* it.[7] The court has power (considered as mere power) to direct the jury what verdict to render in every civil case, and they will be obliged to obey the direction;[8] and it has like power to direct a verdict for the defendant in every criminal case. On the other hand, the only power possessed by the jury to judge of the law is the incidental power which accrues to them from the abolishment of special verdicts and the establishment of the principle which allows them to resolve, by a general verdict of guilty or not guilty, all questions, both of law and of fact, involved in the trial.[9] But even here there is this limitation upon their power: that if, in a criminal case, they return a verdict of guilty, contrary to the instructions of the court or to the opinion of the court upon the weight of the evidence, the court possesses the power to set it aside and to grant a new trial. The single respect, then, in which this incidental power of the jury to judge of the law is absolute lies in the fact that they may, if they see fit, contrary to their moral duty and the obligations of their oaths, disregard the evidence before them and the law as ex-

[1] Cole *v.* Hebb, 7 Gill & J. (Md.) 20; Tyson *v.* Rickard, 3 Har. & J. (Md.) 109, 116; Davis *v.* Davis, 7 Harr. & J. (Md.) 36; Clarke *v.* Marriott, 9 Gill (Md.), 331, 334; *post*, § 2204.

[2] Harris *v.* Woody, 9 Mo. 113; *post*, § 2244.

[3] United States *v.* Shaw, 1 Cliff. (U. S.) 317; Goddard *v.* Foster, 17 Wall. (U. S.) 123; State *v.* Delong, 12 Iowa, 453; *ante*, § 1065, *et seq.*

[4] Carleton *v.* People, 10 Mich. 250; Barnes *v.* Mayor of Mobile, 19 Ala. 707; Fairbanks *v.* Woodhouse, 6 Cal. 433; Peoria *v.* Calhoun, 29 Ill. 320; *ante*, § 1050.

[5] Cecil Bank *v.* Barry, 20 Md. 287, 295; Consequa *v.* Willings, Pet. (U. S.) C. C. 225; Charlotte *v.* Chouteau, 33 Mo. 194; Livingston *v.* Maryland Ins. Co., 6 Cranch (U. S.), 280; Bowditch *v.* Soltyk, 99 Mass. 136; Kline *v.* Baker, 99 Mass. 253; *ante*, § 1054.

[6] Homer *v.* Taunton, 5 Hurl. & N. 661, 667; Hoare *v.* Silverlock, 12 Ad. & El. (N. S.) 624; Barnett *v.* Allen, 3 Hurl. & N. 376; *ante*, § 1075.

[7] Com. *v.* Knapp, 10 Pick. (Mass.) 477, 496; Rex *v.* Atwood, 2 Leach C. C. 322.

[8] *Post*, § 2242, *et seq.*

[9] Bushell's Case, Vaugh. 135; Devizes *v.* Clark, 3 Ad. & El. 506. Compare Mosley *v.* Walker, 7 Barn. & C. 53, 56; Macclesfield *v.* Pedley, 4 Barn. & Ad. 403.

pounded to them by the court, and return a verdict of not guilty in a criminal case; in which case the law, on principles of public policy and humanity, to prevent the citizen from being vexed by successive prosecutions instituted against him by the government, withholds from the court the power to set their verdict aside, or to bring the accused again to trial upon the same charge, or to subject the jury to punishment. This power, instead of being called a power to judge of the law, should rather be regarded as a power to *set aside the law* in a given instance; and it is believed that the popular affection for the system of trial by jury lies largely in the fact that this system involves a popular prohibition upon the execution of the law in hard cases.[1] This does not constitute them judges of the law in a direct sense; but, on the other hand, the prevailing doctrine is that they are bound, even in criminal trials, to follow and apply the law as laid down by the court, and that the court is not bound to instruct them that they have the power to disregard the law as thus laid down.[2]

[1] In Texas the question is settled by the following judicious statute: "The jury are the exclusive judges of the fact in every criminal case, but not of the law in any case. They are bound to receive the law from the court, and to be governed thereby." Texas Code Crim. Pro., art. 676.

[2] Com. *v.* Anthes, 5 Gray (Mass.), 185; Com. *v.* Rock, 10 Gray (Mass.), 4; Pierce *v.* State, 13 N. H. 536; Robbins *v.* State, 8 Oh. St. 131; Batre *v.* State, 18 Ala. 119 State *v.* Drawdy, 14 Rich. L. (S. C.) 87; Duffy *v.* People, 26 N. Y. 588; United States *v.* Morris, 1 Curt. C. C. (U. S.) 23; Montgomery *v.* State, 11 Oh. 424, 427; Hamilton *v.* People, 29 Mich. 173, 189; Pennsylvania *v.* Bell, Add. (Pa.) 156, 160; Georgia *v.* Brailford, 3 Dall. (U. S.) 1, 4, opinion by Jay, C. J.; Washington *v.* State, 63 Ala. 135; *s. c.* 35 Am. Rep. 8; Sweeney *v.* State, 35 Ark. 586; Pleasant *v.* State, 13 Ark. 360. Mr. Hargrave makes the following observations upon this subject: "Upon the whole, the result is that the immediate and direct right of deciding upon questions of law is entrusted to the judges; that in a jury, it is only incidental; that, in the exercise of this incidental right, the latter are not only placed under the superintendence of the former, but are in some degree controllable by them; and therefore that in all points of law arising on a trial juries ought to show the most respectful deference to the advice and recommendations of judges; nor is it any small merit in this arrangement that, in consequence of it, every person accused of a crime is enabled, by the general plea of not guilty, to have the benefit of a trial in which the judge and jury are a check upon each other." Hargrave's Notes, 1 Inst.

§ 2134. **Impolicy of the Doctrine that Juries are Judges of the Law.** — The evil consequences which will flow from educating juries in the idea that they are judges of the law in a sense which places their judgment above that of the court, and which makes the decisions of the court mere incidental aids or helps to them in making up their judgment upon the law, must be apparent upon the slightest reflection. It was well said, in an early and

155, b. In 1641 the following, among other questions, was propounded by the Irish Parliament, to the judges of that country: "Whether the judge or jurors ought to be judge of the matters of fact." To which the judges replied that, "Although the jurors be the sole judges of matters of fact, yet the judges of the court are judges of the validity of the evidence, and of the matters of law arising out of the same, wherein the jury ought to be guided by them." Nalson's Collection of State Papers, 575, 582 (Lond. 1683.) The present constitution of *Georgia* declares that "the jury in all criminal cases shall be the judges of the law and the facts." Const. Ga., Art. I, § 2, par. I; Ga. Code 1882, § 5019. This provision is the same as that contained in the Penal Code of Georgia of 1833. Under the provision of the Penal Code, it was uniformly ruled that the jury had power to determine the law different from that given them in charge by the judge. Holder *v.* State, 5 Ga. 441; Berry *v.* State, 10 Ga. 511; Keener *v.* State, 18 Ga. 194; McPherson *v.* State, 22 Ga. 478; Dickens *v.* State, 30 Ga. 383. This view was departed from in 1871, when the Supreme Court of that State sustained a charge to the jury in a criminal case which told them "that they were the judges of the law and the facts, so as to enable them to apply the law to the facts, and bring in a general verdict; but that they had no right to make law; the law was laid down in the Code; it was the province of the court to construe the law and give it in charge, and of the jury to take the law as given, apply it to the facts as found by them, and bring in a general verdict;" and also refused to reverse a conviction where the trial court declined to charge the jury "that the jury are judges of the law and facts, and are not bound to take the law from the court, if, having given the law so charged due weight and consideration, you cannot in your consciences bring your judgment to accept the law as given to you in charge by the court." Anderson *v.* State, 42 Ga. 9, 32, 34. The opinion contained no discussion of the question. This ruling was reaffirmed in 1880 (Hill *v.* State, 64 Ga. 454) and again in 1885 (Ridenhauer *v.* State, 75 Ga. 382; Danforth *v.* State, 75 Ga. 614), — the court now holding that the previous decisions, having been pronounced by a unanimous court, were the law of the court, although two of the three judges were in favor of returning to the earlier conception. Under the present rule, it is therefore not error for the judge to refuse to charge the jury that they are judges of the law, or to charge them that they must take the law from the court. Ridenhauer *v.* State, 75 Ga. 382; Danforth *v.* State, 75 Ga. 614.

leading case in Kentucky: "If the court had no right to decide the law, error, confusion, uncertainty and licentiousness would characterize the criminal trials, and the safety of the accused might be as much endangered as the stability of public justice certainly would be."[1] It was well said by Mr. Justice Story, in discussing this question: "If the jury were at liberty to settle the law for themselves, the effect would be, not only that the law itself would be most uncertain, from the different views which juries might take of it, but, in case of error, there would be no remedy or redress of the injured party; for the court would not have any right to review the law as it had been settled by the jury. Indeed, it would be almost impracticable to ascertain what the law, as settled by the jury, actually was. On the contrary, if the court should err in laying down the law to the jury, there is an adequate remedy for the injured party, by a motion for a new trial or a writ of error, as the nature of the jurisdiction of the particular court may require. Every person accused as a criminal has a right to be tried according to the law of the land — the fixed law of the land — and not by the law as a jury may understand it, or choose, from wantonness or ignorance or accidental mistake, to interpret it. If I thought that the jury were the proper judges of the law in criminal cases, I would hold it my duty to abstain from the responsibility of stating the law to them upon any such trial. But believing as I do, that every citizen has a right to be tried by the law and according to the law — that it is his privilege and truest shield against oppression and wrong — I feel it my duty to state my views fully and openly on the present occasion."[2] In like manner it was said by Mr. Justice Campbell, in giving the opinion of the Supreme Court of Michigan: "It is necessary for public and private safety that the law shall be known and certain, and shall not depend on each jury that tries a cause; and the interpretation of the law can have no permanency and uniformity, and cannot become generally known, except through the action of the courts. * * * If the court is to have no voice in laying down these rules,

[1] Montee *v.* Commonwealth, 3 J. J. Marsh. (Ky.) 132, 151.

[2] United States *v.* Battiste, 2 Sumn. (U. S.) 240, 243.

it is obvious that there can be no security whatever, either that the innocent may not be condemned or that society will have any defense against the guilty. A jury may disregard a statute just as freely as any other rule. A fair trial in time of excitement would be almost impossible. All the mischief of *ex post facto* laws would be done by tribunals and authorities wholly irresponsible, and there would be no method of enforcing with effect many of our most important constitutional and legal safeguards against injustice. Parties charged with crime need the protection of the laws aginst unjust convictions quite as often as the public needs it against groundless acquittals. Neither can be safe without having the rules of law defined and preserved, and beyond the mere discretion of any one." [1] "The laws," said Mr. President Addison, "must operate by certain rules, not by the casual feelings of jurors, and jurors must judge of the facts according to certain rules of law. For miserable would be our situation if our lives depended not on fixed rules, but on the feelings which might happen to be excited in the jurors who were to try us. If, in the case of one man, compassion pervert the construction of the law to acquit, in the case of another resentment may pervert it to condemn; and whenever guilt may thus escape from punishment, innocence may be no longer a shield. I therefore know no argument less proper or more dangerous, or to which juries ought to listen with greater suspicion or aversion, than that which must derive its force from confounding the authority of the court and the jury, instilling into the one a prejudice against the opinion of the other, and persuading jurors that they are at liberty to apply to facts a rule of their own, different from that which the law applies." [2]

§ **2135. Further of this Subject.** — The maxim that jurors are judges of the law was a species of legal fiction, devised to establish the independence of juries; for, before the introduction of this maxim into the law if the jurors presumed to render a general verdict, and if, in the opinion of the judges, they mis-

[1] Hamilton *v.* People, 29 Mich. 173, 191.

[2] Pennsylvania *v.* Bell, Add. (Pa.) 156, 160.

took the law, they were themselves liable to punishment. But when the maxim became established that they were judges of the law, this liability to punishment of course ceased; for a judge is not liable to punishment for rendering a mistaken decision.[1]

[1] In Coke upon Littleton the text of Littleton runs thus: "Also in such case where the inquest may give their verdict at large, if they will take upon them the knowledge of the law upon the matter, they may give their verdict generally, as is put in their charge," etc. Upon which text Lord Coke in his commentary says: "Although the jurie, if they will take upon them (as Littleton here saith) the knowledge of the law, may give a general verdict, yet it is dangerous for them so to doe for if they doe mistake the law, *they runne into danger of an attaint;* therefore to find the speciall matter is the safest way, where the case is doubtfull." Co. Litt., 228 *a*. See also *Id.* 155 *b*. Blackstone, speaking of a special verdict and a special case, says: "In both these instances the jury may, if they think proper, take upon themselves to determine, *at their own hazard*, the complicated question of fact and law and, without either special verdict or special case, may find a verdict absolutely either for the plaintiff or defendant." 3 Bla. Com. 378. In the year 1670 William Penn and George Mead were tried before the Recorder of London under an indictment for seditiously preaching to a crowd in Grace Church Street. The recorder charged the jury that the court was the sole judge of the question of sedition, and that all they had to do was to find whether the defendants had preached or not. As this was not denied, it was of course a binding instruction to the jury to find for the crown. Nevertheless they acquitted the prisoners, and the court, considering it as a contempt, fined each juror in the sum of forty marks. One of these jurors named Bushell refused to pay the fine, and being arrested therefor, sued out a writ of *habeas corpus* before Chief Justice Vaughan, of the Court of Common Pleas, who, without hesitation, discharged him from the imprisonment, as being illegal and arbitrary, and in so doing gave an opinion which has become historical, and which established, for the first time in England, the independence of jurors. Bushell's Case, Vaughan, 135; *s. c.* 6 How. St. Tr. 999, 1008, 1013, 1014. See further on this interesting question Francklin's Case, 17 How. St. Tr. 625; Rex *v.* Woodfall, 5 Burr. 2661. Mr. Chief Justice Sharswood, in his opimon in a case already cited, Kane *v.* Com., 89 Pa. St. 522, 526; *s. c.* 33 Am. Rep. 787, gives also the following instance: "In 1735, on the trial of John Peter Zenger, for a libel against the government, before Chief Justice DeLancy, of New York, Andrew Hamilton, of Pennsylvania, certainly the foremost lawyer of the colonies, in a forensic effort in defense of the prisoner equal to that of Erskine, afterwards in the case of the Dean of St. Asaph, not only took the ground that the jury had a right to say whether the publication was a libel, but added in in the most emphatic language: 'I know that they [the jury] have the right *beyond all doubt*, to determine both the

§ 2136. **Conclusions which Flow from this Doctrine.** — One of the conclusions which flow from this doctrine is that the judge in every criminal trial *has the right* to instruct the jury as to the

law and the fact; and when they do not doubt of the law, they ought to do so.' Francklin's Trial, 17 How. St. Tr. 626, 675. The jury in that case, contrary to the charge of the court, returned a verdict of not guilty. The corporation of the city of New York passed a vote of thanks to Mr. Hamilton for his able and eloquent defense of 'the rights of mankind and of the liberty of the press,' and the freedom of the city was presented to him in a gold box." The celebrated statute known as Fox's Libel Act, Stat. 32 Geo. III., c. 60, grew out of the act of Lord Mansfield and his associates in enforcing a similar doctrine in England. Rex. *v.* Woodfall, 5 Burr. 2661; Rex. *v.* Shipley, 3 T. R. 428 n. This was what is termed a *declaratory statute* in which Parliament settled the law to be, that it should be competent for the jury, in all cases of indictment or information for libel, to give a verdict of guilty or not guilty upon the whole matter in issue; but that the court should, according to their discretion, give their opinion and direction in like manner as in other criminal cases. The controversy which resulted in the enactment of this celebrated statute had such a powerful impression upon the minds of the inhabitants of the American States in the early days of the Republic that, when they came to frame their constitutions many of them inserted in their Bill of Rights a declaration in words or substance like the following from the constitution of Pennsylvania: "That in all indictments for libel, the jury shall have the right to determine the law and fact, as in other cases." The *View of Samuel Chase*, Associate Justice of the Supreme Court of the United States, in his answer delivered at the bar of the Senate of the United States sitting as a high court of impeachment to try him for high crimes and misdemeanors, is perhaps not to be cited as possessing much judicial authority, nor indeed, are the judicial opinions of that heated, erratic, tyrannical and partisan judge. Nevertheless it has, perhaps, sufficient historic interest to justify the quoting of a single paragraph: "And lastly it was his opinion and still is that it is the duty of every court of this country, and was his duty on the trial now under consideration, to guard the jury against erroneous impressions respecting the laws of the land. He well knows that it is the right of juries in criminal cases to give a general verdict of acquittal, which cannot be set aside on account of being contrary to law, and that hence results the power of juries to decide on the law as well as on the facts, in criminal cases. This power he holds to be a sacred part of our legal privileges, which he never has attempted, and never will attempt to abridge or obstruct. But he also knows that in the exercise of this power it is the duty of the jury to govern themselves by the law of the land, over which they have no dispensing power; and their right to expect and receive from the court all the assistance which it can give for rightly understanding the law. To withhold this assistance in any manner whatever, to forbear to give it in that way which may be most effectual for preserving the jury from error and mistake, — would be an abandonment or forget-

law of the case. It would scarcely be expected that this proposition should be stated by a law-writer; but it was actually raised in Kentucky as late as 1831 and solemnly adjudicated.[1] Turning the question around, we find that another court has recently been called upon to decide that, notwithstanding the constitutional or statutory provision conferring upon juries the power to judge of the law, it cannot be held that an erroneous instruction from the bench as to the law is harmless to the defendant, although the court instructed the jury that the instructions given to them were advisory merely, that they were not bound to follow them, and that they had the right to determine both the law and the fact. The obvious reason is that the jury would probably be influenced by the erroneous instruction.[2] Moreover, as hereafter seen, the judge is bound in criminal cases, always upon request,[3] and in some jurisdictions without request[4] to instruct the jury fully as to the law of the case. Under the theory which upholds in the largest sense the power of juries as judges of the law,[5] the office of the judge in instructing them is merely to render them *assistance* in discharging their functions of judg-

fulness of duty, which no judge could justify to his conscience or to the laws. In this case, therefore, where the question of law arising on the indictment had been finally settled by authoritative decisions, it was the duty of the court, and especially of this respondent as presiding judge, early to apprise the counsel and the jury of these decisions, and their effect, so as to save the former from the danger of making an improper attempt to mislead the jury in a matter of law and the jury from having their minds preoccupied by erroneous impressions." 1 Chase Tr. 34.

[1] Montee *v.* Com., 3 J. J. Marsh. (Ky.) 132, 149-152.

[2] State *v.* Rice, 56 Ia. 431.

[3] *Post*, § 2347.

[4] *Post*, § 2339.

[5] Thus, in an action for defamation in the early jurisprudence of Massachusetts the following language occurs in the opinion of the court given by Parsons, C. J.: "The question of law therefore arises on the second issue. Both parties had submitted the trial of this issue to a jury. The issue involved both law and fact, and the jury must decide the law and the fact. To enable them to settle the fact they were to weigh the testimony, that they might truly decide the law, *they were entitled to the assistance of the judge*. If the judge had declined to aid in a matter of law, yet the jury must have formed their conclusion of law as correctly as they were able. But the judge was officially obliged to declare to the jury his opinion of the law. If this be denied, as a matter not within the jurisdiction of the court, it must also be denied that the jury were legally

ing of the law, or, as sometimes expressed, that they are *advisory*,[1] merely.

§ 2137. Right of Jury to find a General Verdict in Civil Cases. — In civil cases, unless restrained by statute, as in some States, where either party may require the jury to find special issues or answer special interrogatories, it is the privilege of the jury to decline finding any other than a general verdict. Accordingly, it was held in the English King's Bench in 1835, by the four judges, after careful consideration, that if the trial judge explains to the jury, and they clearly understand that in the absence of a particular fact the plaintiff's right to recover will depend upon a doubtful legal question, and the judge requests them to find that fact, if satisfied of its existence, but they nevertheless give a verdict for the plaintiff generally, and, on being pressed, refuse to find the particular fact, the court will not set aside the verdict.[2]

§ 2138. [CONTINUED.] INSTRUCTIONS PROPERLY REFUSED. — Where this view prevails, the trial court is not bound, in a criminal prosecution under a statute (as for selling intoxicating liquors), to instruct the jury, "that the jury have a right to judge of the constitutionality of the law," and "that if the jury do so judge, and have a reasonable

authorized to decide on the law, — the consequence of which would be that, when any defendant representative should plead his privilege in bar, whether the plea be true or false cannot be inquired into, because every such plea must involve both law and fact, and the judge must send the parties out of court." Coffin *v.* Coffin, 4 Mass. 2, 25. See also, as embodying similar views, Tresca *v.* Maddox, 11 La. Ann. 206, 209.

[1] Williams *v.* State, 10 Ind. 503; reviewing the following decisions: Townsend *v.* State, 2 Blackf. (Ind.) 151, which is overruled by Warren *v.* State, 4 Blackf. (Ind.) 150, and by Carter *v.* State, 2 Ind. 617. See also Hudelson *v.* State, 94 Ind. 426, 429; Fowler *v.* State, 85 Ind. 538, 541; McCarthy *v.* State, 56 Ind. 203. But while the jury in criminal cases in that State are made the judges of the law as well as of the facts, the court has gone so far in favor of common sense as to hold that, since the charge of the court is presumed to control their minds *to some extent*, if the court has misdirected them in a material matter of law, the misdirection is ground for a new trial. Clem *v.* State, 42 Ind. 422, 447.

[2] Devizes *v.* Clark, 3 Ad. & El. 506. Compare Mosley *v.* Walker, 7 Barn. & Cres. 53, 56; Macclesfield *v.* Pedley, 4 Barn. & Ad. 403.

doubt whether the law be constitutional or not, they must acquit the prisoner."[1] When, therefore, in such a prosecution the defendant's counsel requested the court to instruct the jury that they were not, in their decisions upon the law, necessarily to be governed by the opinion of the judge presiding at the trial; but the court declined so to instruct them, and instructed them that, in their deliberation they were to be governed by the law as stated to them by the court, and that it was their province to apply the law so stated to the facts proved on the trial, and to decide upon the whole case, whether the offense charged was or was not proved beyond a reasonable doubt. It was held that these rulings afforded no grounds for exception.[2] - - - - In the leading case in New Hampshire the prosecution was likewise under the statute for the unlawful selling of intoxicating liquors. The defendant's counsel contended (whether in argument to the court or to the jury the report does not state), that the jury were the judges of the law as well as of the facts in the case; that it was their duty to judge of the constitutionality of the statutes and to form their own opinion upon that question; and that the court were not to *instruct* them relative to questions of law, as in civil cases, but were merely to give *advice* to them in matters of law. But the court instructed them, that the position that the jury were judges of the law, as well as of the fact, as contended for by the defendant's counsel, was not correct, to the extent of the general terms in which it was stated; that the same rule existed, in this respect, in criminal cases, which prevails in civil cases; that it was the duty of the court to instruct the jury in relation to questions of law; that the court were responsible for the correctness of the instructions given; that, in case of conviction, if the instructions were wrong, the verdict might be set aside for that cause; but that the jury had the *power* to overrule the instructions of the court and to decide the law contrary to those instructions, through their power to give a general verdict of acquittal; that, if they did so, and acquitted the defendant, the court could not correct the matter, if the jury had erred, because the defendant could not, in such case, be tried again; and that the circumstance that the jury had thus the power to overrule the instructions of the court, in case of an acquittal, did not show that they had the *right* to judge of the law. The court then proceeded to instruct them, contrary to the contention of the defendant's counsel, that the statute was not unconstitutional. The foregoing instruction is believed, by the present writer, to be as

[1] Com *v.* Anthes, 5 Gray (Mass.), 186 (by a divided court).

[2] Com. *v.* Rock, 10 Gray (Mass.), 4.

clear a statement of the extent of the power and right of juries in criminal cases to judge the law as well as the fact as can be found in any discussion of the subject. It was held by the whole court, so far as the report discloses, that these directions were right.[1] - - - - In the leading case in Alabama the defendant was tried upon an indictment for refusing to testify in certain gaming cases before the grand jury, after being summoned and having appeared before them. The counsel requested the court to charge the jury, "that the jury have the right to judge of the law as well as of the facts of the case; and whether, in the exercise of this right, they would distrust the court, or whether they would receive the law from the court, must be left to their discretion under the sanction of their oath." It was held that the trial court rightly refused so to charge.[2] In a case in Michigan the court, in an able opinion by Campbell, J., sustained the trial court in refusing the following instructions: "This is a criminal trial on an information for felony, and all the questions of law and fact in the case are exclusively for the jury, and the jury are paramount judges, both of the law and the facts."[3] - - - - In Arkansas, in a case of murder, counsel for the prisoner requested the court to charge the jury as follows: "It is the duty of the jury to apply the law to the testimony, in order to determine the criminal intent with which the alleged assault or deed of the defendant was committed; and they must receive the law, when given, from the court; but in criminal cases, where the issue involves a mixed question of law and fact, the jury are the judges of the law and the facts." It was held proper for the court to give the instruction, omitting the last clause beginning with the words, "but in criminal cases," etc.[4] - - - - An instruction which tells the jury that they have the right to judge of the law, as well as of the facts of the case, and that, whether in the exercise of this right, they would distrust the court, or whether they would receive the law from the court, must be left to their own discretion under the sanction of their oath, is properly refused.[5] The same has been ruled of the following instruction: "The jury are the judges both of the law and the facts in a crim-

[1] Pierce *v.* State, 13 N. H. 537 (elaborate opinions by Baker, J., and Parker, C. J.).

[2] Batre *v.* State, 18 Ala. 119, 122. The court cite in support of its view, Pierson *v.* State, 12 Ala. 149; United States *v.* Battiste, 2 Sumn. (U. S.) 240; Townsend *v.* State, 2 Blackf. (Ind.) 151; Pierce *v.* State, 13 N. H. 536; Montgomery *v.* State, 11 Oh. 424; Levi *v.* Milne, 4 Bing. 195.

[3] Hamilton *v.* People, 29 Mich. 173, 189–193.

[4] Sweeney *v.* State, 35 Ark. 586, 601.

[5] Batre *v.* State, 18 Ala. 119, 122.

inal case, and are not bound by the opinion of the court. The jury may judge for themselves, and if they feel it their duty to differ from the court on a question of law, they may find their verdict accordingly." [1]

§ 2139. What Instructions given under this View. — In a case in New York, the indictment was for robbery and the court charged the jury: "If you believe the witnesses for the prosecution, it will be your duty to render a verdict either of robbery or of larceny from the person, or of grand or petit larceny; and it will be for you to say which." An exception to this charge was treated by the court as presenting the question whether jurors in criminal trials are the judges of the law as well as of the facts, and consequently whether it is proper for courts to give them peremptory instructions upon the legal questions arising upon such trials. The conclusion of the Court of Appeals was that it is as much the duty of the jurors to be governed by the instructions of the court upon legal questions, in criminal as it is in civil cases. The following are the principal reasons given by Selden, J., for this conclusion, in which conclusion all the judges concurred: "1. The selection of jurors from all classes of the people, whose education and business cannot, as a general rule, have qualified them to decide legal questions, renders it unreasonable as well as apparently unsafe to require them to pass upon such questions. 2. If jurors were to determine the law, its stability would be subverted, and it would become 'as variable as the prejudices, the inclinations and passions of men.' Every case would be governed, not by any known or established rule, but by a rule made for the occasion. Jurors would become not only judges but legislators as well. 3. All questions in regard to the admission or rejection of evidence, being questions of law, are required to be decided by the court. If jurors are to decide law and fact, their jurisdiction should extend to those questions, which often control the verdict. 4. Where the jury finds the facts of a case by special verdict, if they also find a conclusion of law different from that which the law would derive from the same facts, the court disregards the conclusion, and gives judgment according to the facts found. 5. If the jury find a verdict in a civil case against law, the court sets it aside. That the same is not done in criminal cases, is owing, I think, more to the tenderness of the common law toward persons accused of crime, than to any recognized right of jurors to decide legal questions. 6. In all cases, civil and criminal, where only legal questions are raised, as by demurrers to pleadings, demurrers

[1] Washington *v.* State, 63 Ala. 136; *s. c.* 35 Am.Rep. 8.

to evidence, special verdicts, bills of exceptions, and motions in arrest of judgment, such questions are decided by the court, and not by the jury. 7. The fact of guilt being ascertained and declared by the jury, the court determines the punishment which the law prescribes for the offense."[1] - - - - After a conviction for burglary, in a case in South Carolina, notice of a motion for a new trial was given on the following (among other) grounds: "1. Because the court erred in charging the jury that they were not judges of the law as well as of the facts in the trial of capital felonies; that they could not decide on the law in such cases; that the court was alone responsible for that. 2. Because the court charged the jury that if they believed the evidence adduced on the part of the State they were bound to convict the prisoners." The report of the trial judge goes on to state: "The evidence is reported at the request of one of the counsel, and the jury were instructed that their duty was to examine the evidence and to ascertain what facts were proved; that the duty devolved upon the court was to give them in charge such principles of law as are applicable to the case, and that it was important to maintain this distinction in the discharge of our several duties, and, as the counsel had confidently insisted in argument, as he now does in the first ground of appeal, that the jury were the judges of the law, I, with equal confidence, not only instructed them otherwise, but endeavored to show how dangerous it would be in the administration of justice, if they should assume the responsibilities attached to the court; that an error in law committed by the court could be corrected on appeal; but that, if they assumed to be judges of the law, and thereby the guilty should escape, there would be no remedy. Referring to the evidence I expressly informed them that it was neither my duty nor my wish to control their decision, but rather to direct their inquiries and to enable them to come to a correct conclusion; and that if they believed the witnesses introduced by the State, the prisoners were guilty of the crime charged, at the same time inviting their attention to the evidence introduced for the defense and submitting the control of the facts to them." It was held, on appeal, that, in these directions, no error had been committed.[2] - - - - In the leading case in Ohio, which was an indictment for murder by administering poison, the court delivered to the jury an elaborate charge containing, upon the subject under consideration, the following proposition: "1. It is the province and the duty of the jury to determine what is and what is not proven in the case; to pass upon all questions of fact. This is the ex-

[1] Duffy *v.* People, 26 N. Y. 588, 591. [2] State *v.* Drawdy, 14 Rich. L. 87

clusive province of the jury, and one with which the court will not and cannot properly interfere or direct. Sometimes a jury imagine that the judge entertains a particular opinion, either for or against the defendant, but it is the duty of the jury not to know, or even consider, whether any opinion is or is not entertained by the court, as to the guilt or innocence of the accused. The finding of the jury upon all questions of fact, and upon the issues submitted to them of guilty or not guilty, is to be their finding exclusively, upon the evidence, unexplained by the opinions of others. 2. It is the duty of the jury to receive the law as it is given to them by the court. It is the exclusive province of the court to determine what the law is, and the jury have no right to hold the laws to be otherwise, in any particular, than as given to them by the court." Unlike the instruction in the New Hampshire case above quoted,[1] this charge did not advise the jury that they had the *power* to disregard the instructions of the court, in so far that, if contrary to those instructions they should return a verdict of acquittal, the court could not grant a new trial. The court held that there was no error in this part of the charge.[2]

§ 2140. View that Juries may Rightfully Judge of the Law Independently of the Court. — In Massachusetts,[3] Maine,[4] Indiana,[5] Tennessee,[6] North Carolina,[7] Illinois,[8] Louisiana,[9] Con-

[1] *Ante*, § 2138.

[2] Robbins *v.* State, 8 Ohio St. 131, 148, 149, 166. The court added that this was in accordance with the rule prescribed in Montgomery *v.* State, 11 Oh. 424, and as settled by the great weight of authority both in Federal and State courts.

[3] Commonwealth *v.* Porter, 10 Metc. (Mass.) 263, 283.

[4] State *v.* Snow, 18 Me. 346.

[5] Stout *v.* State, 96 Ind. 407; Heagy *v.* State ex rel., 85 Ind. 260; Fowler *v.* State, 85 Ind. 538; Keiser *v.* State, 83 Ind. 234 (not bound by decisions of Supreme Court); Williams *v.* State, 10 Ind. 503; Daily *v.* State, 10 Ind. 536; Warren *v.* State, 4 Blackf. (Ind.) 150; Harvey *v.* State, 40 Ind. 516; Lynch *v.* State, 9 Ind. 541. Compare Murphy *v.* State, 6 Ind. 490: Carter *v.* State, 2 Ind. 617; Townsend *v.* State, 2 Blackf. (Ind.) 151.

[6] Hannah *v.* State, 75 Tenn. (11 Lea) 201.

[7] By statute, see State *v.* Meller, 75 N. C. 74.

[8] Schnier *v.* People, 23 Ill. 17; *s. c.* Hor. & Th. Cas. Self Def. 285; Fisher *v.* People, 23 Ill. 283; Adams *v.* People, 47 Ill. 376; *s. c.* Hor. & Th. Cas. Self Def. 208. But see Mullinix *v.* People, 76 Ill. 211; *post* § 2142.

[9] State *v.* Saliba, 18 La. Ann. 35. But see State *v.* Ford, 37 La. Ann. 443, 465. And compare State *v.* Vinson, 37 La. Ann. 792; State *v.* Hannibal, 37 La. Ann. 619; State *v.* Johnson, 30 La. Ann. Pt. II, 904; State *v.* Jurche, 17 La. Ann. 71. But see the next section.

necticut,[1] and Vermont,[2] Pennsylvania,[3] and perhaps in some other American jurisdictions, conceptions exist of the power of juries to judge of the law, which enlarge their functions very considerably beyond what would be implied in the foregoing observations; though, as seen in the succeeding sections, pointing out the manner in which they instruct juries on this question, some of them differ from the courts which profess to take the opposite view, more in abstract theory than in any practical way.[4]

[1] State *v.* Thomas, 47 Conn. 546, 552; *s. c.* 36 Am. Rep. 98 (holding that juries have the power, in criminal cases, to declare an act of the legislature unconstitutional).

[2] State *v.* Croteau, 23 Vt. 15.

[3] The power of juries in criminal cases to judge of the law as well as of the facts has been pronounced by the Supreme Court of Pennsylvania as late as the year 1879 to be "one of the most valuable securities guaranteed by our Bill of Rights." "Judges," continued the court, "may still be partial and oppressive, as well from political as personal prejudice, and when a jury are satisfied of such prejudice, it is not only their right, but their duty, to interpose the shield of their protection to the accused." Kane *v.* Com., 89 Pa. St. 522, 527, opinion by Sharswood, C. J. In respect of the sense in which the jurors are judges of the law it was said in the same case: "It has been strongly contended that, though the jury have the power, they have not the right, to give a verdict contrary to the instruction of the court upon the law; in other words, that to do so would be a breach of their duty and a violation of their oath. The distinction between power and right, whatever may be its value in ethics, in law is very shadowy and unsubstantial. He who has the legal power to do anything has the legal right. No court should give a binding instruction to a jury which they are powerless to enforce by granting a new trial if it should be disregarded. They may present to them the obvious considerations which should induce them to receive and follow their instructions, but beyond this they have no right to go. The argument in favor of their taking the law from the court is addressed very properly *ad verecun diam*. The court is appointed to instruct them, and their opinion is the very best evidence of what the law is." *Ibid.* 525, opinion by Sharswood, C. J.

[4] Those who care to pursue the subject further will find in the case of People *v.* Croswell, 3 Johns. Cas. (N. Y.) 337, a very elaborate and learned opinion by Mr. Chief Justice Lewis in which Mr. Chief Justice Livingstone concurred, upholding Lord Mansfield's view of the power of judges to determine, after the fact of publication has been found, the question of libel or no libel, in the course of which the following cases were reviewed: Fuller's Case, 14 How. St. Tr. 517, *anno* 1702; Tuchin's Case, *anno* 1704, where reported not stated; Francklin's Case, 17 How. St. Tr. 625; Rex *v.* Owens, 10 How. St. Tr. App. 194, *anno* 1752; Rex *v.* Wilkes, 4 Burr. 2527, *anno* 1764-1770; Rex *v.* Woodfall, 5 Burr. 2661; 96 Case of the Dean of St. Asaph, *anno*

§ 2141. Jury, how Instructed where this Doctrine Prevails. [Louisiana.] — In a recent and important case in Louisiana, where several persons were jointly indicted for murder and convicted, the judge charged the jury upon this subject as follows, and the charge was approved by the Supreme Court: "The constitution of this State makes jurors the judges of the law as well as of the facts in criminal cases; but while this is so, I charge you that it is your sworn duty to follow the law given to you by the court, and you are not its judges to the extent claimed by counsel. The very moment you feel that the law expounded in this charge is the law of this case, your oaths compel you to apply it to the facts; and, though you have the physical power to disregard it, you cannot do so without violating your oaths. In taking the law from the court, you incur no responsibility; in disregarding it, your error is without remedy. But, on the other hand, misstatements of the law by the court to the prejudice of these accused may be excepted to by their counsel, and its correctness passed upon by a higher tribunal. Your oath binds you to rest your verdict on the law and the evidence." [1] - - - - Notwithstanding the approval of the strong charge quoted in the preceding paragraph, the same court, in the same year, solemnly adjudged that it is error, in a criminal case, for the judge to charge the jury that they are to take the law of the case as given to them by the court. The language was: "You, the jury, will now apply the following presumptions, and the facts proved, to the law of the

1784, where reported not stated; Stockdale's Case, *anno* 1789, where reported not stated; Rex *v.* Withers, 3 T. R. 428. Answers of the Judges to the Lords when the Libel Bill was under consideration. This decision resulted in a statute passed by the General Assembly of New York, declaring, among other things, that "on every such indictment or information the jury which shall try the same shall have the right to determine the law and the fact, under the direction of the court, in like manner as in other criminal cases, and shall not be directed or required by the court or judge, before whom such indictment or information shall be tried, to find the defendant guilty, merely on the proof of the matter charged to be libelous, and of the sense ascribed thereto, in such indictment or information; provided nevertheless, that nothing herein contained shall be held or taken to impair or destroy the right and privilege of the defendant to apply to the court to have the judgment arrested, as hath heretofore been practiced." In consequence of the enacting of this statute, the Supreme Court of New York at the August term, 1805 (no motion having been made for judgment on the verdict), unanimously awarded a new trial in the case of the People *v.* Croswell, 3 Johns. Cas. (N. Y.) 337.

[1] State *v.* Ford, 37 La. Ann. 443, 465.

case as given by the court, and determine whether the defendant is guilty or innocent of the crime." [1] - - - - In another case, decided by that court during the same year, the following instruction was approved in a case of murder: "Gentlemen, you are the judges of the facts, also of the law as expounded by me, and which you are to apply to the facts proven. You are not compelled to follow my instructions, because you are at liberty to interpret the law yourselves. But you must not arbitrarily disregard my instructions. However, if you are convinced they are wrong, and that you know the law better than I do, it is your right to follow your own conscientious convictions. It is safe for you to regard my explanation of the law, for if I am mistaken, the accused will have his remedy by bills of exception and appeal." The objection was to the last sentence, and this was placed upon the ground that there having been two mistrials, the language tended to dispel any conscientious scruples which the jury might have against a conviction, and to induce them to wash their hands of the consequences of their verdict. The Supreme Court did not take this view, but said: "The charge as a whole is not amenable to objection by even the most critical. But in truth the sentence that is obnoxious to the defendant is of itself and by itself not ground of complaint. It is not error to tell the jury it was safe for them to regard the judge's explanation of the law and the reason of it. He might have gone further, and, instead, have told them it was their duty to accept the law as expounded by him and to apply it to the facts of the case." [2] - - - - In an earlier case in the same state, the judge charged the jury that they were the judges of the law, but added the words: "If you believe that you know more law than the judge does, you can believe so," it was held no error. The sentence quoted did not destroy or limit the effect of the general charge.[3]

[1] State *v.* Vinson, 37 La. Ann. 792. Notwithstanding what the court held in its opinion, given by Fenner, J., it was conceded that the judge might rightfully and properly explain to the jury, "their clear duty to accept and apply the law as laid down for them by the judge."

[2] State *v.* Hannibal, 37 La. Ann. 619, 620.

[3] State *v.* Johnson, 30 La. Ann. (Pt. II.) 904. But in an earlier criminal case in the same State, the defendant asked the judge to charge the jury "that, in finding a verdict, they were the judges of the law and facts." This the judge refused, but charged as follows: "That they were the sole judges of the facts proved. It was their duty to apply the law as laid down by the court. That the jury had the power, but not the right, to disregard the charge of the judge." This was held error, and the conviction was reversed. State *v.* Jurche, 17 La. Ann. 71. In an earlier case in the same State it has been held proper to charge the jury in a criminal case,

§ 2142. [CONTINUED.] ILLINOIS. — On the trial of an indictment for selling intoxicating liquor to a person in the habit of getting intoxicated, contrary to a statute, the defendant asked the following instruction: "The court instructs the jury for the defense that the jury are the sole judges of the law as well as the facts in the case." The court added the following: "But the jury are further instructed, that it is the duty of the jury to accept and act upon the law, as laid down to you by the court, unless you can say, upon your oaths, that you are better judges of the law than the court, and if you can say, upon your oaths, that you are better judges of the law than the court, then you are at liberty to so act." It was held that this modification of the instruction was eminently just and proper.[1]

§ 2143. [CONTINUED.] INDIANA. — In Indiana, an instruction in a case of murder which tells the jury that, while it is the duty of the court to instruct them as to the law bearing upon the case, they are not bound by the instruction, is held not erroneous, since the statute[2] makes it the duty of the court to instruct the jury upon the law, and the constitution gives them the right to determine the law in a criminal case.[3] In another criminal case in the same State, the jury were instructed that they were the judges of the law, and that the instructions of the court were advisory merely, and might be disregarded. By the next instruction they were told that they had no right to determine the question whether the facts stated in the indictment constituted a

"that they are judges of the law and fact, but that they are expected to receive the law as given them by the judge." It has been reasoned that "they are expected and ought, as a rule, to receive it, though they are under no compulsion to do so." State *v.* Tally, 23 La. Ann. 677, 678. Earlier decisions in the same State on this subject, which do not seem to coincide with the latest holdings are: State *v.* Ballerio, 11 La. Ann. 81; State *v.* Scott, 11 La. Ann. 421; State *v.* Scott, 12 La. Ann. 386.

[1] Mullinix *v.* People, 76 Ill. 211. The court said that the modification was strictly within what was held in the case of Fisher *v.* People, 23 Ill. 283.

[2] R. S. Ind. 1881, §§ 64 and 1823. The constitutional provision is as follows: "In all criminal cases whatever, the jury shall have the right to determine the law and the facts." R S. Ind. 1881, § 64. The statutory provision is as follows: "In charging the jury, he must state to them all matters of law which are necessary for their information in giving their verdict. If he present the facts of the case, he must inform the jury that they are the exclusive judges of all questions of fact, and that they have a right also to determine the law." *Ibid.*, § 1823.

[3] Powers *v.* State, 87 Ind 145, 156.

public offense, or to determine the sufficiency of the indictment; and that, if the facts stated therein were proved beyond a reasonable doubt, they must convict. It was held (two of the five judges dissenting), that the second instruction was a fatal error. The majority, in an opinion by Zollars, J., said: "The constitution declares, in the broadest and most imperative terms, that, in all criminal cases, the jury shall have the right to determine the law as well as the facts. This right has been recognized and enforced in its broadest scope by many decisions of this court. It is made the duty of the court to instruct the jury as to the law in the case, and at the same time inform them that they are the judges of the law;[1] — and the court reiterated the doctrine of previous cases that under the constitution and the statute, the office of the instructions is not to bind the consciences but to enlighten the judgments of the jury; in other words, that the instructions are *advisory* merely and not binding upon the jury.[2] - - - - It is therefore held correct in a criminal case, in that State, to instruct the jury as follows: "You are the judges of the law and the evidence, and of what facts are proved and what facts are not proved. It is the duty of the court to instruct you in the law, but his instructions are advisory only, and you may disregard them and determine the law for yourselves. Likewise, the decisions of the Supreme Court read to you by the defendant, are not binding upon you, but you may disregard them and determine yourselves what the law is."[3] - - - - Upon like grounds the following instruction has been held, in a criminal case, erroneous, because it told the jury that they were to be *governed* by the decisions of the Supreme Court: "The law makes you the exclusive judges of the law and the evidence in this cause. But the fact that you are made the judges of what the law is, does not authorize you to make or invent law; you must determine what the law is, and be governed by the law as it is, without regard to your opinions as to the justice or injustice of the law. The law requires the court to charge you what the law is, as an aid to you in determining what the law is. The counsel are also permitted to read law to you, and discuss the law for the same purpose. The decisions of the Supreme Court are law until overruled, and you cannot disregard the decisions of the Supreme Court. It is your duty to determine what that court has decided upon the subject under consideration, and to be governed thereby. You

[1] Citing R. S. Ind. 1881, § 1823.

[2] Hudelson *v.* State, 94 Ind. 426, 429 (Elliott and Hammond, JJ., dissenting).

[3] Approved in Fowler *v.* State, 85 Ind. 538, 541, on authority of Keiser *v.* State, 83 Ind. 234; Elliott and Zollars, JJ., dissenting.

have the power to consider the decisions of the Supreme Courts." [1] - - - - The legislative and judicial folly, almost criminal in itself, of placing the judgment of ignorant jurors upon questions of law above that of the highest tribunal in the State and of clothing them with the discretionary power of disregarding the judgments of that tribunal, a power which is not conferred upon the judges of the inferior tribunals, — did not satisfy the criminal classes and their advocates. Even the following instruction was challenged by the defendant in a prosecution for selling intoxicating liquor: "It is the duty of the court to instruct you in the law, but his instructions are advisory only, and you may disregard his instructions and determine the law for yourselves." Of course the court found no fault with this charge, since it was a reiteration of what had been held in several previous decisions.[2] - - - - Applying this principle, it has been held error, in a case of murder, to give the following instructions: "The jury in a criminal case, are the judges of the law and the evidence. The jurors are not authorized to make a law for each case, but must decide it according to the law as it is. If the court instruct the jury truly and fully as to the law, the jurors must be governed by the instructions. If the court does not do this, the jury may disregard the instructions." [3]

§ 2144. [CONTINUED.] CONNECTICUT. — The statute of Connecticut recites that, "the court shall state its opinion to the jury, upon all questions of law arising in the trial of a criminal case, and submit to their consideration both the law and the facts, without any direction how to find their verdict." With this statute in force the judge, on the trial of an information for keeping a place where intoxicating liquors was sold, submitted to the jury the question of the constitutionality of the statute, but added the following words: "But the jury are the judges of the law under the same obligations that attach to the judge on the bench; they are not authorized to say that that is not law which is the law of the State. The Supreme Court has decided that section to be constitutional. The judges of that court are selected for their learning in the law. Will you say it is unconstitutional when they say it is constitutional? The next case to be tried may be a civil case, the law applicable to which may have been decided by the same Supreme Court; you would not suffer your private views and interests to influence you to

[1] Keiser *v.* State, 83 Ind. 235.
[2] Nuzum *v.* State, 88 Ind. 599.
[3] McDonald *v.* State, 63 Ind. 544

disregard the law thus decided. Neither have you anything to do with the policy of the law; that belongs to the legislature which enacted it. The court also says to you that in its judgment the section of the statute, upon which this prosecution is founded, is constitutional. If you decide that to be unconstitutional which the Supreme Court hold to be constitutional, you will disturb the foundations of law. But, after all, you are the judges of the law; and if, on your conscience, you can say this section is unconstitutional, then you ought to acquit the accused." The Court of Errors refused to advise a new trial.[1] - - - - In the same State, on the trial of an indictment for keeping a place where it *was reputed* that intoxicating liquors were sold, counsel for the defendant requested the court to charge the jury that the section of the statute on which the prosecution was based was unconstitutional and void, and that if they conscientiously believed that the section was unconstitutional, they had a right so to decide, inasmuch as the Supreme Court had never decided the section to be constitutional. The court did not so instruct the jury, but instructed them that they were the judges of the law as well as of the facts in the case, and that if they believed the section unconstitutional, they had a right so to decide; but that they were as much bound by the law as the judge on the bench, and that it was not to be presumed that they would be guilty of such an absurdity as to decide that the section in question was not valid, when the Supreme Court of the State had held otherwise. It was held that in this there was no error. The objection which was made to it lay in the allusion to a supposed decision of the Supreme Court holding the section to be constitutional. As the court were of opinion that it was constitutional, they reasoned that it could really have made little difference whether the court had actually made such a decision, so long as the trial judge was right in his view of the law and the Supreme Court were prepared to sustain him in that view. Said Park, C. J.: "The most that can be said is that the jury were misled into taking the only view of the law that they could correctly have taken. The defendant lost a possible chance of the jury's erroneously deciding the law in his favor. This ground for a new trial does not commend itself to our sense of justice. But we need not decide whether, if that were the precise state of the case, it would be a sufficient ground for granting a new trial. This court had in fact decided the question as to the validity of the statute."[2]

[1] State *v.* Buckley, 40 Conn. 247.

[2] State *v.* Thomas, 47 Conn. 546, 552; *s. c.* 36 Am. Rep. 98.

§ 2145. [Continued.] Iowa. — "Gentlemen of the jury: You have taken a solemn oath to try this cause according to the law and evidence given you in open court, and you have no authority to consider or be controlled by anything else than given you as law by the court; and unless your verdict accords with the law as given you by the court, you are guilty of willful perjury. It makes no difference what you think the law ought to be, you have no authority to consider or be controlled by anything else as law than that given you by the court." [1]

§ 2146. [Continued.] Pennsylvania. — In a criminal case in Pennsylvania, the judge, among other things, charged the jury as follows: "The only safe course for you to pursue, so far as the law regarding offenses which you may have given you in charge, is to receive your instructions from the court, for the reason you are not supposed to be learned in the law; and if you should commit an error therein, or counsel should be mistaken in stating the law to you, and you, relying on their version, or on your own ideas, in either case should commit an error, there is no remedy for such error." It was held that this charge was unexceptionable. "The court had an undoubted right to instruct the jury as to the law, and to warn them, as they did, against finding contrary to it. This is very different from telling them that they must find the defendant guilty, which is what is meant by a binding instruction in criminal cases." [2]

§ 2147. Charge of Mr. Justice Field on the Trial of Greathouse. — On the trial of Ridgeley Greathouse and others, for treason, in the United States Circuit Court at San Francisco in 1863, before Mr. Justice Field, of the Supreme Court of the United States, and Mr. District Judge Hoffman, Mr. Justice Field, in charging the jury, admonished them on this subject as follows: "There prevails a very general, but erroneous opinion, that in all criminal cases, the jury are the judges as well of the law as of the fact — that is, that they have a right to disregard the law as laid down by the court, and to follow their own notions on the subject. Such is not the right of the jury. They have the power, it is true, to disregard the instructions of the court, and in case of acquittal their decision will be final — for new trials are not granted in criminal cases where a verdict is passed in favor of the defendant; but they have no moral right to adopt their own views of the law. It

[1] Approved in State *v.* Miller, 53 Iowa, 156, 157.

[2] Nicholson *v.* Com., 96 Pa. St. 503, 505.

is their duty to take the law from the court and apply it to the facts of the case. It is the province of the court, and of the court alone, to determine all questions of law arising in the progress of a trial; and it is the province of the jury to pass upon the evidence and determine all contested questions of fact. The responsibility of deciding correctly as to the law rests solely with the court, and the responsibility of finding correctly the facts, rests solely with the jury. The separation of the functions of the court from those of the jury, in this respect, is essential to the efficacy and safety of jury trials. Any other doctrine would lead only to confusion and uncertainty in the administration of justice. 'I hold it,' said Mr. Justice Story, 'the most sacred constitutional right of every party accused of crime, that the jury should respond as to the facts and the court as to the law. * * * This is the right of every citizen, and it is his only protection.' You will, therefore, in this case, gentlemen, take the law from the court, and follow it. If the court err, the responsibility will not be shared by you." [1]

§ 2148. CHARGE OF MR. JUSTICE BALDWIN ON THE TRIAL OF WILSON. — On the trial of Wilson and Porter, indicted in the year 1830, in the Circuit Court of the United States at Philadelphia, for robbing the mail, Mr. Justice Baldwin, of the Supreme Court of the United States, charged the jury on this subject as follows: "We have thus stated to you the law of this case under the solemn duties and obligations imposed upon us, under the clear conviction that, in doing so, we have presented to you the true test by which you will apply the evidence to the case; but you will distinctly understand that you are the judges both of the law and fact in a criminal case, and are not bound by the opinion of the court; you may judge for yourselves, and if you feel it your duty to differ from us, you must find your verdict accordingly. At the same time, it is our duty to say, that it is in perfect accordance with the spirit of our legal institutions that courts should decide questions of law, and the juries of facts; the nature of the tribunals naturally leads to this division of duties, and it is better, for the sake of public justice, that it should be so: when the law is settled by a court, there is more certainty than when done by a jury; it will be better known and more respected in public opinion. But if you are prepared to say that the law is different from what you have heard from us, you are, in the exercise of a constitutional right, to do so. We have only one other remark to make on this subject. By taking the law as given by the

[1] United States *v.* Greathouse, 4 Sawy. (U. S.) 457, 464; *s. c.* 2 Abb. (U. S.) 364.

court you incur no moral responsibility; in making a rule of your own, there may be some danger of a mistake." [1] In a case before the Supreme Court of Pennsylvania in 1879, Mr. Chief Justice Sharswood, in giving the opinion of the court expressed his personal preference for the foregoing passage as being "a model to be followed by other judges when called on to instruct the jury upon the subject." [2]

§ **2149. No Power to Direct a Verdict of Guilty.** — In criminal cases the judge has no power to direct a verdict of guilty, no matter how clear, unimpeached and free from suspicion the evidence for the prosecution may be. Under constitutional provisions existing, it is assumed, in all the States, which guarantee to persons accused of crime the right of trial by jury, an accused person has, in every case where he has pleaded not guilty, the absolute right to have the question of guilty or not guilty submitted to the jury, no matter what the state of the evidence may be. Such is the nature of the right thus granted, that it has been frequently held that it cannot be waived by the prisoner, and that the trial of a criminal case before the court without a jury, is erroneous, even where it takes place with the prisoner's consent.[3] So far as the writer is aware, the only respectable American authority in favor of the proposition that the judge can direct a verdict of guilty in a criminal case, is the ruling of Mr. Justice Hunt, in the Circuit Court of the United States, on the trial of an indictment against Susan B. Anthony for illegally voting at a Federal election.[4] Aside from the fact that the learned justice seems to have doubted the propriety of his own ruling, since, on the subsequent trial of the officers of election, indicted with Miss Anthony for the same offense, in which substantially the same testimony was introduced, he stated that, instead of ordering a verdict of guilty, he would submit the case to the jury with the instruction that there was no justification for the act of the defendants and that in effect they were all

[1] United States *v.* Wilson, Baldw. (U. S.) 78, 99. The charge contained other observations of the same character.

[2] Kane *v.* Com., 89 Pa. St. 522; *s. c.* 33 Am. Rep. 787.

[3] State *v.* Maine, 27 Conn. 281.

[4] United States *v.* Anthony, 11 Blatchf. (U. S.) 200.

guilty.[1] In a prosecution in a court of the United States, the question necessarily arises under the sixth amendment to the Federal constitution, which guarantees to every accused person "the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed." The question came before Mr. Circuit Judge McCrary, in the Federal District of Kansas in 1882, who, after consulting with Mr. Justice Miller (who concurred with him in his view), declared that it is not competent, in a criminal trial in a court of the United States, for the judge to direct a verdict of guilty, no matter what the state of the evidence may be, provided the prisoner has pleaded not guilty. In the course of his opinion, he said: "It is now well settled in the Federal courts that, in civil cases, where the facts are undisputed and the case turns upon questions of law, the court may direct a verdict in accordance with its opinion of the law; but the authorities which settle this rule have no application to criminal cases. In a civil case, the court may set aside the verdict, whether it be for the plaintiff or defendant, upon the ground that it is contrary to the law as given by the court; but in a criminal case, if the verdict is one of acquittal, the court has no power to set it aside. It would be a useless form for a court to submit a civil case involving only questions of law to the consideration of a jury, where the verdict, when found, if not in accordance with the court's view of the law, would be set aside. The same result is accomplished by an instruction, given in advance, to find a verdict in accordance with the court's opinion of the law. But not so in crimina cases. A verdict of acquittal cannot be set aside; and therefore, if the court can direct a verdict of guilty, it can do indirectly that which it has no power to do directly." [2]

[1] Whart. Crim. Law (7th ed.), § 82*a*.

[2] United States *v.* Taylor, 3 McCrary (U. S.), 500, 505. Compare Theel *v.* Com. (Pa.), 12 Atl. Rep. 148.

CHAPTER LXI.

MATTERS OF CRIME.

ARTICLE I. — WHAT QUESTIONS FOR THE COURT AND WHAT FOR THE JURY.
ARTICLE II. — PRECEDENTS OF INSTRUCTIONS AS TO PARTICULAR CRIMES.

ARTICLE I. — WHAT QUESTIONS FOR THE COURT AND WHAT FOR THE JURY.

SECTION
2154. Intent in Criminal Cases a Question of Fact.
2155. [Illustration.] Whether the Formation of a Club was Intended as an Evasion of the Statute Against the Sale of Intoxicating Liquors.
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§ 2154. Intent in Criminal Cases a Question of Fact.— The rule of law which, by means of what is called a *presumption*, ascribes a certain conclusion of fact to a certain other fact, such as the rule which ascribes malice to the use of a deadly weapon,[1] and the rule which ascribes an intent to steal from the recent unexplained possession of stolen goods, is contrary to the general principle applicable alike in the civil[2] and in the criminal[3] law. In all cases where the statute makes the intent with which an act was done an ingredient of its criminality, such intent is a fact to be charged in the indictment, and affirmatively found by the jury, in order to a conviction; and although a *presumption of law* will annex the intent to the commission of the act so as to make out a *prima facie* case of guilt, yet where there is any evidence tending to rebut this presumption, the question of intent must be submitted to the jury.[4] In those jurisdictions where *special verdicts* are still permitted in criminal cases, if the jury in such a case returns a special verdict without finding the existence of the criminal intent, the verdict will be fatally defective, and will not support a judgment of conviction.[5] Outside of the

[1] *Post*, § 2531.

[2] *Ante*, § 1333, *et seq.*

[3] Washington *v.* State, 63 Ala. 135; *s. c.* 35 Am. Rep. 8; Oliver *v.* State, 17 Ala. 588, 596; *s. c.* Horr. & Thomp. Cases Self Def. 725.

[4] State *v.* Phifer, 90 N. C. 721 (distinguishing State *v.* Jaynes, 78 N. C. 504).

[5] State *v.* Blue, 84 N. C. 807. Under the Texas Penal Code, "no mistake of law excused one committing an offense; but, if a person laboring under *mistake as to a particular fact*

cases where the law draws these artificial presumptions, with certain limited exceptions where, on grounds of public policy, the law conclusively presumes a criminal intent, it may be laid down that such an intent being a necessary ingredient of every crime is a material subject of inquiry, and the existence of it is always a question of fact for the jury. This is happily illustrated by the rule which allows the jury in the case of an indictment for an assault with intent to kill, if they find that such an intent did not exist, or more accurately speaking, if they have a reasonable doubt whether it did exist, — they may find the accused guilty of an aggravated assault and battery, or of a simple assault, as the case may be.[1] It is necessary in this last class of cases for the State to prove the specific intent. A general felonious intent, it has been held, is not sufficient. The actual existence of the intent charged in the indictment is a *question of fact* for the jury, in the decision of which they ought to act upon those presumptions which are recognized by the law, *i.e.*, that the law presumes that a party intends the natural consequences of his own act, so far as they are applicable, applying their own judgment and experience to all the circumstances disclosed by the evidence.[2] Thus, the intent with which a child has been abducted;[3] or the intent with which an assault was committed under an indictment for assault with intent to murder;[4] or the intent with which the defendant had received moneys under an indictment for handling, receiving and concealing moneys which had been

shall do an act which would otherwise be criminal he is guilty of no offense." Penal Code Texas, art. 45. But the mistake as to fact which will excuse must be such as did not arise from a want of proper care on the part of the person committing the offense. *Ibid.*, art. 46. Whether there was such a want of proper care in ascertaining the fact about which the defendant claims to have been ignorant, which ignorance led to the commission of the offense, is a question for the jury and not for the court to determine. Hailes *v.* State, 15 Tex. App. 94; Watson *v.* State, 13 Tex. App. 76.

[1] Dixon *v.* State, 3 Ia. 416; Tyra *v.* Com., 2 Metc. (Ky.) 1; Ogletree *v.* State, 28 Ala. 693.

[2] Ogletree *v.* State, 28 Ala. 693.

[3] Oliver *v.* State, 17 Ala. 588; *s. c.* Horr. & Thomp. Cases Self Defense, 725.

[4] Washington *v.* State, 63 Ala. 135; *s. c.* 35 Am. Rep. 8.

stolen;[1] or under an indictment for giving a challenge to fight in single combat with deadly weapons, whether the defendant intended, by the language so used, to challenge the prosecutor so to fight;[2] these and every like question must be decided by the judge and not by the jury. .

§ 2155. [ILLUSTRATION.] WHETHER THE FORMATION OF A CLUB WAS INTENDED AS AN EVASION OF THE STATUTE AGAINST THE SALE OF INTOXICATING LIQUORS. — In a criminal prosecution for selling intoxicating liquors in contravention of a statute, where it appeared from the testimony of the defendant that he and a number of his neighbors had formed a club and purchased a ten gallon keg of whisky, agreeing that each one should pay his proportion of the cost, and in the division the defendant received less than a gallon, the minimum amount denounced by the statute, — the court could not rule, as a matter of law, that the

[1] Robinson *v.* State, 84 Ind. 452, 456. Contrary to the text, it is held in Alabama, and, as the writer conceives, erroneously, that, in criminal prosecutions for larceny, in all cases which are free from doubt and in which there is no conflict in the evidence, the question of intent is to be determined by the court. Johnson *v* State, 73 Ala. 523 (overruling on this point McMullen *v.* State, 53 Ala. 531). What the court really held was that it is competent for the judge, upon a state of facts which shows that no felonious intent existed, to direct the jury to bring in a *verdict of acquittal*. Obviously, it is the duty of the court, where the evidence shows a mere trespass, and in other appropriate cases, so to direct the jury; and it has been frequently so held. McCourt *v.* People, 64 N. Y. 583; Com. *v.* Stebbins, 8 Gray (Mass.), 492. This was all that was held on this point in Green *v.* State, 68 Ala. 539, which is cited by the court as authority for its position in the case upon which this comment is made. See also Spivey *v.* State, 26 Ala. 90; Witt *v.* State, 9 Mo. 671. The court may, of course, declare after a verdict of guilty, in deciding the question whether there was evidence to support the verdict, that a state of facts shown by the evidence constitutes larceny. Vaughn *v.* Com., 10 Gratt. (Va.) 758. So, it may declare that the facts assumed in a hypothetical instruction do not constitute larceny. Witt *v.* State, 9 Mo. 671; State *v.* Shermer, 55 Mo. 83; State *v.* Stone, 68 Mo. 101. But it is believed that under no view of the office of judge and jury in criminal cases can the judge, as against the accused, withdraw the question of intent from the jury. He may, indeed, instruct them that the law presumes the intent from a given state of facts; but they must in the end draw the conclusion and not he; and they are judges of the law (*ante*, § 2133, *et seq.*) in such a sense that if they refuse to draw the presumption he cannot compel them to do it.

[2] Ivey *v.* State, 12 Ala. 276.

scheme was intended as a mere evasion of the law, but that it was a question for the jury whether it was or was not.[1] This is in conformity with the text of Dr. Bishop: "From whatever motive parties so shape a transaction that it does not constitute a sale, or a sale of the inhibited quantity, and it is not meant to be such, they escape the statutory penalty. But no mere evasion of the law, where a sale is the thing intended by the parties, it being for the jury to say whether or not such was their intent, where *prima facie* the transaction was not a sale, will avail them."[2]

§ 2156. An Instruction as to the Intent with which the Accused entered a Dwelling in a Case of Burglary. — "The intent with which an act is committed being but a mental state of the party accused, direct proof of it is not required. Nor, indeed, can it ordinarily be so shown; but it is generally derived from and established by all the facts and circumstances attending the doing of the act complained of, as disclosed by the evidence; and in this case the intent with which the defendant entered the dwelling-house of Gale, if he did enter it, must be determined by you from all the evidence in the case."[3]

§ 2157. Whether an Assembly Unlawful. — It is said that an assembly is an unlawful one, where three or more persons assemble themselves together to do an illegal act.[4] So, any meeting assembled under such circumstances as, according to the opinion of rational and firm men, is likely to produce danger to the tranquility of the neighborhood, is an unlawful assembly.[5] The difference between an unlawful assembly and a *riot* is said to be this: If the parties assemble in a tumultuous manner, and actually execute their purpose with violence, it is a riot; but if they merely meet upon a purpose which, if executed, would make them rioters, and, having done nothing, they separate without having carried their purpose into effect, it is an unlawful assem-

[1] State *v.* Clark, 18 Mo. App. 531. So held in a similar case in Com. *v.* Smith, 102 Mass. 144. Compare Hogg *v.* People, 15 Bradw. (Ill.) 288; *s. c.* 19 Cent. L. J. 476.

[2] Bish. Stat. Crim., § 1013.

[3] Approved in State *v.* Maxwell, 42 Iowa, 210, citing Wharton on Cr. Law, § 1600. See *contra*, 3 Greenl. Ev., § 82.

[4] 4 Bla. Com. 146; Cok. 3rd Inst. 176; Slater *v.* Wood, 9 Bosw. (N. Y.) 15, 28.

[5] Reg. *v.* Vincent, 9 Carr. & P. 91 and 275; Reg. *v.* Neale, 9 Carr. & P. 431; Slater *v.* Wood, *supra*.

bly.[1] Whether an assembly is unlawful, where the facts are conceded or found, is necessarily a question of law *for the court;*[2] but where the facts are in doubt or disputed, it is a mixed question of law and fact to be submitted to the jury under proper hypothetical instructions.

§ 2158. Meaning of the Words "Willful," "Wanton," etc. — In the prosecution of a criminal offense, under a statute which predicates the criminal character of the act upon the fact of its being willfully done, it is obvious that the element of willfulness is a material element in the case. Of this character are prosecutions for malicious injuries to private property, or the willful obstructing of private roads, and the like. In these cases, where the act is accidentally done, or done without evil motive, there is no criminality. It is justly said, in speaking of this subject, that the word "willful," when used in a penal statute, means more than it does in common parlance; it means with evil intent or without reasonable grounds for believing the act to be lawful.[3] It is therefore error to charge that the term "willfully" means voluntarily and knowingly.[4] So, where the word "wanton" is used, in order to make an injury to property, — the killing of animals, for instance, — a wanton act, it must have been done regardless of the rights of the owner, in reckless sport, or under such circumstances as evince a wicked or mischievous intent, and without excuse.[5] It is said, in a prosecution under art. 680 (Sayles, 1888 § 1167) of the Texas Penal Code, which provides that "if any person shall willfully or wantonly kill, maim, wound, disfigure, poison, or cruelly and unmercifully beat and abuse any animal or bird * * * he shall be fined," etc.; that "the act must be done intentionally and by design, and without excuse, and under circumstances evincing a lawless and destructive spirit."[6]

[1] Slater *v.* Wood, *supra;* Rex *v.* Birt, 5 Carr. & P. 154.

[2] Slater *v.* Wood, 9 Bosw. (N. Y.) 15. Thomas *v.* State, 14 Tex. App. 200, 204. See also State *v.* Preston, 34 Wis. 675; State *v.* Clark, 29 N. J. L. 96; Savage *v.* Tuller, Brayt. (Vt.) 223; U. S. *v.* Three Railroad Cars, 1 Abb. U. S. 196.

[4] Rose *v.* State, 19 Tex. App. 470. See also Thomas *v.* State, 14 Tex. App. 200.

[5] Thomas *v.* State, 14 Tex. App. 200, 205. See also Jones *v.* State, 3 Tex. App. 228; Branch *v.* State, 41 Tex. 622; Kilpatrick *v.* People, 5 Denio (N. Y.), 277; Com. *v.* Walden, 3 Cush. (Mass.) 558; Wright *v.* State, 30 Ga. 325; State *v.* Pierce, 7 Ala. 728.

[6] Branch *v.* State, 41 Tex. 622; Jones *v.* State, 3 Tex. App. 228; Lott *v.* State, 9 Tex. App. 206; Davis *v.* State, 12 Tex. App. 11.

In such a prosecution the element of willfulness or of wantonness being thus material,[1] it is necessary, under the Texas statute, which requires the court to charge the law applicable to the case,[2] for the court in such prosecutions to define the meaning of these terms in charging the jury.[3] In such a prosecution, it is error to charge the jury that "the willful intent of the defendant is presumed, and it devolves upon the defendant to show his innocent intent."[4] The definition of "willfulness" that "by willfulness, as used in this charge, is meant that the act was done without reasonable ground to believe that the act of taking was lawful," has been several times approved.[5]

§ 2159. **Character: Quality.** — As seen in a former chapter, questions of character, quality or description, are generally *questions of fact* for the jury. So, in a criminal prosecution, what constitutes a woman a *prostitute*, is a question of fact for the determination of the jury, and an instruction which endeavors to lay down what degree of unchastity is required to constitute a woman a prostitute, is error.[6] In like manner, on the trial of an information under a statute for selling intoxicating liquor to an *habitual drunkard*, it is a question for the jury whether the person is in the habit of becoming intoxicated, and it is proper to refuse to instruct them that it is not sufficient to show that the person had been frequently intoxicated, or that *five* occasions of intoxication would not justify the finding of habitual intoxication.[7]

§ 2160. **Self-Defense: Reasonableness of Appearance of Danger.** — It is the settled principle of law that, when a person is assailed by another, and from the nature of the attack, viewed in the light of any previous threats or hostile declarations made by the assailant, and of his known character for violence, the

[1] Prim *v.* State, 36 Ala. 244.

[2] Tex. Code Crim. Proc., art. 677.

[3] Trice *v.* State, 17 Tex. App. 43.

[4] Brinkœter *v.* State, 14 Tex. App. 67. See also Jones *v.* State, 18 Tex. App. 485.

[5] Owens *v.* State, 19 Tex. App. 242. Compare Thomas *v.* State, 14 Tex. App. 200; Lane *v.* State, 16 Tex. App. 173, 178; Wood *v.* State, 16 Tex. App. 574; Shubert *v.* State, 16 Tex. App. 645; Trice *v.* State, 17 Tex. App. 43, 46.

[6] State *v.* Rice, 56 Ia. 431.

[7] Gallagher *v.* People, 120 Ill. 179; *s. c.* 11 N. East. Rep. 335.

assailed has reasonable ground to believe, and does believe, that the assailant intends presently to take his life or to do him some great bodily injury, he will be justified in killing his assailant, provided he have not previously brought on the assault, and provided the circumstances are such that the extreme measure would seem, to the comprehension of a reasonable man, necessary in his situation to prevent the threatened injury. Whether the appearances of danger are sufficient to convince a reasonable man, in the situation of the accused, that death or a felony upon the person was intended, is a *question of fact* for the jury.[1] The principle of these decisions is that it is not the *bare belief*, on the part of the accused, that he is in danger of death or great bodily harm at the time he resorts to the force, which will excuse or justify him, but that upon his trial, he must make it appear, to the satisfaction of the jury, that he had reasonable grounds for such apprehension, — at least he must raise a reasonable doubt in their minds as to whether he had not such reasonable grounds. It was therefore held not error to caution the jury that "it is for the jury, and not the prisoner, to judge of the reasonable grounds of apprehension."[2] As was well said by Nash, C. J.: "The existence of reasonable ground is a *matter of fact* to be determined by the jury. If the person charged with the homicide is to judge for himself whether this reasonable ground existed, the most atrocious murders may be committed

[1] Com. *v.* Selfridge, Horr. & Thomp. Cas. Self Def. 2; U. S. *v.* Wiltberger, 3 Wash C. C. (U. S.) 515; *s. c.* Horr. & Thomp. Cas. Self Def. 35; State *v.* Harris, 1 Jones L. (N. C.) 190; Goodall *v.* State, 1 Ore. 334; Pfomer *v.* People, 4 Park. Cr. R. (N. Y.) 558; McPherson *v.* State, 22 Ga. 479, 489, *semble;* Meredith *v.* Com., 18 B. Mon. (Ky.) 49, 56; Shorter *v.* People, 2 N. Y. 197.

[2] State *v.* Harris, 1 Jones L. (N. C.) 190; *s. c.* Horr. & Thomp. Cas. Self Def. 276. This will also appear from the following authorities: Foster Cr. L. 265; Meade's Case, Lewin C. C. 184; Cotton *v.* State, 31 Miss. 504; *s. c.* Horr. & Thomp. Cas. Self Def. 310; Oliver *v.* State, 17 Ala. 587; *s. c.* Horr. & Thomp. Cas. Self Def. 725; People *v.* McLeod, 1 Hill (N. Y.), 377; *s. c.* Horr. & Thomp. Cas. Self Def. 784; Jackson *v.* State, Horr. & Thomp. Cas. Self Def. 476; State *v.* Turpin, 77 N. C. 173, 477; Williams *v.* State, 2 Tex. App. 271; State *v.* Bohan, 19 Kan. 28, 55; Davis *v.* People, 88 Ill. 350; State *v.* Abarr, 39 Iowa, 185. Compare Gladden *v.* State, 12 Fla. 562, 576.

with impunity. The prisoner says he believed his life was in danger. Who can look into his heart? If the law allows him to judge, who can contradict him? The circumstances are nothing; it is his *belief* that justifies him. The law is not so. It is only from circumstances accompanying the transaction, that reasonable ground can be ascertained, and of their bearing and influence the jury are the sole judges."[1] In a like manner it is said by Fisher, J.: "What is a reasonable ground to apprehend such design must always be as much, or indeed more, a question of fact for the jury, than a question of law for the court; for while it is true, in regard to inanimate subjects, where the fact is the same, the law must also be the same; this is not true, even as a general rule, in this class of cases. The hostile demonstrations of two men may in every respect be the same; yet the party threatened may be placed in imminent peril from the conduct of one, and feel not the slightest apprehension of danger from the other. A design to commit a felony, or to do some great personal injury may be apprehended in the one case, and it may have no existence whatever in the other. One may excite fear and the greatest apprehensions of danger, while the same demonstrations on the part of another may only excite mirth and ridicule. The question is in both cases the same; was there imminent danger to the life or to the person of the party threatened? As part of the means of arriving at the truth of this fact, the peculiar character of the hostile party is as much a fact for the consideration of the jury as any other fact in issue; and the jury must determine from the hostile demonstrations, whether there was such danger of *this party's* executing his felonious design as to justify the party killing. * * * The jury must of necessity be the judges, whether reasonable ground to apprehend the design contemplated by the law existed, and whether there was imminent danger, from all appearances, that such design would be executed."[2] The rule simply means that a man, under such cir-

[1] State *v.* Harris, 1 Jones L. (N. C.) 190, 195; *s. c.* Horr. & Thomp. Cas. Self. Def. 276.

[2] Cotton *v.* State, 31 Miss. 504, 511; *s. c.* Horr. & Thomp. Cas. Self Def. 310, 315.

cumstances, is held to a reasonable exercise of his faculties; that he may not plead his own cowardice, weakness, idiosyncrasies, unless such peculiarities are so strong as, in the eye of the law, to deprive him of responsibility.[1] The "reasonable man" of the law is each particular juror, standing, as nearly as the effort of the law can place him, in the precise position in which the defendant stood at the time when he did the fatal act. "It is sound sense," said Bynum, J., in a very clear exposition of the law on this subject, "and we think sound law, that, before a jury should be required to say whether the defendant did anything more than a reasonable man should have done under the circumstances, it should, as far as can be, be placed in the defendant's situation, surrounded with the same appearances of danger, with the same degree of knowledge of the deceased's probable purpose, which the defendant possessed."[2] This is precisely what is meant by the courts when they say that the assaulted person must decide at his peril whether it is necessary to kill his assailant or not. He decides at the peril of a jury subsequently finding that he was under no reasonable apprehension of death or great bodily harm, at the time when he committed the act.[3] It is scarcely necessary to add that it is error for the court to decide this question for the jury, by telling them that, under the circumstances under which the assault was made, the defendant was not justified in using a deadly weapon;[4] for the jury, and not the defendant, are to judge as to the ground of the apprehension.[5]

§ 2161. Previous Threats by Deceased Against the Accused. — So, whether previous threats taken in connection with the facts surrounding the killing are sufficient to justify the killing, is a *question of fact* for the jury; and it has been held in one case that the judge cannot determine this fact as a question of law, by ruling that the facts immediately surrounding the killing do not afford a sufficient predicate for the introduc-

[1] State *v.* Shoultz, 25 Mo. 128, 149.
[2] State *v.* Turpin, 77 N. C. 473, 477.
[3] State *v.* Bohan, 19 Kan. 28, 55.
[4] Davis *v.* People, 88 Ill. 350.
[5] State *v.* Abarr, 39 Iowa, 185.

tion of evidence of such threats.[1] But as already seen,[2] the judge must determine all preliminary questions of fact involved in the question whether evidence is to be admitted or excluded. It is also a general rule that mere threats, unaccompanied by acts indicating a present purpose of carrying them into execution, will afford no justification or excuse for homicide. From this it follows that, except in a limited class of cases, evidence of them is not admissible, unless there be also evidence of such hostile demonstration or act, and whether there is such evidence the court must judge.[3]

2162. Whether the Accused used Excessive Force.— On like grounds the question whether the *degree of force* was necessary for the protection of person or property, and therefore justified, is not a question of law for the court, but a *question of fact* for a jury.[4] So, a *wife* may lawfully fight in the necessary defense of her husband;[5] but whether, in so fighting, she used *excessive force*, is, in a subsequent criminal prosecution for assault and battery, to be determined by the jury.[6]

§ 2163. Instruction as to right of Defense Against Felonious Assault. — "A person may repel force by force in defense of his person, habitation or property, against one who manifestly intends or endeavors by violence or surprise to commit a known felony on either; and if a conflict ensue in such case, and life is taken, the killing is justifiable.

[1] Pridgen *v.* State, 31 Tex. 420; Jackson *v.* State (Tenn.), Horr. & Thomp. Cas. Self Def. 476.

[2] *Ante*, § 318 *et seq.*

[3] Evans *v.* State, 44 Miss. 762; *s. c.* Horr. & Thomp. Cas. Self Def. 329; Meyers *v.* State, 33 Tex. 535; *s. c.* Horr. & Thomp. Cas. Self Def. 432; Hughey *v.* State, 47 Ala. 97; *s. c.* Horr. & Thomp. Cas. Self Def. 589, note; State *v.* Leonard, 6 La. Ann. 420; State *v.* Keene, 50 Mo. 357; State *v.* Sloan, 47 Mo. 604; *s. c.* Horr. & Thomp. Cas. Self Def. 516; Howell *v.* State, 5 Ga. 48; Lander *v.* State, 12 Tex. 462; *s. c.* Horr. & Thomp. Cas. Self Def. 366; Cummins *v.* Crawford, 88 Ill. 312, 317; Payne *v.* State, 60 Ala. 80; Kendrick *v.* State, 55 Miss. 436; People *v.* Taing, 53 Cal. 602; *s. c.* 8 Rep. 618.

[4] State *v.* Clements, 32 Me. 279; Gallagher *v.* State, 3 Minn. 270; *s. c.* Horr. & Thomp. Cas. Self Def. 720; Hopkinson *v.* People, 18 Ill. 264, *s. c.* Horr. & Thomp. Cas. Self Def. 80.

[5] State *v.* Johnson, 75 N. C. 174, State *v.* Bullock, 91 N. C. 614.

[6] State *v.* Bullock, *supra*; State *v* Jones, 77 N. C. 520.

It must be proved that the assault was eminently perilous, and unless there be a plain manifestation of a felonious intent, no assault will justify killing the assailant. A party is not compelled to flee from his adversary, who assails him with a deadly weapon; before he can justify the homicide, the assault must be so fierce as not to allow the party assailed to yield a step without manifest danger to his life or of enormous bodily injury. In such case, if there be no other way of saving his own life, he may, in self-defense, kill his assailant." [1]

§ 2164. INSTRUCTIONS AS TO DEFENSE AGAINST NON-FELONIOUS ASSAULTS. — "But the rule of law is different when the attack not felonious. * * * An assault without a weapon of any kind, by a quarrelsome and violent man upon another, when there is no reason for the belief by the person attacked, that his person was in danger of death or great bodily harm, but that an ordinary battery was all that was intended, and all that he had reason to fear from the acts of his assailant, the party assailed has no right to take the life of such assailant." [2] - - - - While a person is not bound to retreat from a place where he has a right to remain, and may lawfully repel a threatened assault, and to that end may use force enough to repel the assailant; yet he has no right to repel a threatened assault with naked fists, by the use of a deadly weapon, in a deadly manner and which he has concealed up to the time of its use.[3]

§ 2165. INSTRUCTION AS TO DEFENSE OF HABITATION. — "If the jury believe, from the evidence, that, just prior to his death, the deceased attempted, in a violent manner, to enter the dwelling of the defendant, for the purpose of assaulting or offering personal violence to the defendant, being in said dwelling, or any other person dwelling or being therein, and that the defendant, in reasonably resisting such attempt of the deceased, unintentionally and without malice killed the deceased,

[1] Approved in State *v.* Kennedy, 20 Iowa, 571; citing State *v.* Thompson, 9 Iowa, 188; Fost. Cr. L. 273; 1 East P. C. 272, §§ 44, 273, 45, 221, 7, p. 3; Hawk. P. C., § 23; *Id.* 87, § 13; 1 Hale, 488; Reg. *v.* Smith, 8 C. & P. 160; Wild's Case, 2 Lew. C. C. 214; Iowa Code, § 4112, 4113. Some general instructions on the law of self-defense not elsewhere referred to in this chapter will be found in State *v.* Gee, 85 Mo. 647, People *v.* Guidice, 73 Cal. 226; *s. c.* 15 Pac. Rep. 44; People *v.* Willett, 36 Hun (N. Y.), 500, 506 (admonishing the jury that there is no question of self-defense in the case).

[2] Approved in State *v.* Kennedy, 20 Ia. 571, 572.

[3] State *v.* Thompson, 9 Ia. 190.

then the killing was justifiable or excusable, and the jury ought to acquit the defendant. The jury, in considering whether the killing was in defense of habitation, should consider the circumstances attending the killing, and the conduct of the parties at the time, and immediately previous thereto, and the means and force used, as bearing upon the question of whether the killing was in defense of habitation." [1]

§ 2166. Instruction as to Obligation to Use no more Force than Necessary. — "If the jury believe that George Guyer and deceased, acting in concert and with the intention of inflicting great bodily harm upon defendant, attacked him with clubs, the defendant had the right to resist such attack with a weapon of like character, and if, in the necessary defense of his own person and without using any more force, or a more dangerous weapon than was being used against him, he inflicted a blow which he had reason to, and did, believe was necessary for his own protection, but which, unintentionally upon his part, produced death, such act would not be criminal and the jury should acquit." [2]

§ 2167. Instruction: No Right of Self-Defense in One who Voluntarily makes an Attack or Brings on a Difficulty. — "The law of self-defense does not imply the right of attack, nor will it permit of acts done in retaliation or for revenge. Therefore, if you shall believe and find from the evidence that the defendant sought, brought on or voluntarily entered into a difficulty with the deceased for the purpose

[1] Approved in Greschia *v.* People, 53 Ill. 298 299. In Lilly *v.* State, 20 Tex. App. 11, there is an instruction applicable to particular facts involving the question of the right of *defense of property*.

[2] Approved in State *v.* Burke, 30 Ia. 332, 333. The court said: "The law gives a person the same right to use such force as may be reasonably necessary, under the circumstances by which he is surrounded, to protect himself from *great bodily harm*, as it does to prevent his life being taken. He may excusably use this necessary force to save himself from any felonious assault." "It was expressly so held by this court in the case of the State *v.* Benham, 23 Ia. 154, 162. The same view is supported in the following cases: State *v.* Thompson, 9 Ia. 188; State *v.* Decklotts, 19 *Id.* 447; State *v.* Neeley, 20 *Id.* 108; State *v.* Kennedy, *Id.* 569." In State *v.* Burke, *supra*, there are two other instructions applying the same principle to the facts in evidence. In Greschia *v.* People, 53 Ill. 298, the same principle was expressed in the following instruction: "If the force used was unreasonable in amount and character, and such as a reasonable mind would have so considered under the circumstances, it is proper for the jury to consider that fact in determining whether the killing was in self-defense."

of wreaking vengeance upon him, or if you shall find and believe that he wounded the deceased at a time when he had, because of the acts of the deceased, no reasonable apprehension of immediate and impending injury to himself, and did so from a spirit of retaliation and revenge for the purpose of punishing the deceased for past injuries done him, the defendant, then the defendant cannot avail himself of the law of self-defense, and you should not acquit on that ground. And the court further instructs you that in case you find that the defendant sought, brought on or voluntarily entered into a difficulty with the deceased, it does not matter in the application of the law of self-defense how great the danger or imminent the peril to which the defendant may have believed himself to have been exposed during such difficulty." [1]

§ 2168. UNLESS THE ASSAILANT ENDEAVORS IN GOOD FAITH TO WITHDRAW FROM THE COMBAT. — "Before the defendant can claim that he was acting in self-defense, it must appear that the defendant must really and in good faith have endeavored to decline any further struggle before the homicide was committed. And in this case, if you believe from the evidence that the defendant was engaged in mortal combat with Davis, the deceased, and that the defendant did not really and in good faith endeavor to decline any further struggle before the homicide was committed, if one were committed, then, and in such case, the defendant cannot avail himself of the plea of self-defense." [2]

§ 2169. [CONTINUED.] "RETREATING TO THE WALL" — NON-FELONIOUS COMBAT. — Homicide is excusable when it is committed by one or two persons who have mutually and voluntarily engaged in an unlawful combat without any felonious purpose; and after they have mutually so engaged, one of them having become dissatisfied with it, and desirous to withdraw from it, makes that desire manifest by abandoning the combat and retreating from his adversary, who nevertheless pur-

[1] Approved in State *v.* Vansant, 80 Mo. 67, 69. The same rule is expressed with some distinctness in instructions given and approved in the following cases: State *v.* Starr, 38 Mo. 271, 273; State *v.* Peak, 85 Mo. 190; State *v.* Shelledy, 8 Iowa, 485; State *v.* Maguire, 69 Mo. 197, 200; Kemp *v.* State, 13 Tex. App. 561. The following, and many other cases sanction the doctrine of the above instructions: State *v.* Linney, 52 Mo. 40; State *v.* Underwood, 57 Mo. 40; State *v.* Brown, 64 Mo. 367; State *v.* Ferguson, 2 Hill (S. C.), 619; State *v.* Lane, 1 Ired. L. (N. C.) 113.

[2] Approved in People *v.* Robertson, 67 Cal. 646, 649. The court cite Runyon *v.* State, 57 Ind. 84; 1 Bish. Crim. L., § 865. In Texas the court properly instructs the jury that a person assailed is not bound to retreat. Kemp *v.* State, 13 Tex. App. 561.

sues him until at last he is compelled, in the necessary defense of himself from great bodily harm or death, to turn upon and slay his adversary. In such case the law, while it does not regard the slayer as entirely innocent, because he had first voluntarily engaged in the contest, yet inasmuch as he subsequently, and before the fatal blow was given, did all he could to repair his original fault, the law excuses him because of the necessity under which he was placed by the act of the deceased. - - - - "Between his duty to flee and his right to kill he must fly, or, as the books have it, must retreat to the wall. But by this is not meant that a party must always fly, or even attempt flight. The circumstances of the attack must be such, the weapon with which he is menaced of such a character, that retreat might well increase his peril. By 'retreating to the wall' is only meant that the party must avail himself of any apparent and reasonable avenues of escape by which his danger might be averted, and the necessity of striking his assailant avoided. 'But if the attack is of such a nature, the weapon of such a character, that to attempt a retreat might increase the danger, the party need retreat no farther.' 'These definitions and interpretations of the law of self-defense are general rules that are to be applied by the jury to the situation and conduct of both the defendant and the prosecuting witnesses, as they shall determine that position and conduct to have been from the evidence in this cause.'" [1]

§ 2170. INSTRUCTION AS TO THE RIGHT TO ACT ON REASONABLE APPEARANCES OF DANGER. — "In order to justify homicide on the ground of self-defense, or defense of another, it is not essential that there should be any actual or real danger to the life or person of the party killing, or to the life or person of the party for whose protection the homicide is committed, if there be an appearance of danger, caused by the acts or demonstrations of the party killed, or by words coupled with the acts or demonstrations of such party; and if such acts or demonstrations, or such words coupled with acts or demonstrations, produce in the mind of the party slaying a reasonable expectation or fear of death or some serious bodily injury to himself, or to the person in whose behalf he interferes, the party killing will be justified if he acts on such appearance of danger, and under such reasonable expectation or fear, even though it subsequently appear that there was in reality no danger." [2]

[1] Approved in People *v.* Guidice (Cal.), 15 Pac. Rep. 44.

[2] Approved in Kemp *v.* State, 13 Tex. App. 561, 565, where the principle is applied to various hypotheses of fact presented by the evidence in a charge which was highly commended by the appellate court.

§ 2171. The Same subject continued. — "To justify the use of a deadly weapon in self-defense, it must appear that the danger was so urgent and pressing that in order to save his own life, or to prevent his receiving great bodily harm, the attack upon the prosecuting witness was absolutely necessary; and it must appear that the prosecuting witness was the assailant or that the defendant had really and in good faith endeavored to decline further struggle before the blow was given. A bare fear of the commission of the offense, to prevent which defendant used a deadly weapon, is not sufficient to justify it; but the circumstances must be sufficient to excite the fears of a reasonable man, and the party attacking must have acted under the influence of such fears alone. It is not necessary, however, to justify the use of a deadly weapon, that the danger be actual. It is enough that it be an apparent danger; such an appearance as would induce a reasonable person, in defendant's position, to believe that he was in immediate danger of great bodily injury. Upon such appearances a party may act with safety; nor will he be held accountable though it should afterwards appear that the indications upon which he acted were wholly fallacious, and that he was in no actual peril. The rule in such cases is this: What would a reasonable person, — a person of ordinary caution, judgment and observation, — in the position of the defendant, seeing what he saw, and knowing what he knew, suppose from this situation and these surroundings? If such reasonable person, so placed, would have been justified in believing himself in imminent danger, then the defendant would be justified in believing himself in such peril, and acting upon such appearances." [1]

§ 2172. Another Instruction on the same Principle. — "The bare fear that a man intends to commit murder or other atrocious felony, however well grounded, unaccompanied by any overt act indicative of any such intention, will not warrant killing the party by way of prevention. There must be some overt act indicative of imminent danger at the time, but the jury will judge whether the conduct and acts of the deceased, Henry Brown, at the time of the shooting were of such a character as to create in the mind of the prisoner a reasonable fear that the deceased intended to commit murder or other felony, or to do the prisoner great bodily harm. Apprehension of danger, to justify a homicide, ought to be based not alone on surmises; but there ought to be coupled therewith some act on the part of the party from whom

[1] Approved in People *v.* Guidice (Cal.), 15 Pac. Rep. 44.

danger was apprehended, evidencing an immediate intention to carry into execution his threats or designs; and the jury are to judge of the reasonable grounds for such apprehension on the part of the prisoner, from all the facts and circumstances, as they existed at the time of the killing."[1]

§ 2173. Instruction as to Previous Threats, etc., Considered as Characterizing the Attack. — "Previous threats or acts of hostility of the deceased towards the defendant, however violent they may have been, were not of themselves sufficient to justify defendant in seeking and slaying the deceased. To excuse him, or justify him, he must have acted under an honest belief that it was necessary at the time to take the life of the deceased in order to save his own; and it must appear that there was reasonable cause to excite this apprehension on his part; so that if you find that the deceased, at the time he was killed, did nothing to excite in the mind of the defendant the fear that deceased was about to execute his threats, then the threats and bad character of deceased, whatever you may find them to have been, are

[1] Approved in State *v.* Cain, 20 W. Va. 710. "This instruction propounds the law correctly." Stoneman's Case, 25 Gratt. (Va.) 887. "It also recognizes in the clearest language what we have already decided, that it is the *prisoner's* stand-point which the jury must regard, and not that of the ideal 'reasonable man.'" This principle will be found embodied in many other instructions, but it is believed in none in a clearer manner than in the three foregoing. See instructions on this subject in State *v.* Starr, 38 Mo. 273; State *v.* Thompson, 9 Iowa, 190; State *v.* Vansant, 80 Mo. 67 (where the Supreme Court criticised the use of the word "believe," and substituted the word "apprehend," so as to make the usual expression read, "reasonable cause to apprehend and did apprehend;" instead of, "reasonable cause to believe and did believe"); People *v.* De Witt, 68 Cal. 584, 586; Greschia *v.* People, 53 Ill. 296; Williams *v.* State, 6 Neb. 336; May *v.* People, 8 Colo. 224; State *v.* Griffin, 87 Mo. 608, 613; State *v.* Gee, 85 Mo. 647; State *v.* Bohan, 19 Kan. 30 (on the authority of State *v.* Horne, 9 Kan. 119; State *v.* Howard, 14 Kan. 173); Darling *v.* Williams, 35 Oh. St. 61 (civil case); Lee *v.* State, 21 Tex. App. 244; Reins *v.* People, 30 Ill. 262; State *v.* Jones, 78 Mo. 283, 284 (citing State *v.* Eaton, 75 Mo. 586). See also Grainger *v.* State, 5 Yerg. (Tenn.) 459; Rippy *v.* State, 2 Head (Tenn.), 217; Williams *v.* State, 3 Heisk. (Tenn.) 376; Teal *v.* State, 22 Ga. 75; State *v.* Sloan, 47 Mo. 604; State *v.* Byrant, 55 Mo. 75; Oliver *v.* State, 17 Ala. 587; Carroll *v.* State, 23 Ala. 28; Noles *v.* State, 26 Ala. 31; Wesley *v.* State, 37 Miss. 327; Evans *v.* State, 44 Miss. 762; Gladden *v.* State, 12 Fla. 562; State *v.* Neeley, 20 Iowa, 108; State *v.* Collins, 32 Ia. 36; State *v.* Morphy, 33 Ia. 270; State *v.* Potter, 13 Kan. 414; Stoneman *v.* Com., 25 Gratt. (Va.) 887.

unavailing, and should not be considered by you. But if the evidence leaves you in doubt as to what the acts of deceased were at the time, or immediately after the killing, you may consider the threats and character of the deceased, in connection with all the other evidence, in determining who was probably the aggressor. The jury are instructed that no mere threats made by deceased before or at the time of killing, unaccompanied at the time of killing with any attempt to carry them into execution, are sufficient to justify the killing, or reduce it to a lower degree of homicide than murder; and if you find that defendant shot and killed the deceased because of such threats, and because defendant thought such threats would justify him in killing deceased, and that when he shot and killed him he was in no fear of imminent danger, he is guilty of murder. And if the killing was the result of a deliberate purpose fixed in his mind to kill, it was murder in the first degree." [1]

§ 2174. Instruction as to Character of Deceased for Violence as Characterizing Appearance of Danger. — "The character of the deceased is a proper matter for your consideration, and you should give it such weight as you deem proper, in determining whether or not he, by his acts at the time of the wounding, gave the defendant reasonable cause to apprehend such danger as to justify his act of wounding on the ground of self-defense, according to the law upon that subject as stated in these instructions. The mere fact, however, that the deceased was a man of bad character, if you believe he was of such character, will not justify the taking of his life." [2]

§ 2175. Arrest without Warrant: Reasonable Appearance of Offense having been Committed. — In making an arrest upon personal observation and without warrant, the officer will be excused when no offense has been perpetrated, if the circumstances are such as reasonably to warrant the belief that it has been done; [3] and whether the grounds of the belief were reasonable will be a question for a jury.[4]

[1] Approved in Mize *v.* State, 36 Ark. 661, 662. Other instructions on the same theory, less comprehensive than the foregoing, will be found in the following cases: State *v.* Shelledy, 8 Iowa, 485 (that threats do not justify bringing on a difficulty, see State *v.* Vansant, 80 Mo. 67, 70; Parker *v.* State, 18 Tex. App. 72, 90; citing Smith *v.* State, 15 Tex. App. 338); State *v.* Jones, 78 Mo. 283; People *v.* Guidice, 73 Cal. 276; *s. c.* 15 Pac. Rep. 44.

[2] Approved in State *v.* Vansant, 80 Mo. 67, 70.

[3] Neal *v.* Joyner, 89 N. C. 287.

[4] State *v.* McNinch, 90 N. C. 695, 699.

§ 2176. Instruction as to Power of Peace Officers to Arrest for Breaches of the Peace in their Presence. — "Constables are peace officers, and it is their right and duty to arrest, with or without a warrant, any person who has committed any public offense in their presence, or who is at the time engaged in, or about to commit, any breach of the peace; and they have the right in making such arrest, to use such force as is necessary therefor, and to summon to their aid a *posse* sufficient to accomplish such arrest. A breach of the peace is a public offense, and it may be committed by any loud or boisterous language calculated to disturb the good order of the persons there assembled, or by the drawing or brandishing of deadly weapons accompanied by threats to attack or kill another then and there present." [1]

[1] Approved in Fleetwood *v.* Com., 80 Ky. 1 (citing Mockabee *v.* Com., 78 Ky. 380). In Fleetwood *v.* Com., there is a long series of instructions applicable to the various hypotheses of fact arising in a case where a peace officer was killed in endeavoring to effect an arrest for a breach of the peace committed in his presence, involving the questions of unnecessary force on the part of the officer, and of the right of self-defense on the part of the prisoner, which usually arise in such cases. In State *v.* Green, 66 Mo. 640, 641, there are two instructions on the theory that the killing of an officer in order to resist or avoid arrest is murder in the first degree. The court citing in support of the common-law rule that such a killing is murder, the following authorities: 1 Russ. on Crimes, 592; 1 East P. C. 309; 1 Hale P. C. 464–5; 2 Hale, 118; and under the Missouri statute the following: Johnson *v.* State, 7 Mo. 183; State *v.* Jennings, 18 Mo. 435. In Pierce *v.* State, 17 Tex. App. 238, there is a series of instructions, given in a criminal prosecution for resisting an officer in the execution of a warrant of arrest, under the Texas statute. In Ballard *v.* State, 43 Oh. St. 341, there is a series of instructions given in a case where a peace officer was killed while endeavoring to effect an arrest, and the prisoner was prosecuted for murder. In the course of this instruction the following proposition was laid down: "The point is made by defense that unless the officer has *absolute knowledge* that an offense is being committed against the laws of the State, he has no right to arrest without a warrant for a misdemeanor. This claim is not tenable. If the person arrested is, as a matter of fact, in the act of committing such offense, at the time of the arrest, and the officer has information or knowledge which induces him to reasonably believe, and at the time of the arrest he does believe, that such offense is being committed, and the arrest is made on that account, this is sufficient." The same charge also contained the following counter proposition: "The State claims that if an officer, at a venture, without any information, knowledge, or suspicion on the subject, arrests a man without a warrant for unlawfully carrying a pistol concealed on his person, and it turns out as a matter of fact that the party arrested is, at the time of the arrest committing the offense for which he is arrested, the officer is protected, and the ar-

§ 2177. **Necessity of Taking Life in Order to Prevent a Rescue.** — Whether it was necessary for an officer having a prisoner under arrest to take the life of a person attempting to rescue him, will be a *question of fact* for the jury.[1]

§ 2178. INSTANCE OF A PROPER INSTRUCTION UPON THIS QUESTION. — "If the jury shall be satisfied by the evidence, that the defendant was at the time a police officer of Bell's Ferry, admitted to be an incorporated town, and that Tom Brooks was in said town at the time, engaged in a difficulty with a negro, or was drunk and disorderly in the presence of the defendant, then the defendant not only had the right, but it was his duty to arrest him without a warrant; and if he did arrest him under such circumstances, he had the right, and it was his duty to keep him in custody, and to this end to commit him to the place of confinement used by the town, until he could conveniently be carried before the mayor of the town; and if, while he had him under arrest, the deceased attempted to rescue him, or to prevent the defendant from using the necessary means to keep him in custody until such time as he might conveniently take him before the mayor for trial; and if, in order to keep Brooks in custody and prevent his rescue by deceased it was necessary for the defendant to strike the deceased with the billy, and defendant, in striking the blow, used no more force than was necessary (and in estimating the necessary force in this view of the case, the jury need not be very nice, or, as is sometimes said, weigh in gold scales), the defendant will be justified or excused, and the jury will return a verdict of not guilty."[2]

§ 2179. [CONTINUED.] WHEN THE OFFICER WOULD BE GUILTY OF MANSLAUGHTER. — "But when the defendant arrested Brooks, it was his duty to carry him before the mayor for trial as soon as he conveniently might; and if he could have done so immediately, and Brooks at the time was not too much intoxicated, but in condition to be tried by the mayor, then the defendant had no right to carry him to the place of confinement used by the town; and unless defendant acted

rest is lawful. This claim, I say to the jury, cannot be allowed. In such case, to make the arrest lawful, the officer should believe that the party arrested is guilty of the offense for which the arrest is made, and the belief should be based upon such facts or such information, or both, as might reasonably induce such belief."

[1] State *v.* Bland, 97 N. C. 438.

[2] Approved in State *v.* Bland, 97 N. C. 438.

honestly, according to his sense of right, and not under a pretext of duty in starting with Brooks to such place, — if he struck the deceased the fatal blow to prevent the deceased from defeating his, defendant's purpose to carry Brooks to such place of custody, he would be guilty of manslaughter." [1]

§ **2180. Necessity of Tying the Prisoner.** — An officer arresting a prisoner, under a State's warrant charging him with an escape, has a right to tie him if he deem it necessary to secure him; and of this he is necessarily the judge, subject to the future *decision of a jury*, in an indictment for assault and battery, upon the question whether he acts in good faith and as a man of ordinary prudence would act under the circumstances; and it is for them to say whether he abused his authority.[2]

§ **2181. What is a Deadly or Dangerous Weapon.** — Whether a weapon used in making an assault was a deadly weapon, under the circumstances in which it was used, is generally a *question of fact* for the jury,[3] to be determined from its description by witnesses, the nature of the wound inflicted, the opinion of experts, and other circumstances in evidence.[4] The court should not, in instructing the jury, assume that a deadly weapon was used, or that the weapon which is shown by the evidence to have been used, was a deadly weapon; but it will not be presumed on appeal, where the record does not disclose the fact, that the court failed properly to instruct the jury as to what would constitute a deadly weapon, within the meaning of the law.[5]

[1] Approved in State *v.* Bland, 97 N. C. 439.

[2] State *v.* Stalcup, 2 Ired. L. (N. C.) 50. Compare State *v.* Pendergrass, 2 Dev. & Bat. L. (N. C.) 365, where the question related to the power of a schoolmaster to inflict punishment.

[3] People *v.* McFadden, 65 Cal. 445.

[4] Sylvester *v.* State, 71 Ala. 18, 25.

[5] Jenkins *v.* State, 82 Ala. 25; *s. c.* 2 South. Rep. 150. In a prosecution under a statute for committing an assault with a *dangerous weapon* (Act of Congress of March 3d, 1825, § 22; 4 U. S. Stat. at Large, 121), it is reasoned that, while the court may, in general terms, define the meaning of the statute, as that it means that the weapon used must be a weapon *dangerous to life*, — and while, in many cases, it will be practicable for the court to declare that the particular weapon was or was not a dangerous weapon, within the meaning of the law, and that, when it

§ 2182. **Disturbing Religious Worship.** — Whether a society is "met together for public worship," within the meaning of a statute defining and punishing the disturbance of religious worship, has been held a question of fact, in the sense that the judge cannot direct the jury that a society is not so assembled, even after the pastor has pronounced the benediction.[1] But, with more sense, it was said by another court: "After the minister in charge dismisses the congregation, it then ceases to be a congregation met for religious worship. There must be some point of time when the purpose for which the congregation met is ended, and that time has always been understood to be when the head of the congregation dismisses it;" [2] and accordingly, an instruction was approved which told the jury that if the acts complained of were not committed until after the congregation were dismissed, they would find the defendant not guilty.[3] Whether a *temperance camp-meeting* is "a public assembly convened for the purpose of religious worship," within the meaning of a statute punishing the offense of disturbing such assemblies,[4] has been held a *question of fact* for the jury.[5]

§ 2183. **Manslaughter: Reasonable Provocation: "Cooling Time."** — If a homicide be committed under the influence of passion, or in heat of blood, produced by an adequate or reasonable provocation, and before a reasonable time has elapsed for the blood to cool and reason to resume its habitual control, and is the result of the temporary excitement by which the control

is so practicable, it is a *matter of law*, and the court must take the responsibility of so declaring (United States *v.* Small, 2 Curt. C. C. (U. S.) 241, 243; citing United States *v.* Wilson, Baldw. (U. S.) 78), yet where the question is whether an assault with a dangerous weapon has been proved, and the weapon *might* be dangerous to life or not, according to the manner in which it was used, or according to the part of the body attempted to be struck, then a more general direction must be given to the jury; and it must be left for them to decide whether the assault, if committed, was with a dangerous weapon. United States *v.* Small, *supra* (citing Rex *v.* Noakes, 5 Carr. & P. 326).

[1] State *v.* Snyder, 14 Ind. 429.

[2] State *v.* Jones, 53 Mo. 488.

[3] *Ibid.* Another instruction in a case of disturbing religious worship will be found in State *v.* Stubblefield, 32 Mo. 564.

[4] Gen. Laws N. H., ch. 273, § 9.

[5] State *v.* Norris, 59 N. H. 536.

of reason has been disturbed, rather than of any wickedness of heart or cruelty or recklessness of disposition, the offense is manslaughter only, and not murder.[1] The provocation which will have this effect is often spoken of in the books as a *reasonable* provocation.[2] It has been ruled that the question what is a sufficient provocation to reduce the homicide to the grade of manslaughter is a *question of law*, to be ruled by the court, and to be expounded by the judge to the jury in hypothetical instructions; and that it would be error to submit that question to the jury.[3] It was so held of the following instruction: "If the jury believe from the evidence that Payne killed White upon legal provocation, and without malice, and in sudden heat and passion, and not in self-defense, they must find him guilty of manslaughter."[4] On the contrary, it has been reasoned in a leading case, in which the opinion was given by a judge who was a master of the criminal law, that, the question whether the provocation was adequate or reasonable, such as will reduce the homicide to the grade of manslaughter, is a *question of fact* for the jury; so also is the question whether, at the time when the fatal act was committed, a reasonable time had elapsed for the passions to cool and for reason to resume its accustomed sway.[5] Indeed, it is difficult to understand how this question of reasonableness can be decided as a question of law, since reasonableness generally is a question of fact for the jury,[6] and since the law cannot formulate any definite rule upon the subject for the guidance of juries. In one case, where the question related not to manslaughter but to murder in the second degree under a

[1] Maher *v.* People, 10 Mich. 212.

[2] 1 East. P. C. 232; 2 Bish. Cr. L. (7th ed.), § 697; 1 Whart. Cr. L. (7th ed.), § 969; 1 Russ. Cr. L. (7th Am. ed.) 580; State *v.* Holme, 54 Mo. 153, 165; Young *v.* State, 11 Humph. (Tenn.) 200; Fost. Cr. L. 313; Rosc. Crim. Ev. 557; State *v.* Zellers, 7 N. J. L. 220; State *v.* Ellis, 74 Mo. 207, 215 (where there is an argument proving that the word "reasonable" is used in this connection interchangeably with "lawful" "legal," "sufficient," etc.).

[3] State *v.* Dunn, 18 Mo. 419; State *v.* Jones, 20 Mo. 58, 64; Payne *v.* Com., 1 Metc. (Ky.) 370; State *v.* Ellis, 74 Mo. 207, 219.

[4] Payne *v.* Com., 1 Metc. (Ky.) 370.

[5] Maher *v.* People, 10 Mich. 212.

[6] *Ante*, § 1530.

peculiar construction of a statute, it was said: "What words of reproach and attendant circumstances will be deemed a just cause of provocation, and constitute the homicide murder in the second degree, is, in every case, a question of law for the court; and whether the state of mind necessary to make the killing the lowest grade of murder, was, in fact, superinduced by such provocation and actually existed at the time of the killing, is a question of fact for the jury. And the cases must be decided as they arise, each upon its own facts." [1] In another case, in the same court, it was said: "It is impossible, in the nature of things, for the court to lay down a rule explaining lawful provocation in every given case. This must depend upon the varied facts and matters introduced in evidence; and when facts are offered in evidence for the purpose of showing a lawful provocation, it is the duty of the court to pronounce whether, in law, such facts amount to a lawful provocation or not." [2] The judge always determines this question in a negative way in deciding whether there is evidence tending to show such a provocation, and hence whether in the state of the evidence it is proper to submit the question of manslaughter to the jury at all. In like manner, where there has been a state of mind produced by such a provocation as would reduce the killing to manslaughter, whether before the fatal blow was struck, there had been what the law denominates cooling time, has been held a *question of law* which must not be submitted to the jury. Accordingly, the following instruction was held error: "If, at the time the prisoner shot, he was smarting under the blow he had received from the axe, and there had not been time to cool, this would be, in law, a legal provocation," etc.[3] The court may, of course, properly tell the jury that a provocation induced by insulting words is not sufficient in law to reduce a homicide to manslaughter.[4]

[1] State *v.* Ellis, 74 Mo. 207, 219.

[2] State *v.* Nueslein, 25 Mo. 111, 127.

[3] State *v.* Sizemore, 7 Jones L. (N. C.) 206.

[4] Cotton *v.* State, 32 Tex. 626 (where such an instruction was approved). See also May *v.* People, 8 Colo. 217, where several instructions under this head will be found. In State *v.* Shelledy, 8 Ia. 485, 489 (where the instructions were approved on appeal), the question was submitted to the jury under the following instruction: "The jury, if they are satisfied

§ 2184. **Court cannot give Imperative Instructions as to Grades of Crime.** — By section 39 of the statute of Ohio known as the Crimes Act, "in all trials for murder, the jury before whom the trial is had, if they find the prisoner guilty thereof, shall ascertain in their verdict whether it be murder in the first or second degree or manslaughter." Under this statute, it has been held error to instruct the jury on the trial of an indictment for murder in the first degree by means of poison, that, in that kind of a case, murder is not of different degrees, and that if the jury find the defendant guilty as he stands charged in the indictment, they *must* return a verdict for murder in the first degree. Such an instruction was regarded as an *invasion of the province of the jury* as defined in the above statute.[1] It has been said in a subsequent case that it was not intended by the ruling above referred to to deny that it is the right and duty of the court to instruct the jury upon all questions of law arising before them in the case; nor to release the jury from the *duty* of receiving the law as given to them by the court. "The principle of the ruling," said White, J., "is that the jury must not be imperatively required to render a verdict for a particular degree of homicide; nor must the instruction be such as to deny to them the power of rendering such verdict as their judgment and conscience dictate, after being fully instructed as to their duty."[2]

of the homicide, in determining the degree of the crime committed in causing the death, cannot consider any provocation, on the part of the deceased, for the purpose of reducing it from murder to manslaughter — unless said provocation was so recent, that the homicide was committed in a sudden transport of passion, occasioned by that provocation — that is, that if between the provocation and the homicide, there was sufficient time for the blood to cool, passion to subside, and reason to interpose — the provocation, however great, amounts to naught, and cannot be considered by the jury. That in determining the time for the passion to cool, the inquiry is, whether the suspension of reason, arising from sudden passion, continued from the time of provocation, till the very instant the act producing death took place; and that if, from any circumstance whatever, it appears that the parties reflected or deliberated, or if, in legal presumption, there was time or opportunity for cooling — that then the provocation cannot be considered by the jury in making up their verdict." For instructions defining manslaughter, see *post*, § 2212, *et seq.*

[1] Robbins *v.* State, 8 Ohio St. 132, 194.

[2] Adams *v.* State, 29 Ohio St. 412, 415.

The Pennsylvania statute is similar to that of Ohio, and has received a similar interpretation.[1] In a case in that State the trial court charged the jury thus: "If the prisoner is guilty, there can be no difficulty in ascertaining the degree; for, being by poison, it must be in the first degree, if purposely administered. * * * If you are convinced that he is guilty of the crime, it is murder in the first degree, as declared by the act of the assembly, and it is your duty to say so without regard to the consequences to the prisoner." This charge was held not to be erroneous, the court being of opinion that it did not take from the jury the *right* of deciding the degree of the crime; but the court, nevertheless, said: "The question in this case approaches closely to the boundary line of peremptoriness; but we cannot say it overstepped it, in view of those parts of the charge which left them [the jury] free to act for themselves." [2] It is scarcely necessary to say that for the judge to tell the jury that if the defendant purposely killed the deceased in attempting to rob him, the offense was murder in the first degree, and not murder in the second degree, — does not infringe even this strict rule, but is a correct instruction which it is the duty of the court to give.[3] But as hereafter seen [4] the court is not bound to charge the law in respect of any grade of crime which the evidence does not tend to prove.

§ 2185. Restriction where the Indictment Contains Several Counts. — Where an indictment for murder in the first degree contains several counts, under either of which it is equally competent on the same proof to return a verdict of murder in the second degree, it is not to the prejudice of the accused for the

[1] Rhodes *v.* Com., 48 Pa. St. 396; Lane *v.* Com., 59 Pa. St. 371.

[2] Shaffner *v.* Com., 72 Pa. St. 60.

[3] Adams *v.* State, 29 Ohio St. 412.

[4] *Post*, § 2188. Useful precedents of instructions as to the grade of crime in cases of murder will be found in Kemp *v.* State, 13 Tex. App. 561 (charge as a whole highly commended on appeal); in State *v.* Thomas, 78 Mo. 336 (charge drawn by an able judge and commended on appeal); in May *v.* People, 8 Colo. 217, and in fact in most of the cases of murder where the instructions are set out.

court to *restrict the jury*, in finding the defendant guilty of murder in the second degree, *to one of the counts only*.[1]

§ **2186. Questions of Jurisdiction.** — In one case it was laid down by Mr. Justice Daniel, of the Supreme Court of the United States, at circuit, as follows: "Questions of jurisdiction ordinarily belong to, and are decided exclusively by the court, as pure matters of law. * * * Where the jurisdiction, however, *depends upon the existence of facts*, the jury may, under the direction of the court as to matter of law, affirm, through the medium of a general verdict, that there is or is not jurisdiction." Thus, on the trial of an Indian for murdering a boy reputed to be white, evidence was heard that the mother of the boy was an Indian, and the court being of opinion that the rule in such a case is that the condition of the child follows that of the mother, left it to the jury to say whether the mother of the child was an Indian woman or not; the defense being that the court was without jurisdiction over a murder committed by one Indian upon another.[2]

§ **2187. Materiality of Testimony on which Perjury Assigned.** — The materiality of the testimony of a witness upon which perjury is assigned, is a *question of law* for the court.[3]

§ **2188. Instructions as to the Penalty.** — The rule under this head is analogous to that in civil cases, in respect of the measure or rule of damages.[4] The rule in civil cases is that, where there is an established rule of law as to the measure of damages applicable to a particular case, the judge ought to inform the jury what that rule really is, and that a failure to do so is ground for a new trial.[5] So important is this rule that, although

[1] Adams *v.* State, 29 Oh. St. 412.

[2] United States *v.* Sanders, Hempst. (U. S.) 483, 486.

[3] Gordon *v.* State, 48 N. J. L. 611; Cothran *v.* State, 39 Miss. 511. What proof necessary to establish materiality of testimony: Com. *v.* Pollard, 12 Metc. (Mass.) 225. In Rex *v.* Dunston, Ry. & M. 109, Abbott, C. J., decided the question as one of law.

[4] *Ante*, § 2060, *et seq.*

[5] Hadley *v.* Baxendale, 9 Exch. 341; *s. c.* 18 Jur. 358; 23 L. J. (Exch.) 179; Blake *v.* Midland etc. R. Co., 21 L. J. (Q. B.) 233, 237.

non-direction is in general no ground for a new trial in civil cases, unless a proper instruction is requested and refused, yet the failure to instruct the jury as to the rule of damages has been held ground of a new trial, even where the specific instruction was not asked.[1] It is, accordingly, right for the judge to tell the jury in a civil case, if such be the law, that the plaintiff is entitled to no more than nominal damages,[2] or to explain to them how large a verdict will carry costs.[3] For stronger reasons, it is the duty of the judge in a criminal trial where the jury assess the punishment, to advise them as to the punishment which the law annexes to the crime charged; and it is supposed that a failure to do this, even where not requested, would in most jurisdictions be ground of reversing the judgment. Where the offense consists of several degrees, the same observation may be made in respect of the duty of advising the jury as to the several grades of crime, of which they may find the defendant guilty. The judge is not bound, in general, to charge the law in respect of any grade of the offense charged in the indictment, if there is no evidence tending to prove the defendant guilty of that grade of the offense. Where the indictment was for robbery, and the judge instructed the jury: "You may find a verdict against the defendant, guilty as charged in the indictment, of the crime of robbery; or you may find a verdict of grand larceny; or you may find a verdict of acquittal; as you may think proper under the instruc-

[1] Knight *v.* Egerton, 7 Exch. 407.

[2] Twyman *v.* Knowles, 13 C .B. 222.

[3] *Ibid.* Levy *v.* Milne, 12 Moore, 418; *s. c.* 4 Bing. 195. See Mears *v.* Griffin, 2 Scott (N. R.), 15; *s. c.* 1 Man. & G. 796; Kilmore *v.* Abdoolah, 27 L. J. (Exch.) 307. In Pool *v.* Whitcombe (3 Fost. & F. 70; *s. c.* 6 L. T. (N. S.) 783), it was held at *nisi prius*, that, in making up their verdict, the jury have no right to take into consideration what amount of damages will carry costs. To the same point is Waffle *v.* Dillenbeck, 39 Barb. (N. Y.) 123. Other authority is to the effect that in civil cases, it is discretionary with the trial court to call the attention of the jury to the consequences of their verdict, as, for instance, what costs will flow from it (Tucker *v.* Ely, 37 Hun (N. Y.), 565; distinguishing Kanna *v.* Kester, 15 Weekl. Dig. (N. Y.) 119; Andrews *v.* Miles, *Id.* 290; Rewey *v.* Riley, 17 *Id.* 573); or whether, the action being grounded on fraud, a verdict for the plaintiff will enable him to have an execution against the body of the defendant. Keller *v.* Strasburger, 90 N. Y. 379.

tions which I have given; " it was held that the instruction presented no available error.[1]

§ 2189. Error as to Penalty. — In Texas the courts have settled upon the rule that an error in the charge in respect of the penalty which the law attaches to the offense for which the accused is on trial, will operate to reverse a conviction, whether the error be excepted to or not,[2] and although the error is favorable to the defendant.[3] This is contrary to the rule which, so far as the writer knows, is universally held in other jurisdictions, that the fact that the judge has directed the jury wrongly will not be ground of reversal, where the jury, disregarding the instruction, have decided the question rightly;[4] and the folly of such a doctrine culminates in the conclusion to which it has led, that, where the jury have been misdirected as to the penalty, the conviction cannot be sustained, although the punishment assessed is one which might lawfully be assessed under an accurate charge of the court,[5] or even though it gave the accused a lighter punishment than that prescribed by statute.[6] This *Texas* doctrine is founded in a provision of the Code of Criminal Procedure of that State, which code is spotted all over with the finger-marks of lawyers who get their living by defending persons accused of crime, that it is the duty of the presiding judge, in a criminal case, whether asked or not, to give to the jury a written charge, in which he shall distinctly set forth the law applicable to the case.[7] In that State an extreme disposition to refine in criminal cases and to presume nothing in favor of the intelligence of the juries, has induced the

[1] People *v.* Robinson, 65 Cal. 136. For a good model of an instruction under this head, where the indictment was for murder in the first degree and the evidence presented an hypothesis under which the jury might find the defendant guilty of manslaughter in the fourth degree, see State *v.* Vansant, 80 Mo. 67, 72.

[2] Robinson *v.* State, 2 Tex. App. 390; Hamilton *v.* State, 2 Tex. App. 494. So of a failure to charge as to the penalty which the law annexes to the offense. Collins *v.* State, 5 Tex. App. 38.

[3] Buford *v.* State, 44 Tex. 525; Jones *v.* State, 7 Tex. App. 338; Bouldin *v.* State, 8 Tex. App. 624; Cohen *v.* State, 11 Tex. App. 337; Wilson *v.* State, 14 Tex. App. 524; Turner *v.* State, 17 Tex. App. 587; Searcy *v.* State, 1 Tex. App. 440; Allen *v.* State, 1 Tex. App. 514; Garnet *v.* State, 1 Tex. App. 605; Howard *v.* State, 18 Tex. App. 348.

[4] *Post*, § 2104; *ante*, § 1020.

[5] Jones *v.* State, 7 Tex. App. 338; Bouldin *v.* State, 8 Tex. App. 624; Wilson *v.* State, 14 Tex. App. 524; Garnet *v.* State, 1 Tex. App. 605.

[6] Cohen *v.* State, 11 Tex. App. 337.

[7] Tex. Code Crim. Proc., art. 677.

holding that it is ground of reversing a conviction that the court instructed the jury as follows: "If the jury find the defendants guilty of the theft as charged in the indictment, they will so say and will assess the punishment, if the value of the property be worth $20.00 or over, not less than two nor more than five years; if the value was less than $20.00, for a term not less than one nor more than two years."[1] The reason given for the ruling was that the instruction omitted to say *where* the confinement must be; and this, although there was no question that the jury had returned a correct verdict under the law.[2] It is a just conclusion, however, that in every charge in a criminal case the jury ought to be informed of the penalty which the law affixes to the crime, in order that, in assessing the penalty, they may have in their minds a just conception of the magnitude of the crime in the intendment of the law.

Article II.—Precedents of Instructions as to Particular Crimes.

Section

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2194. Assault.
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2210. [Continued.] "Malice," "Malice Aforethought," "Premeditated Malice."

[1] Hamilton *v.* State, 2 Tex. App. 494.

[2] Hamilton *v.* State, 2 Tex. App. 494.

SECTION
2211. Homicide: Burden on Defendant to show Circumstances of Excuse or Justification.
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2217. Riot: What Participants Guilty.
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§ 2193. ADULTEROUS COHABITATION. — "If the jury shall find from the evidence that the defendants were not living together in a state of open and notorious adultery, but were simply at the time charged in the information stopping together in the same room occasionally, and were only guilty of occasional acts of illicit intercourse, then the court should find the defendants not guilty." [1]

§ 2194. ASSAULT. — "The court instructs the jury that an assault is an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." [2]

§ 2195. BURGLARY IN THE FIRST DEGREE IN MISSOURI. — "If the jury believe from the evidence that the defendants, at any time within three years prior to the finding of the indictment in this case, to wit: March 28th, 1881, at the county of Saline, State of Missouri, broke and entered the said dwelling-house of William P. Walton, by forcibly breaking and bursting the window, in which there was at the time a human being, with the intent of stealing and carrying away any goods, wares, merchandise or other property then being in said dwelling-house, then they will find the defendants guilty of burglary in the first degree, and assess their punishment at imprisonment in the State penitentiary for a

[1] Approved in State *v.* Crowner, 56 Mo. 149; Wagner's Stat., 500, § 8; Wright *v.* State, 5 Blackf. (Ind.) 358; Searls *v.* People, 13 Ill. 597; State *v.* Gartrell, 14 Ind. 280; State *v.* Marvin, 12 Iowa, 499; Hinson *v.* State, 7 Mo. 244; Dameron *v.* State, 8 Mo. 494.

[2] Approved in May *v.* People, 8 Colo. 224, 226. For a definition of *assault with intent to kill* under the Indiana statute, see McCulley *v.* State, 62 Ind. 433. For an instruction on the subject of assault with a dangerous weapon under the Federal statute, see United States *v.* Small, 2 Curt. C. C. (U. S.) 241, 244.

term of years not less than ten. The breaking of the window by pulling off the plank and undoing the fastening is a forcible bursting and breaking within the meaning of the statute." [1]

§ 2196. RAPE. — "Rape is the carnal knowledge of a woman without her consent, obtained by force or threats. The force employed to obtain such carnal knowledge must be such as might reasonably be supposed sufficient to overcome resistance, taking into consideration the relative strength of the parties and other circumstances of the case. The threats employed must be such as might reasonably create a just fear of death or great bodily harm, in view of the relative condition of the parties, as to health, strength and all other circumstances of the case. To constitute the crime of rape it is necessary that penetration be shown, but, if penetration be shown to have actually taken place as a matter of fact, the degree of penetration is immaterial. But further, to constitute rape there must be an assault. Now, the use of any unlawful violence upon the person of another, with intent to injure him, whatever be the means or degree of violence used, is an assault and battery; any attempt to commit a battery or any threatening gesture, showing in itself, or by words accompanying it, an immediate intention coupled with an ability to commit a battery, is an assault. The injury intended may be either bodily pain, constraint or sense of shame, or other disagreeable emotion of the mind. In this case, gentlemen, to warrant the conviction of the defendant of rape, it should appear from the evidence: 1. That the defendant, Reuben Fitzgerald, in Coryell county, Texas, on or about the 30th day of May, A. D. 1885, made an assault on the alleged female, Ida Turk. 2. That by such assault, and by actual force and threats, as above defined, the defendant obtained carnal knowledge of the said Ida Turk by actual penetration. 3. That

[1] Approved in State *v.* Butterfield, 75 Mo. 301; citing Rev. Stat of Missouri, 1879, §§ 1292, 1300. For an instruction on the theory that the opening of a door fastened with a chain hooked over a rail is a sufficient breaking to constitute burglary, see State *v.* Hecox, 83 Mo. 531, 538. For another instruction for burglary under the Missouri statute, embracing among other things the proposition that the mere unlocking and opening of a door is a breaking within the meaning of the statute, see State *v.* Tutt, 63 Mo. 598; citing Wagr. Mo. Stat. 454, § 10; 1 Bish. Crim. Law, § 327; 4 Bla. Com. 226; Ducher *v.* State, 18 Ohio, 308; State *v.* Alexander, 56 Me. 131; People *v.* Fellinger, 24 How. Pr. (N. Y.) 341; People *v.* Bush, 3 Parker's Cr. (N. Y.) 553. For a charge on the subject of burglary under the Ohio statute, see Mulrooney *v.* State, 26 Oh. St. 327.

such carnal knowledge of the said Ida Turk was obtained by defendant without her consent and against her will." [1]

§ 2197. Robbery. — "The court instructs the jury, as matter of law, that robbery is the felonious and violent taking of money, goods, or other valuable things from the person of another, by force or intimidation. Every person guilty of robbery shall be imprisoned in the penitentiary not less than one year nor more than fourteen years; or if he is armed with a dangerous weapon, with intent, if resisted, to kill or maim such person, or being so armed, he wounds or strikes him, or if he has any confederate present so armed to aid or abet him, he may be imprisoned for any term of years or for life." [2] - - - - "The fact that the defendant took the property in question from the person, and that it was afterwards found in his possession, is not sufficient to convict him of robbery. You must further find from the evidence, beyond all reasonable doubt, that the defendant took it from the person by force and in spite of his resistance, with the intent to rob or steal, and unless you do so find you must find the defendant not guilty." [3]

§ 2198. [Continued.] Concert Among Robbers Provable by Circumstances. — "While the law requires that, to find the defendants guilty in this case the evidence should show that they were acting in concert, still it is not necessary that it should be positively proved that they actually met together and agreed to rob Randolph. Such concert may be proved from circumstances; and if, from all the evidence, the jury are satisfied that the defendants acted together, each aiding in his own way, it would be sufficient." [4]

[1] Approved in Fitzgerald *v.* State, 20 Tex. App. 294, 295, 296. The very full charge in this case contains a number of useful instructions not here given. Other useful instructions on the same subject will be found in the following cases: Sharp *v.* State, 15 Tex. App. 171, 178; Anschicks *v.* State, 6 Tex. App. 524, 533 (approved on the ground that it followed the Penal Code, art. 542, and was in conformity with the holding in Jenkins *v.* State, 2 Tex. App. 346); Boles *v.* State, 18 Tex. App. 422 (held error to refuse on authority of Jarnigan *v.* State, 6 Tex. App. 465); Favors *v.* State, 20 Tex. App. 156; Anderson *v.* State, 104 Ind. 467. See also Jones *v.* State, 10 Tex. App. 552; Jenkins *v.* State, 1 Tex. App. 346; Saddler *v.* State, 12 Tex. App. 194; Bass *v.* State, 16 Tex. App. 62. For instructions on the subject of assault with intent to ravish, see Moore *v.* State, 20 Tex. App. 275, 278 (error to refuse); Fitzgerald *v.* State, 20 Tex. App. 294.

[2] Approved in Needham *v.* People, 98 Ill. 279.

[3] Approved in Stevens *v.* State, 19 Neb. 650. For another instruction on a hypothetical state of facts see State *v.* Carr, 43 Ia. 420.

[4] Approved in Miller *v.* People, 39 Ill. 464.

§ 2199. Conspiracy. — "A conspiracy is a combination of two or more persons by some concerted action to accomplish some criminal or unlawful purpose, or to accomplish some purpose not in itself criminal or unlawful, by criminal or unlawful means." [1] - - - - "To convict, under an indictment for conspiracy, either the end attempted to be accomplished must be unlawful, or the means used must be unlawful; and, under such circumstances the word 'unlawful' partakes of criminality."[2]

§ 2200. Conspiracy to Murder. — "If two or more persons conspire together to do an unlawful act, and in the prosecution of the design, an individual is killed, or death ensue, it is murder in all who enter into, or take part in the execution of the design. But if the unlawful act be a trespass only, to make all guilty of murder, the death must happen in the prosecution of the design. If the unlawful act be a felony, or be more than a mere trespass, it will be murder in all, although death happen collaterally, or beside the original design." [3]

§ 2201. Embezzlement by a Bailee. — "If you believe from the evidence that the defendant received from the said Caylor the organ in question, under an agreement that the defendant should act as the agent of the said Caylor in the sale of said organ, and that defendant should sell said organ, and pay over to and deliver to said Caylor a certain sum in money or notes that defendant should secure from the sale of said organ, and you further believe that the defendant sold said organ as his own property, and not as agent for said Caylor, and that at the time of said sale the defendant had the fraudulent intent to appropriate the proceeds of said sale to his own use, and that in pursuance of said intent the defendant afterwards appropriated the proceeds of said sale to his own use and benefit, without the consent of said Caylor, the defendant would, under such circumstances, be guilty of embezzling the organ; but if you believe it was the intention of the defendant to act in good faith towards said Caylor, and carry out his alleged agreement, and that he, after said sale, conceived for the first time the intention to

[1] Approved in Hardin *v.* State, 4 Tex. App. 364.

[2] Approved in Smith *v.* People, 25 Ill. 21. For a charge on the subject of Conspiracy to Defraud, see People *v.* Clark, 10 Mich. 317, 318.

[3] Approved in State *v.* Shelledy, 8 Iowa, 484. Citing Fost. Cr. L. 258, 344, 351; 1 East P. C. 255, 259; 1 Hale P. C. 443, 444; United States *v.* Ross, 1 Gall. (U. S.) 625; 2 Bish. Cr. Law, 626. Other instructions on the subject of conspiracy to murder will be found in the same case and also in Hardin *v.* State, 4 Tex. App. 364.

appropriate the proceeds of the sale, he would not be guilty of embezzling the organ." [1]

§ 2202. LARCENY — "To find the defendants guilty under the indictment, the jury must believe from the evidence that the defendant, at the time he caught said mare, took her with the felonious intent to convert her permanently to his own use." [2] - - - - "If you find from the evidence that said goods were lost; that the same were found by the defendant; that at the time he found the same he did not know who owned them; that there were no marks upon or about the goods showing to whom they belonged, so that defendant could identify the owner at once — even though defendant could afterwards have discovered the owner by honest diligence,— then you must acquit the defendant." [3]

[1] Approved in Epperson *v.* State, 22 Tex. App. 694, 697; *s. c.* 3 S. W. Rep. 789, Wilson, J., saying: "It clearly and distinctly states the correct rule as announced in the decisions on the subject." Citing Leonard *v.* State, 7 Tex. App. 417. In State *v.* Wingo, 89 Ind. 206, there is a series of instructions in a prosecution for larceny by a bailee under the Indiana statute — holding in substance that the offense cannot be larceny, and the court in approving it held that while it cannot be larceny it may be embezzlement. The court cite Keely *v.* State, 14 Ind. 36; Hart *v.* State, 57 Ind. 102; Jones *v.* State, 59 Ind. 229; Umphrey *v.* State, 63 Ind. 223; Starck *v.* State, 63 Ind. 285; Moore Crim. Law, § 918. In State *v.* Leicham, 41 Wis. 581, 582, there is also a series of instructions approved on appeal in a prosecution for larceny by an agent. In State *v.* Baumhager, 28 Minn. 229, there is a charge on the subject of embezzlement of public moneys by a county treasurer by means of a county order. In approving which the court cite Rose. Ev. 453; 2 Arch. Cr. Pr. & Pl. 578; Rex *v.* Hall, 3 Starkie, 67.

In State *v.* Ware, 62 Mo. 597, 602, the court ruled that this instruction was unquestionably the law and should have been given (citing State *v.* Shermer, 55 Mo. 83, and cases there cited).

[3] Approved in State *v.* Dean, 49 Ia. 74. Citing Iowa Code, 1873, §§ 3907, 1514, 1515, 1516, 1518 and 1522; People *v.* Cogdell, 1 Hill (N. Y.), 94; People *v.* Anderson, 14 Johns. (N. Y.) 294; State *v.* Conway, 18 Mo. 321; Wright *v.* State, 5 Yerg. (Tenn.) 154; State *v.* Wood, 46 Ia. 116; Abrams *v.* People, 6 Hun (N. Y.), 491; Wilson *v.* People, 39 N. Y. 459. Other useful authorities on the subject of larceny will be found in the following cases: People *v.* Crawford, 48 Mich. 500; Ferrill *v.* Com., 1 Duv. (Ky.) 154, (larceny committed in another State and the stolen goods brought into Kentucky). Reviewing the following authorities: People *v.* Gardner, 2 Johns. (N. Y.) 477; Simmons *v.* Com., 5 Binn. (Pa.) 617; Com. *v.* Cullins, 1 Mass. 116; State *v.* Ellis, 3 Conn. 186; Hamilton *v.* State, 11 Oh. 436; 1 Bish. Crim. Law, § 59, p. 598; *Id.*, §§ 595; 599; *Id.*, §§ 596, 597 *a.*); Lawrence *v.* State, 20 Tex. App. 536, 541 (instruc-

§ 2203. Perjury: Strength of Evidence to Convict. — "The evidence of one witness as to the falsity of the evidence upon which perjury is assigned is not sufficient to warrant conviction. If there is but one witness testifying directly to the falsity of the evidence of one charged with perjury, there must be evidence of circumstances corroborating such falsifying testimony. There is no rule by which the exact weight of the corroborating circumstances requisite to warrant a conviction can be determined; and it must be for the jury to determine whether such corroborating circumstances are sufficient to justify a verdict of guilty. It is frequently stated that such corroborating circumstances must be equivalent to the positive or direct testimony of a witness. But such is not the rule of law. If it were the rule, it would be a rule without sense, furnishing no guidance to the jury; for the weight which attaches to the direct testimony of a witness can scarcely be said to be exactly equal in any two individual cases; and consequently there could be no rule for arriving at the weight of the direct testimony of one witness." [1]

§ 2204. Murder at Common Law. — "Murder is the unlawful killing of a human being in the peace of the people, with malice aforethought, either express or implied by law." [2] - - - - "It is not necessary that when a purpose to take life is formed, the particular party who is killed shall be present to the mind of the party accused. It is sufficient if the purpose was formed to kill any one coming along, who presented the opportunity and inducements to the crime." [3] - - - - "In general, where an involuntary killing happens in consequence of an unlawful act, it will be either murder or manslaughter, according to the nature of the act which occasions it. If it be in the prosecution of a felonious intent, or in consequence of an act naturally tending to bloodshed, it will be

tion on the theory of taking property with an honest though mistaken belief in his own title); State *v.* Heaton, 23 W. Va. 776 (as to the title and possession of the owner), State *v.* Hill, 65 Mo. 85 (citing State *v.* Donnegan, 34 Mo. 67).

[1] Approved in Galloway *v.* State, 29 Ind. 442. Citing Starkie on Ev., 649 *et seq.*; State *v.* Dickson, 6 Kan. 211; State *v.* Gee, 85 Mo. 647; State *v.* Shelledy, 8 Ia. 485; McDermott *v.* State, 89 Ind. 192; State *v.* Jones, 78 Mo. 280; State *v.* Thomas, 78 Mo. 336 (drawn by an able judge and commended on appeal); Cotton *v.* State, 32 Tex. 626.

[2] Approved in Jackson *v.* People, 18 Ill. 270.

[3] Approved in State *v.* Dickson, 6 Kan. 213.

murder. If no more was intended than a mere civil trespass, it is manslaughter." [1]

§ 2205. General Instruction upon Hypothesis of Murder in First Degree. — "If you shall find and believe from the evidence that at the county of Jackson, State of Missouri, at any time prior to the 31st day of May, 1883, the day on which the indictment in this cause was filed, the defendant John Vansant, in the manner and by the means specified in the indictment, willfully, with deliberation, premeditation and malice aforethought, assaulted and wounded the deceased, Porter Armstrong, and that within one year and a day thereafter, and before the filing of said indictment, the said Porter Armstrong, at the county and State aforesaid, died from the effects of the wound so inflicted upon him by the defendant, the verdict should be that defendant is guilty of murder in the first degree." [2]

§ 2206. An Instruction Embracing the Proposition that there need be no Appreciable Time Between the Formation of the Intent and the Doing of the Act. — "In this degree of felonious homicide, there must be the elements of purpose, malice and premeditation. If either of these elements be absent, there can be no conviction of this grade of felonious homicide. A premeditated design or purpose is one resulting from thought and reflection. A design conceived and afterwards so deliberately considered as to become resolved and fixed, is regarded by the law as premeditated. When the design to take human life is formed after deliberation, and where there is adequate time and opportunity for deliberate thought, then, no matter how soon the felonious killing may follow the formation of the settled purpose, it is

[1] Approved in State *v.* Shelledy, 8 Ia. 485, 495. For other instructions see State *v.* Dickson, 6 Kan. 211; Jackson *v.* People, 18 Ill. 270 (under Illinois statute); in State *v.* Shelledy, *supra*, there are several instructions applicable to the hypothesis of deceased being taken out by the defendant and others, and thrown into the river where he drowned, or else that he jumped into the river to escape from his captors. In Epps *v.* State, 102 Ind. 539, 553, useful instructions will be found in a case of murder by poisoning. In State *v.* Gee, 85 Mo. 647, there is a series of instructions in a case of murder applicable to several phases of the evidence, drawn by a judge of ability, which the present writer commends as a good model to practitioners in that State. For an instruction defining murder under the Colorado statute, see May *v.* People, 8 Colo. 217.

[2] Approved in State *v.* Vansant, 80 Mo. 67.

murder in the first degree. There need be no appreciable space of time between the formation of the intention to kill and the killing; they may be as instantaneous as successive thoughts. It is only necessary that the act of killing be preceded by the concurrence of will, deliberation and premeditation on the part of the slayer; but when there is no time and opportunity for deliberate thought, then the unlawful killing cannot be murder in the first degree." [1]

§ 2207. MURDER IN THE SECOND DEGREE. — "If you shall believe, from the evidence, beyond a reasonable doubt, that the defendant, at the time and place mentioned in the indictment, with a pistol, willfully, premeditatedly, and of his malice aforethought, but without deliberation, shot and killed Peter Minnick, you will find him guilty of murder in the second degree, and assess his punishment in the penitentiary for a term not less than ten years." [2] - - - - "If you shall believe from the evidence, that the defendant shot and killed Minnick while he, the defendant, was in a violent passion, suddenly aroused by opprobrious epithets or abusive words spoken by Minnick to defendant, then such shooting and killing was not done with deliberation, and was not murder in the first degree. On the other hand, although the defendant shot and killed Minnick while the defendant was in a violent passion, suddenly aroused by opprobrious epithets or abusive words spoken to him by Minnick, — yet if such shooting and killing was done willfully, premeditatedly and of his malice aforethought, as heretofore explained, then defendant was guilty of murder in the second degree." [3]

[1] Approved in Koerner *v.* State, 98 Ind. 8. The court say that the instruction is within the doctrine of Fahnestock *v.* State, 23 Ind. 231, and Binns *v.* State, 66 Ind. 428, and Wharton on Homicide, § 180. *Other useful instructions* on the hypothesis of murder in the first degree will be found in State *v.* Wisdom, 84 Mo. 177, 187; State *v.* Alexander, 66 Mo. 148; State *v.* Wingo, 66 Mo. 181; State *v.* Curtis, 70 Mo. 594; State *v.* Dickson, 78 Mo. 438; May *v.* People, 8 Colo. 217; Cotton *v.* State, 32 Tex. 626.

[2] Approved in State *v.* Gee, 85 Mo. 647, 648.

[3] Approved in State *v.* Gee, 85 Mo. 647, 649. The crime of murder in the second degree is entirely a creature of statute, and the statutes of different States which define this crime are not uniform in their terms, nor are their decisions uniform in the construction of them. The leading characteristics of murder in the second degree are the presence of malice (distinguishing it from manslaughter) and the absence of premeditation or deliberation, — in Missouri, the absence of deliberation merely. Other instructions defining this crime either in the abstract or in the concrete with reference to states of fact in evidence, will be found in the following cases: State *v.* Gee,

§ 2208. [CONTINUED.] MURDER PRESUMED TO BE IN SECOND DEGREE. — "The court instructs the jury that where a homicide is proved the presumption is that it is murder in the second degree. If the State would elevate it to murder in the first degree, she must establish the characteristics of that crime, and if the prisoner would reduce it to manslaughter, the burden is on him."[1]

§ 2209. DEFINITIONS IN MURDER CASES: "WILLFULLY," "DELIBERATELY," "PREMEDITATEDLY," "MALICE," "HEAT OF PASSION." — "The word willful, as used in the indictment and in these instructions, means intentionally, that is, not accidentally; deliberately means in a cool state of the blood, that is, not in the heat of passion; premeditated means thought of beforehand for any length of time however short; malice in the instructions does not mean hatred or ill-will, as it commonly does, but it means the intentional doing of a wrongful act; heat of passion as used in these instructions, means a condition of quick anger or sudden injury, engendered by a real or supposed grievance suffered at the time, and in order to reduce the crime from murder in the first degree to murder in the second degree, the killing must be done upon the instant the provocation is given, before the blood has had time to cool and reason to resume its sway, before the mind has time to consider the character and gravity of the act about to be done, and not from hatred or for pre-existing revenge."[2] - - - - "The word 'willfully,' as used in these instructions, means intentionally, not accidentally. 'Deliberately' does not mean brooded over, considered or reflected upon for a week, a day or an hour, but it means an intent to kill, executed by the defendant in a cool state of the blood, in furtherance of a formed design to gratify a feeling of revenge, or accomplish some other unlawful purpose, and not under the influence of a violent

supra; State *v.* Achey, 64 Ind. 59; State *v.* Shelledy, 8 Ia. 485; State *v.* Thomas, 78 Mo. 336 (instructions drawn by an able judge and commended on appeal); State *v.* Harris, 59 Mo. 553; State *v.* Smith (Ia.), 34 N. W. Rep. 597. In State *v.* Meshek, 61 Iowa, 316, 319. there is an instruction on the hypothesis that the killing of an officer in the known resistance of a lawful arrest, is murder in the second degree; but this offense would ordinarily be murder in the first degree.

[1] Approved in State *v.* Cain, 20 W. Va. 679, 709. Citing Hill's Case, 2 Gratt. (Va.) 595. The principle embodied in the above instruction is believed to be universally acknowledged.

[2] Approved in State *v.* Jones, 78 Mo. 278, 280.

passion suddenly aroused by a real or supposed grievance, amounting to a temporary dethronement of reason." [1]

§ 2210. [CONTINUED.] "MALICE," "MALICE AFORETHOUGHT," "PREMEDITATED MALICE." — "Malice may, in general terms, be defined to be the doing of a wrongful act intentionally, without just cause or excuse. As employed in the foregoing definition of murder, the term malice includes in its meaning all those states of the mind under which the killing of a human being takes place without any cause which will in law justify, excuse or extenuate the homicide." [2] - - - - "Premeditated malice is where the intention to unlawfully take life is deliberately formed in the mind, and that determination meditated upon before the fatal stroke is given. There need be no appreciable space of time between the formation of the intention to kill and the killing. They may be as instantaneous as successive thoughts. It is only necessary that the act of killing be preceded by a concurrence of will, deliberation and premeditation on the part of the slayer." [3] - - - - "Malice, as used in the indictment, does not mean mere spite, ill-will, or dislike, as it is ordinarily understood; but it means that condition of the mind which prompts one person to take the life of another without just cause or justification, and it signifies the state of disposition which shows a heart regardless of social duty and fatally bent on mischief. Malice aforethought means that the act was done with malice and premeditation." [4]

§ 2211. HOMICIDE: BURDEN ON DEFENDANT TO SHOW CIRCUMSTANCES OF EXCUSE OR JUSTIFICATION. — "If the jury shall find from the evidence, that the killing of Roman Morris has been proved as charged, then any defense which the defendant may rely upon in justification or excuse of the act, or to reduce the killing to the grade of manslaughter,

[1] Approved in State *v.* Thomas, 78 Mo. 227, 338; State *v.* Gee, 85 Mo. 647; May *v.* People, 8 Colo. 217.

[2] Approved in Kemp *v.* State, 13 Tex. App. 562.

[3] Approved in Binns *v.* State, 66 Ind. 433. Citing Beauchamp *v.* State, 6 Blackf. (Ind.) 299; Fahnestock *v.* State, 23 Ind. 231; Keenan *v.* Commonwealth, 44 Pa. St. 55; McKenzie *v.* State, 26 Ark. 334; State *v.* Dunn, 18 Mo. 419; State *v.* Jennings, 18 Mo. 435.

[4] Approved in State *v.* Gee, 85 Mo. 647, 649. Other instructions embracing similar definitions will be found in State *v.* Shelledy, 8 Iowa, 485 ("Malice Aforethought"); May *v.* People, 8 Colo. 217; Jackson *v.* People, 18 Ill. 270; Thomas *v.* State, 78 Mo. 336; State *v.* Achey, 64 Ind. 59; Cotton *v.* State, 32 Tex. 626.

it is incumbent on the defendant satisfactorily to establish such defense, unless the proof thereof arise out of the evidence produced against him. - - - - If the killing of the person mentioned in the indictment be satisfactorily shown, beyond all reasonable doubt, to have been the act of the defendant, then the law pronounces it murder, unless the defendant has shown, or it appears by the evidence for the people, that circumstances existed excusing or justifying the act, or mitigating it so as to make it manslaughter." [1]

§ 2212. MANSLAUGHTER. — "Manslaughter is the unlawful killing of a human being without malice, express or implied, either voluntarily upon a sudden heat, or involuntarily but in the commission of some unlawful act. And if you find from the evidence, beyond a reasonable doubt, that the defendant did the killing unlawfully and voluntarily but in a sudden heat or transport of passion, or involuntarily in the commission of an unlawful act, and without malice, express or implied, then the offense would be manslaughter, and you should so find him guilty." [2] - - - - "Manslaughter is the unlawful and felonious killing of another, without malice, either express or implied. It differs from murder in this: That though the act which occasions the death be unlawful, or likely to be attended with bodily mischief, yet malice, either express or implied, which is the very essence of murder, is presumed to be wanting; and if, therefore, in doing an unlawful act, or in carrying out an unlawful design, death happen, but without malice, the offense would be only manslaughter, provided such unlawful act or design be not a felony; because, then, the law implies the existence of malice. But if the intent goes no farther than to commit a bare trespass, it will be manslaughter." [3] - - - - "The court instructs the jury that the crime of murder requires the mind to have acted from deliberation and intelligence, and when it is clouded by a passion, apparently irresistible in a reasonable person, the killing is only manslaughter. The passion which in law rebuts the imputation of malice, so as to reduce the killing to manslaughter, need not be so overpowering as for the time to shut out knowledge and destroy volition, but that heated condition of the mind that would render a reasonable man deaf to the voice of reason, so that

[1] Approved in Jackson *v.* People, 18 Ill. 270.

[2] Approved in Powers *v.* State, 87 Ind. 154.

[3] Approved in State *v.* Shelledy, 8 Ia. 485. Citing 2 Bishop Cr. Law, §§ 624, 627; People *v.* Enoch, 13 Wend. (N. Y.) 163; People *v.* Rector, 19 Wend. (N. Y.) 592.

although the act done was likely to produce death, it was not the result of malignity of heart, but imputable to human infirmity. There is no necessity that the reason should be dethroned, or that the slayer should act in a whirlwind of passion, but there must be a sudden passion upon reasonable provocation, apparently sufficient to make the passion irresistible." [1]

§ 2213. ANOTHER PRECEDENT. — "Manslaughter is voluntary homicide committed under the immediate influence of sudden passion, arising from an adequate cause, but neither justified not excused by law. By the expression 'under the immediate influence of sudden passion' is meant: 1. That the provocation must arise at the time of the commission of the offense, and that the passion is not the result of a former provocation. 2. That the act must be directly caused by the passion arising out of the provocation. It is not enough that the mind be merely agitated by passion arising from some other provocation, or provocation given by some person other than the person killed. 3. The passion intended is either of the emotions of the mind known as anger, rage, sudden resentment or terror, rendering it incapable of cool reflection. By the expression 'adequate cause' is meant such as would commonly produce a degree of anger, rage, resentment or terror in a person of ordinary temper, sufficient to render the mind incapable of cool reflection. - - - - In order to reduce a voluntary homicide to the grade of manslaughter, it is necessary not only that adequate cause exist to produce a degree of anger, rage, sudden resentment or terror, sufficient to render the mind incapable of cool reflection, but also that such state of mind did actually exist at the time of the commission of the offense. - - - - Thus, gentlemen, when a voluntary homicide takes place under the immediate influence of sudden passion, as explained above, and no cause exists which will in law justify or excuse its commission, then to determine whether such homicide is manslaughter or murder in the second degree, the true test is, was there adequate cause to produce such passion? If there was such adequate cause, the homicide will be manslaughter; if there was not such adequate cause, the homicide will be murder of the second degree." [2]

[1] Approved in May *v.* People, 8 Colo. 210, 224.

[2] Approved and commended in Kemp *v.* State, 13 Tex. App. 561, 563. *Other instructions on the subject of manslaughter*, given under different statutes and hence not uniform in their character will be found in State *v.* France, 76 Mo. 684 (citing and relying on State *v.* Holme, 54 Mo. 153; 2 Bish. Cr. L., § 638); Sparks *v.* Com., 3 Bush (Ky.), 113 (hypothetical instruction); State

§ 2214. Involuntary Manslaughter. — "If you are convinced beyond a reasonable doubt by the evidence, that the defendant, Henry Johnson, unlawfully commited an assault and battery upon the person of James Carbon, in Porter county, Indiana, on the 16th day of August, 1884, without any intention or purpose to kill him, the said James Carbon, but thereby inflicted a wound upon his person, by reason of which the said Carbon died in said county, on the 24th day of August, 1884, the defendant is guilty of involuntary manslaughter. Assault and battery, as used in this instruction, may be defined as any unlawful touching, striking, biting, beating or wounding of one person by another, in a rude, insolent and angry manner." [1]

§ 2215. Of Homicide per Infortunium. — "If the jury find from the evidence, that the deceased and defendant were riding the same horse along the road, the defendant having a pistol in his hand, and that the deceased seized hold of the pistol in the hand of defendant and attempted to take the pistol from defendant by force, and in the scuffle which ensued the pistol was accidentally discharged and produced the

v. Jones, 78 Mo. 280 (hypothetical instruction as to "heat of blood" produced by adultery with defendant's wife and subsequent "cooling time"); State *v.* Thomas, 78 Mo. 336 (without a design to produce death, but in a cruel or unusual manner, and also on other elements of the crime); State *v.* Greschia, 53 Ill. 296; State *v.* Gee, 85 Mo. 647 (excellent series of instructions in a case of murder); State *v.* Peak, 85 Mo. 190 (manslaughter in the third degree under Missouri statute); State *v.* Vansant, 80 Mo. 67 (detailed instruction on hypothesis of manslaughter in the fourth degree under Missouri statute); Kelley *v.* State, 53 Ind. 312 (hypothetical instruction as to manslaughter under Indiana statute); State *v.* Christian, 66 Mo. 143 (instruction as to manslaughter in third degree under Missouri statute); State *v.* Hardie, 47 Ia. 648 (instruction as to manslaughter by the negligent use of a deadly weapon); State *v.* Shelledy, 8 Ia. 485 (instruction as to manslaughter in arresting a man, binding him, carrying him away and exposing him so that death ensued, not "returning him safely to his family"); Solander *v.* People, 2 Colo. 48, 54 (instruction as to manslaughter in effecting a criminal abortion). See also May *v.* People, 8 Colo. 217.

[1] It was held on the State's appeal in State *v.* Johnson, 102 Ind. 247, that it was error to refuse this instruction. The statute (R. S. Ind. 1881, § 1908) reads as follows: "Whoever unlawfully kills any human being without malice, express or implied, * * * involuntarily, but in the commission of some unlawful act, is guilty of manslaughter," etc. In approving this instruction the court cite: Com. *v.* McAfee, 108 Mass. 458; Com. *v.* Fox, 7 Gray (Mass.), 585; Adams *v.* State, 65 Ind. 565: Bruner *v.* State, 58 Ind. 159 Willey *v.* State, 46 Ind. 363; 4 Bla. Com. 192; Fost. Cr. L. 259; 1 Bish. Crim. L. (7th ed.), §§ 331, 332; 1 Whart. Crim. L. (8th ed.), §§ 315, 324, 325.

death of the deceased by accident, and without the fault or culpable negligence of the defendant, and without the defendant commencing or bringing on the difficulty with the deceased, the jury will find the defendant not guilty." [1]

§ 2216. Who Liable as Aiders and Abettors. — "All persons are principals who are guilty of acting together in the commission of an offense. When an offense is actually committed by one or more persons, but others are present, and, knowing the unlawful intent, aid by acts or encourage by words or gestures those actually engaged in the commission of the unlawful act, such persons so aiding or encouraging are principal offenders, and may be prosecuted and convicted as such." [2] - - - - "The bare presence of defendant at the time of the taking (if you should find from the evidence that he was present), would not justify his conviction, unless the evidence shows that he committed some act aiding, abetting, assisting or encouraging the person who did commit the theft." [3]

§ 2217. Riot: What Participants Guilty. — "That all concerned in the unlawful assembly are equally guilty of the subsequent acts done by any of them in furtherance of the common objects of the assembly; and all who joined them after the original meeting, and who were present at any subsequent act, and were either active in doing, countenancing, or supporting, or ready, if necessary to support the unlawful act, thereby became parties to the riot, and are equally guilty of all their subsequent acts." [4]

[1] Approved in State *v.* Wisdom, 84 Mo. 177, 190.

[2] Approved in Pierce *v.* State, 17 Tex. App. 232, 239. The same charge also contains instructions applying this principle to the facts in evidence. A similar instruction, approved on appeal, will be found in Cotton *v.* State, 32 Tex. 627. An instruction applying this principle in a case of housebreaking is found in State *v.* Butterfield, 75 Mo. 301. Another applying it in a case of murder is found in State *v.* Maloy, 44 Ia. 113. See also note to State *v.* Ponyier, 6 Crim. Law Mag. 351–355.

[3] In Jackson *v.* State, 20 Tex. App. 190, 192; it was held error to refuse an instruction drawn in the above language, the court citing the following authorities as showing that the instruction announced a correct proposition of law: 1 Bish. Crim. Law (7th ed.), §§ 633, 634; Mercersmith *v.* State, 8 Tex. App. 211; Stevenson *v.* State, 17 Tex. App. 619; Golden *v.* State, 18 Tex. App. 637; Burrell *v.* State, 18 Tex. 713; Ring *v.* State, 42 Tex. 282.

[4] Given in United States *v.* Fenwick, 4 Cranch, C. C. (U. S.) 675, 680. It is believed that this instruction

§ 2218. Drunkenness as Affecting Degree of Guilt. — "While drunkenness is no excuse for any crime or misdemeanor, unless occasioned by the fraud, contrivance or force of some other person, for the purpose of causing the perpetration of an offense, yet if it be a fact appearing in the evidence, it is to be considered by the jury in connection with all other facts in determining the degree of guilt. The fact that the prisoner was drunk, if proven, does not render his act any the less criminal, and in this sense it is not available as an excuse, but upon the question whether the act was deliberate or premeditated it is proper to be considered, and only for this purpose. It neither excuses the offense, nor avoids the punishment which the law inflicts when the character of the offense is ascertained." [1]

§ 2219. Other Instructions in Criminal Cases. — In the cases below cited, instructions approved on appeal or error, will be found on the subject of the right of a *deputy sheriff* to *bear arms;* [2] of an *attempt* to commit *arson;* [3] of offering to *bribe* a *state officer;* [4] of endeavoring to *conceal* the *birth* of a *child;* [5] of *disturbing* the *peace* and quiet of another person; [6] of obtaining money under *false pretenses;* [7] of *gaming;* [8] of *intoxication*, under an indictment for being intoxicated; [9] of selling *intoxicating liquors* as a dram-shop keeper on Sunday; [10] of selling *beer* on *Sunday* under Indiana statute; [11] of *malicious mischief;* [12] of *seduction;* [13] of *conspiracy* to *seduce* a female; [14] of running a railway *train* on *Sunday* in violation

must be read with the qualification that the last clause must have been intended to be understood with reference to the facts of the particular case. It cannot be the law that a person who attends a riotous assembly and afterwards withdraws from it is responsible for acts done by those who continue in it after his withdrawal.

[1] Approved in May *v.* People, 8 Colo. 210, 220.

[2] State *v.* Wisdom, 84 Mo. 177, 190.

[3] State *v.* Hayes, 78 Mo. 309.

[4] O'Brien *v.* State, 6 Tex. App. 667.

[5] State *v.* White, 76 Mo. 98.

[6] State *v.* Burus, 35 Kan. 390.

[7] State *v.* Montgomery, 56 Ia. 198.

[8] Rice *v.* State, 3 Kan. 157 (commended on appeal); Stevens *v.* People, 67 Ill. 588 (keeping a gambling house); State *v.* Jackson, 39 Mo. 420 (betting on "pool").

[9] State *v.* Huxford, 47 Ia. 18.

[10] State *v.* Leeper, 78 Mo. 470.

[11] Morel *v.* State, 89 Ind. 278.

[12] O'Dea *v.* State, 16 Neb. 242 (maliciously destroying a public bridge); State *v.* Underwood, 37 Mo. 226 (maliciously tearing down a dwelling house).

[13] State *v.* Bryan, 34 Kan. 64 (obtaining illicit intercourse under promise of marriage); State *v.* Lewis, 48 Ia. 579.

[14] Smith *v.* People, 25 Ill. 21.

a statute;[1] of *unlawful cohabitation;*[2] of *vagrancy* under a city ordinance;[3] of the *responsibility* of a *wife* for a murder committed with her husband.[4]

[1] State *v.* Railroad Co., 24 W. Va. 785; State *v.* Baltimore &c. R. Co., 15 W. Va. 367.

[2] State *v.* Kirkpatrick, 63 Ia. 556 (citing State *v.* Marvin, 12 Ia. 499).

[3] Shanley *v.* Wells, 71 Ill. 80.

[4] State *v.* Hendricks, 32 Kan. 564.

CHAPTER LXII.

OF NONSUITS.

SECTION
2225. Constitutional Right of Trial by Jury in the Federal Courts.
2226. The Right of Trial by Jury as Guaranteed in the State Constitutions.
2227. No Power at Common Law to compel a Nonsuit.
2228. [Continued.] Modern American Authorities Conflicting.
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2230. Right of the Plaintiff to take a Nonsuit.
2231. [Continued.] This Right accorded by Statutes.
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2234. [Continued.] Non suits in Equity Proceedings.
2235. [Continued.] In Proceedings for Partition.
2236. [Continued.] In Statutory Actions to Quiet Title.
2237. [Continued.] Nonsuit set aside if Plaintiff driven to it by Erroneous Proceedings.
2238. Otherwise if Needlessly or Voluntary Taken.

§ 2225. Constitutional Right of Trial by Jury in the Federal Courts. — The Constitution of the United States (7th amendment) provides that in all suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law. This provision is restrictive upon the Federal courts only. It is competent for the States to abolish the right of trial by jury if they shall see fit.[1]

§ 2226. The Right of Trial by Jury as guaranteed in the State Constitutions. — The right of trial by jury is guaranteed in

[1] Livingston *v.* Mayor of New York, 8 Wend. (N. Y.) 85. See also Barron *v.* Baltimore, 7 Pet. (U. S.) 243; Bonaparte *v.* Camden, &c., R. Co., Baldw. (U. S.) 220; Livingston's Lessee *v.* Moore, 7 Pet. (U. S.) 469, 551; Fox *v.* Ohio, 5 How. (U. S.) 410, 434; James *v.* Commonwealth, 12 Serg. & R. (Pa.) 221; Barker *v.* The People, 3 Cow. (N. Y.) 686.

the Constitutions of all the States, the provisions being as follows: —

Alabama. — The right of trial by jury shall remain inviolate.[1]

Arkansas. — The right of trial by jury shall remain inviolate, and shall extend to all cases at law without regard to the amount in controversy; but a jury trial may be waived by the parties in all cases, in the manner prescribed by law.[2]

California. — The right of trial by jury shall be secured to all, and remain inviolate; but in civil actions three-fourths of a jury may render a verdict. A trial by jury may be waived in all criminal cases, not amounting to felony, by the consent of both parties, expressed in open court, and in civil actions by the consent of parties, signified in such manner as may be prescribed by law. In civil actions, and cases of misdemeanor, the jury may consist of twelve, or of any number less than twelve upon which the parties may agree in open court.[3]

Colorado. — The right of trial by jury shall remain inviolate in criminal cases; but a jury in civil cases in all courts, or in criminal cases in courts not of record, may consist of less than twelve men, as may be prescribed by law.[4]

Connecticut. — The right of trial by jury shall remain inviolate.[5]

Delaware. — Trial by jury shall be as heretofore.[6]

Florida. — The right of trial by jury shall be secured to all, and remain inviolate forever; but in all civil cases a jury trial may be waived by the parties in the manner to be prescribed by law.[7]

Georgia. — The right of trial by jury, except where it is otherwise provided in this Constitution, shall remain inviolate.[8]

Illinois. — The right of trial by jury, as heretofore enjoyed, shall remain inviolate; but the trial of civil cases before justices of the peace by a jury of less than twelve may be authorized by law.[9]

[1] Ala. Const. of 1875, art. 1, § 12.
[2] Ark. Const. of 1874, art. 2, § 7.
[3] Cal. Const. 1879, art. 1, § 7.
[4] Col. Const. 1876, art. 2, § 23.
[5] Conn. Const. of 1818, art. 1, § 21.
[6] Del. Const. of 1831, art. 1, § 4.
[7] Florida Const. of 1868, art. 1, § 3.
[8] Georgia Const. of 1877, art. 6, § 18.
[9] Const. of Ill. 1870, art. 2, § 5.

Indiana. — In all criminal cases whatever, the jury shall have the right to determine the law and the facts.[1] In all civil cases, the right of trial by jury shall remain inviolate.[2]

Iowa. — The right of trial by jury shall remain inviolate; but the general assembly may authorize trial by a jury of a less number than twelve men in the inferior courts.[3]

Kansas. — The right of trial by jury shall be inviolate.[4]

Kentucky. — That the ancient mode of trial by jury shall be held sacred, and the right thereof remain inviolate, subject to such modifications as may be authorized by this Constitution.[5]

Louisiana. — In all criminal prosecutions the accused shall enjoy the right to a speedy public trial by an impartial jury except in cases where the penalty is not necessarily imprisonment at hard labor or death. The general assembly may provide for the trial thereof by a jury less than twelve in number, provided that the accused in every instance shall be tried in the parish where the offense shall have been committed, except in cases of change of venue.[6]

Maine. — In all civil suits, and in all controversies concerning property, the parties shall have a right to a trial by jury, except in cases where it has heretofore been otherwise practiced; the party claiming the right may be heard by himself and his counsel, or either, at his election.[7]

Maryland. — That the inhabitants of Maryland are entitled to the common law of England, and the trial by jury, according to the course of that law.[8] * * * That the trial of facts, where they arise, is one of the great securities of the lives, liberties, and estate of the people.[9] The parties to any cause may submit the same to the court for determination without the aid of a jury.[10]

Massachusetts. — In all controversies concerning property, and in all suits between two or more persons, except in cases in

[1] Ind. Const. of 1851, art. 1, § 19.
[2] *Ibid.*, § 20.
[3] Iowa Const. of 1857, art. 1, § 9.
[4] Kan. Const. of 1859, Bill of Rights, § 5.
[5] Ky. Const. of 1850, art. 13, § 8.
[6] La. Const. of 1879, Bill of Rights, art. 7.
[7] Me. Const. of 1819, art. 1, § 20.
[8] Md. Const. 1867, Dec. of Rights, art. 5.
[9] *Ibid.*, art. 20.
[10] *Ibid.*, art. 4, § 8, Amend. of 1875.

which it has heretofore been otherways used and practiced, the parties have a right to a trial by jury; and this method of procedure shall be held sacred, unless in causes arising on the high seas, and such as relate to mariners' wages, the legislature shall hereafter find it necessary to alter it.[1]

Michigan. — The right of trial by jury shall remain, but shall be deemed to be waived in all civil cases, unless demanded by one of the parties, in such manner as shall be prescribed by law.[2]

Minnesota. — The right of trial by jury shall remain inviolate, and shall extend to all cases at law without regard to the amount in controversy, but a jury trial may be waived by the parties in all cases in the manner prescribed by law.[3]

Mississippi. — The right of trial by jury shall remain inviolate.[4]

Missouri. — The right of trial by jury, as heretofore enjoyed, shall remain inviolate; but a jury for the trial of criminal or civil cases, in courts not of record, may consist of less than twelve men, as may be prescribed by law.[5]

Nebraska. — The right of trial by jury shall remain inviolate, but the legislature may authorize trial by a jury of a less number than twelve men, in courts inferior to the District Court.[6]

Nevada. — The right of trial by jury shall be secured to all, and remain inviolate forever; but a jury trial may be waived by the parties in all civil cases in the manner to be prescribed by law; and in civil cases if three-fourths of the jurors agree upon a verdict, it shall stand and have the same force and effect as a verdict by the whole jury; provided, the legislature, by a law passed by a two-thirds vote of all the members elected to each branch thereof, may require a unanimous verdict notwithstanding this provision.[7]

New Hampshire. — In all controversies concerning property, and in all suits between two or more persons, except in cases in which it has been heretofore otherwise used and practiced, the

[1] Mass. Const. of 1780, part 1, art. 15.
[2] Mich. Const. of 1850, art. 6, § 27.
[3] Minn. Const. of 1857, art. 1, § 4.
[4] Miss. Const. of 1869, art. 1, § 12.
[5] Mo. Const. of 1875, art. 2, § 28.
[6] Neb. Const. of 1875, art. 1, § 6.
[7] Nev. Const. of 1864, art. 1, § 3.

parties have a right to trial by jury; and this method of procedure shall be held sacred, unless, in cases arising on the high seas, and such as relate to mariners' wages, the legislature shall think it necessary hereafter to alter it.[1] In order to reap the fullest advantage of the inestimable privilege of the trial by jury, great care ought to be taken that none but qualified persons shall be appointed to serve, and such ought to [be] fully compensated for their travel, time and attendance.[2]

New Jersey. — The right of trial by jury shall remain inviolate; but the legislature may authorize the trial of civil suits, when the matter in dispute does not exceed fifty dollars, by a jury of six men.[3]

New York. — The trial by jury in all cases in which it has been heretofore used shall remain inviolate forever; but a jury trial may be waived by the parties in all civil cases in the manner to be prescribed by law.[4]

North Carolina. — In all controversies at law respecting property, the ancient mode of trial by jury is one of the best securities of the rights of the people, and ought to remain sacred and inviolable.[5]

Ohio. — The right of trial by jury shall be inviolate.[6]

Oregon. — In all civil cases the right of trial by jury shall remain inviolate.[7]

Pennsylvania. — Trial by jury shall be as heretofore, and the right thereof remain inviolate.[8] The parties, by agreement filed, may in any civil case dispense with trial by jury, and submit the decision of such case to the court having jurisdiction thereof, and such court shall hear and determine the same; and the judgment thereon shall be subject to writ of error as in other cases.[9]

Rhode Island. — The right of trial by jury shall remain inviolate.[10]

[1] N. H. Const. of 1792, part 1, § 20.
[2] *Ibid.*, § 21.
[3] N. J. Const. of 1844, art. 1, § 7.
[4] N. Y. Const. of 1846, art. 1, § 2.
[5] N. C. Const. of 1876, art. 1, § 19.
[6] Ohio Const. of 1851, art. 1, § 5.
[7] Oregon Const. of 1857, art. 1, § 17.
[8] Pa. Const. of 1874, art. 1, § 6.
[9] *Ibid.*, art. 5, § 27.
[10] R. I. Const. of 1842, art. 1, § 15.

South Carolina. — The right of trial by jury shall remain inviolable.[1]

Tennessee. — That the right of trial by jury shall remain inviolate, and no religious or political test shall ever be required as a qualification for jurors.[2]

Texas. — The right of trial by jury shall remain inviolate. The legislature shall pass such laws as may be needed to regulate the same, and to maintain its purity and efficiency.[3] In the trial of all causes in the District Courts, the plaintiff or defendant shall, upon application made in open court, have the right of trial by jury; but no jury shall be impaneled in any civil case unless demanded by a party to the case, and a jury fee be paid by the party demanding a jury, for such sum with such exceptions as may be prescribed by the legislature.[4]

Vermont. — That when any issue of fact, proper, for the cognizance of a jury, is joined in a court of law, the parties have a right to trial by jury, which ought to be held sacred.[5]

Virginia. — That in controversies respecting property, and in suits between man and man, the trial by jury is preferable to any other, and ought to be held sacred.[6]

West Virginia. — In suits at common law, where the value in controversy, exclusive of interest and costs, exceeds twenty dollars, the right of trial by a jury of twelve men, if required by either party, shall be preserved; except that in appeals from the judgment of justices, a jury of a less number may be authorized by law; but in trials of civil cases before a justice, no jury shall be allowed. No fact tried by a jury shall, in any case, be otherwise re-examined than according to the rules of the common law.[7]

Wisconsin. — The right of trial by jury shall remain inviolate, and shall extend to all cases at law without regard to the amount in controversy; but a jury trial may be waived by the parties in all cases in the manner prescribed by law.[8]

[1] S. C. Const. of 1868, art. 1, § 11.
[2] Tenn. Const. of 1870, art. 1, § 6.
[3] Tex. Const. of 1876, art. 1, § 15.
[4] *Ibid.*, art. 5, § 10.
[5] Vt. Const. of 1793, ch. 1, art. 12.
[6] Va. Const. of 1870, art. 1, § 13.
[7] West Va. Const. of 1872, Art. 3, § 13.
[8] Wis. Const. of 1848, art. 1, § 5.

§ 2227. **No Power at Common Law to Compel a Nonsuit.** — It is an established rule of the common law that the court cannot compel the plaintiff to submit to a nonsuit. The court may advise a nonsuit and direct the plaintiff to be called, but if he refuse to suffer a nonsuit, the court can protect and enforce its opinion in no other manner than by awarding a new trial, in case the jury find against its direction.[1] If the plaintiff, after learning the opinion of the court upon his case, insists upon having it submitted to the jury, they must return a verdict thereupon.[2] Accordingly, where, under the Missouri practice, a demurrer to the petition is sustained, if the plaintiff declines to amend, a final judgment ought to be entered on the demurrer. The plaintiff may either stand on the demurrer or amend his petition, but cannot be forced to take a nonsuit because the demurrer has been sustained.[3] So, it has been held error to instruct the jury at the close of the plaintiff's case, or at the close of the whole case, that if they believe a certain state of facts, they will find as in case of a nonsuit. The court reason that, if such an instruction means that the plaintiff is to be forced to take a nonsuit, it is error, for neither the court nor the jury can oblige him to take this course; it is his privilege to have his case passed upon finally by the jury, however unwise it may be of him to exercise it. The court may, where the plaintiff has failed to make out a case which would entitle him to recover, advise him to take a nonsuit, or instruct the jury that upon the evidence before them the plaintiff is not entitled to a verdict. Where the court so instructs the jury it operates as a *demurrer*

[1] Ross *v.* Gill, 1 Wash. (Va.) 87; Thornton *v.* Jett, *Id.* 138; Girard *v.* Gettig, 2 Binn. (Pa.) 234.

[2] 2 Tidd Pr. 869; Dewar *v.* Purday, 4 N. & M. 633; *s. c.* 3 Ad. & El. 166; 1 H. & W. 227; Newmarch *v.* Clay, 14 East, 239; Watkins *v.* Towers, 2 T. R. 275. Recognized in Elworthy *v.* Bird, 13 Price, 222. See also Atwood *v.* Small, 1 Man. & Ryl. 246, 261; Minchin *v.* Clement, 6 Barn. & Ald. 252; Davis *v.* Hardy, 6 Barn. & Cres. 225. Rex *v.* Undertakers &c., 2 T. R. 662; Rex *v.* White, 1 Burr. 338; Harris *v.* Butterly, Cowp. 483; Jackson *v.* Williamson, 2 T. R. 281; Wells *v.* Gaty, 8 Mo. 681; Clark *v.* Steamboat Mound City, 9 Mo. 146; Marshall *v.* Wolfe, 11 Mo. 608; Martin *v.* Henley, 13 Mo. 312.

[3] Comstock *v.* Davis, 51 Mo. 569.

to the evidence, and the finding of the jury would necessarily be for the defendant. This finding would be a bar to a subsequent action for the same cause, while a nonsuit would not prejudice the plaintiff in a subsequent action which he might choose to bring.[1]

§ 2228. [Continued.] **Modern American Authorities Conflicting.** — There is a conflict of authority in America, as to whether a judge can, against the consent of the plaintiff, after the jury have been sworn and evidence adduced before them, direct a judgment of nonsuit. In the courts of the United States,[2] North Carolina,[3] Tennessee,[4] Alabama,[5] Arkansas,[6] Missouri,[7] Kansas,[8] Indiana,[9] Vermont,[10] Michigan,[11] and Mississippi,[12] the judge cannot in any case direct a nonsuit, where the plaintiff insists on going to the jury. But in New York,[13] Pennsyl-

[1] Marshall *v.* Wolfe, 11 Mo. 608.

[2] Elmore *v.* Grymes, 1 Pet. (U. S.) 469; De Wolf *v.* Rabaud, 1 Pet. (U. S.) 476, 497; Crane *v.* Morris, 6 Pet. (U. S.) 598; 609; Castle *v.* Bullard, 23 How. (U. S.) 172; Boucicault *v.* Fox, 5 Blatchf. (U. S.) 87; Foote *v.* Silsby, 1 Blatchf. (U. S.) 445; affd. 14 How. (U. S.) 218; Thompson *v.* Campbell, Hempst. (U. S.) 8.

[3] Dickey *v.* Johnson, 13 Ired. (N. C.) 150. But see Smith *v.* Smith, 8 Ired. (N. C.) 29, where it is held that error will not lie for a refusal to nonsuit the plaintiff, except in a few cases, in which the duty is imposed by statute. In Hatchell *v.* Odom, 2 Dev. & Batt. (N. C.) 302, it was held that the refusal of the judge to grant a nonsuit may not be assigned as error.

[4] Scruggs *v.* Brackin, 4 Yerg. (Tenn.) 528.

[5] Hunt *v.* Stewart, 7 Ala. 525.

[6] Martin *v.* Webb, 5 Ark. 72; Ringo *v.* Field, 6 Ark. 43; Carr *v.* Crain, 7 Ark. 241. But it is no assumption of the power of the jury to instruct them to find as in case of nonsuit. Hill *v.* Rucker, 14 Ark. 706.

[7] St. Louis Floating Dock Ins. Co. *v.* Soulard, 8 Mo. 665; Wells *v.* Gaty, 8 Mo. 681.

[8] Case *v.* Hannahs, 2 Kan. 490.

[9] Williams *v.* Port, 9 Ind. 551.

[10] French *v.* Smith, 4 Vt. 363.

[11] Cahill *v.* Kalamazoo Mutual Ins. Co., 2 Dougl. (Mich.) 124.

[12] Winston *v.* Miller, 12 Smed. & M. (Miss.) 550.

[13] Pratt *v.* Hull, 13 Johns. (N. Y.) 334; Betts *v.* Jackson, 6 Wend. (N. Y.) 173, 203; Foot *v.* Sabin, 19 Johns. (N. Y.) 155, 159; Jansen *v.* Acker, 23 Wend. (N. Y.) 480; Wilds *v.* Hudson River R. Co., 24 N. Y. 430; Fort *v.* Collins, 21 Wend. (N. Y.) 109; Rudd *v.* Davis, 3 Hill (N. Y.), 287. It has been held in New York that a justice of the peace may nonsuit the plaintiff when, in his opinion, the testimony offered does not support the action. Clements *v.* Benjamin, 12 Johns. (N. Y.) 299. It is error for the court to refuse to nonsuit the plaintiff in

vania,[1] Ohio,[2] Wisconsin,[3] Iowa,[4] Connecticut,[5] Maine,[6] New Hampshire,[7] California,[8] Georgia,[9] New Jersey,[10] and South Carolina,[11] the power of the judge, in proper cases, to order a nonsuit without the consent of the plaintiff, is conceded; and what those cases are, will be hereafter considered.

§ 2229. [Continued.] Where the Plaintiff Fails to Appear. — The failure of the plaintiff to appear, when his case is called for trial, is equivalent to the expression of an election on his part to become nonsuit. In such a case no judgment can be taken against him, but his action should be dismissed, or judgment of nonsuit entered.[12] This rule does not apply to actions where the defendant, in the event of the plaintiff not succeeding, will be en-

New York, on motion of the defendant, where the evidence entirely fails to support the plaintiff's case. Foot *v.* Sabin, *supra*. See also Clemence *v.* Auburn, 66 N. Y. 334. The circumstances under which he will, in this State, be warranted in directing a nonsuit, will be elsewhere considered. *Post*, § 2250.

[1] Munn *v.* Mayor of Pittsburgh, 40 Pa. St. 364; Myers *v.* Girard Ins. Co., 26 Pa. St. 192. Formerly, the contrary rule obtained. Irving *v.* Taggart, 1 Serg. & R. (Pa.) 360; Girard *v.* Gettig, 2 Binn. (Pa.) 234; Lyon *v.* Daniels, 14 Pa. St. 197. The subject seems now to be governed by statute. Penn. Act of March 11, 1875, No. 8, p. 6.

[2] Ellis *v.* Ohio L. Ins. & Trust Co., 4 Oh. St. 628; Slipher *v.* Fisher, 11 Ohio, 299; Powell *v.* Jones, 12 Ohio, 35.

[3] Woodward *v.* McReynolds, 1 Chandl. (Wis.) 244; Cutler *v.* Hurlbut, 29 Wis. 152, 165, per Dixon, C. J.; Hoeflinger *v.* Stafford, 38 Wis. 391.

[4] Eddy *v.* Wilson, 1 G. Greene (Ia.), 259.

[5] By statute; and this statute is held not unconstitutional as impairing the right of trial by jury. Naugatuck R. Co. *v.* Waterbury Button Co., 24 Conn. 468.

[6] Perley *v.* Little, 3 Me. 97; Lyon *v.* Sibley, 32 Me. 577, per Tenney, J. But a nonsuit cannot be ordered, except by consent, after testimony has been introduced for the defense. *Ibid.*; Emerson *v.* Joy, 34 Me. 347.

[7] Bailey *v.* Kimball, 26 N. H. 351. And it is error not to do it in a proper case. Stickney *v.* Stickney, 21 N. H. 61.

[8] Ringgold *v.* Haven, 1 Cal. 108; Dalrymple *v.* Hanson, 1 Cal. 125; Mateer *v.* Brown, 1 Cal. 221; Ensminger *v.* McIntire, 23 Cal. 593.

[9] Tison *v.* Yawn, 15 Ga. 491; Long *v.* Lewis, 16 Ga. 154.

[10] Aycrigg *v.* New York &c. R. Co., 30 N. J. L. 460; Central R. Co. *v.* Moore, 24 N. J. L. 824, 830.

[11] Turnbull *v.* Rivers, 3 McCord, (S. C.) 131; Clason *v.* Bird, 2 Brev. (S. C.) 370. But the practice is to be pursued with caution. Rogers *v.* Madden, 2 Bailey (S. C.), 321.

[12] Nordmanser *v.* Hitchcock, 40 Mo. 178, 183.

titled to a judgment against him, — as, for instance, to actions of *replevin*, where the plaintiff has acquired possession of the property under an order of delivery; or, under the practice in Louisiana, where there is what is termed a *reconventional demand*, or some demand equivalent thereto; but where there is no such demand, the rule is there, as elsewhere, that failure of the plaintiff to appear when his cause is called for trial, entitles the defendant to a judgment of nonsuit.[1]

§ **2230. Right of Plaintiff to take a Nonsuit.** — While speaking on the subject of nonsuits, it may not be improper so far to digress from the general line of the discussion, as to point out the difference between *involuntary nonsuits*, such as those just spoken of, and *nonsuits voluntarily taken* by the plaintiff. Except in such cases as those suggested in the preceding sections, where the defendant, in the event of the plaintiff failing in his action will be entitled to a judgment against him, and possibly in some other cases, it is the right of the plaintiff at any stage of the proceeding or trial before the cause is finally submitted to the court or jury for decision, to become nonsuit. The importance of the right consists in the fact that, by taking a nonsuit, where the plaintiff has for some reason failed to produce testimony upon which he feels safe in submitting the cause for decision, he prevents an adjudication of the merits; the judgment of nonsuit is no estoppel; he may begin over again by bringing a new action. But if he submits his cause for decision, and it is decided against him, and the decision is not set aside or reversed, he is forever concluded.

§ **2231. This Right accorded by Statutes.** — The codes of procedure of several of the States confirm this rule. The Missouri statute provides that: "The plaintiff shall be allowed to dismiss his suit, or take a nonsuit, at any time before the same is finally submitted to the jury, or to the court sitting as a jury, or to the court, and not afterwards."[2] It is held, construing the

[1] Phillips *v.* Cassidy, 36 La. Ann. 288.

[2] Rev. Stat. Mo. 1879, § 3556.

above section, that a nonsuit may be taken at any time before the jury retires, or before a final submission to the court and after the law is declared.[1] And where the case is tried by a jury, it is error to refuse to permit the plaintiff to take a nonsuit at any time before the jury have retired to consider their verdict.[2] Moreover, where a cause is tried by a court sitting as a jury, and the parties request declarations of law applicable to the case, the plaintiff should have an opportunity to take a nonsuit after the court has declared the law. Such a proceeding on the part of the court as deprives him of this opportunity, as where the court takes the case under advisement and afterwards draws up and gives an instruction that upon the evidence the plaintiff is not entitled to recover, at the same time rendering a verdict and entering judgment for the defendant, — is error for which the judgment will be reversed.[3] In a Missouri case, on the evening when the cause was submitted to the jury, the court by consent, gave certain instructions. The next morning the jury returned into court and informed the court that they could not agree. The court thereupon withdrew the instructions given and gave new ones. It was held that the plaintiff had a right to take a nonsuit after the new instructions were given and before the jury had again retired.[4]

§ **2232. Exists although Set-off pleaded.** — This right of the plaintiff to take a nonsuit is not affected by the fact that the defendant may have pleaded a set-off in excess of the demand sued for; the defendant cannot have the cause retained in court under the Missouri practice, for the purpose of having a judgment rendered in his favor upon his matter of set-off.[5]

[1] Wood *v.* Nortman, 85 Mo. 298, 304.

[2] Templeton *v.* Wolf, 19 Mo. 101.

[3] Lawrence *v.* Shreve, 26 Mo. 492.

[4] Hensley *v.* Peck, 13 Mo. 587.

[5] Fink *v.* Bruihl, 47 Mo. 173; Nordmanser *v.* Hitchcock, 40 Mo. 178, 182. Compare Branham *v.* Brown, 1 Bailey (S. C.), 262; Cummings *v.* Pruden, 11 Mass. 206; Riley *v.* Carter, 3 Humph. 230; Slaughter *v.* Hailey, 21 Tex. 537; Crain *v.* Hilligross, 21 Ind. 210; Barrow *v.* Robichaux, 15 La. Ann. 70; Plant *v.* Flemming, 20 Cal. 92; Lewis *v.* Denton, 13 Ia. 441; Wiswell *v.* First Congregational Church, 14 Oh. St. 31; Burlington &c. R. Co. *v.* Sater, 1 Ia. 421.

§ 2233. **But not on the Trial of an Issue of Devisavit vel non.**—Cases, however, exist where, even under the operation of such a statute as that of Missouri, cited in a preceding section,[1] the plaintiff is not permitted to take a nonsuit or to dismiss the proceeding without prejudice. It is generally so held in a proceeding in a superior court of record, before a jury, to *establish a will*. This proceeding is denominated *probate in solemn form*, in contradistinction to the ordinary probate of a will before the court having jurisdiction of the administration of the estates of deceased persons where there is no contest, which is denominated *probate in common form*. This probate in solemn form is otherwise called the trial of the issue of *devisavit vel non*. In North Carolina, Missouri, and doubtless in many other States, the issue is made up in the probate court, and sent to the circuit court or other superior court of record, for trial before a jury. In the circuit court the proponents of the will, those having the affirmative of the issue, cannot take a nonsuit, if the contestants insist upon a verdict.[2]

§ 2234. [**Continued.**] **Nonsuits in Equity Proceedings.**—According to the English chancery practice, as it formerly existed, the complainant might, at any time before the final decree, upon the payment of costs, dismiss his bill.[3] "At law," said Scott, J., "under the old system, when the matter to be tried was by the pleadings narrowed down to a single issue, there was a propriety in refusing a plaintiff the liberty of taking a *nonsuit* after submitting his case; but as matters of chancery jurisdiction were usually complicated, in which many facts were involved, the law, in its wisdom, permitted a plaintiff to dismiss his bill before a final decree, and to renew his suit, when, by oversight or any other cause, he had failed to present it in the way it

[1] *Ante*, § 2231.

[2] St. John's Lodge *v.* Callender, 4 Ired. L. (N. C.) 342; Benoist *v.* Murrin, 48 Mo. 48; Roberts *v.* Trauwick, 13 Ala. 68, 86; Whitefield *v.* Hurst, 9 Ired. L. (N. C.) 175. And see Burrow *v.* Ragland, 6 Humph. (Tenn.) 484; Collier *v.* Idley, 1 Bradf. (N. Y.) 95.

[3] Adams' Equity (7th Am. ed.), 373; Hesse *v.* Missouri &c. Ins. Co., 21 Mo. 93, 96, per Scott, J.

should have been."[1] It was held in Missouri in 1855, in the then state of the statute law that, notwithstanding the existence of the statute prohibiting the plaintiff from taking a nonsuit after the cause had been submitted to a jury, or to the court sitting as a jury, yet in suits which under the former practice would have been denominated suits in equity, the plaintiff might still dismiss his petition at any time before a final judgment. The statute referred to was held to apply only to actions at law.[2] In a subsequent case in equity (anno 1873) it was said by Adams, J.: "The plaintiff by taking a *nonsuit* in effect voluntarily dismisses his petition without prejudice. A *nonsuit* with leave to move to set it aside can only be taken in a case at law, so as to bring before us the question of law and fact passed on by the court. In suits in equity, the court below must be allowed to adjudicate on the facts and law, so as to authorize us to pass upon them on appeal or writ of error. And in such suits this court will examine into all the evidence, and decide the case according to the preponderance of testimony and the law arising thereon."[3] In a still later case (anno 1875) it was said by Vories, J., quoting the preceding case: "It is also doubtful whether a *nonsuit* with leave to set the same aside can be taken in a suit in equity, so as to bring the case before this court so as to be reviewed."[4] Where an action of ejectment was blended and confused with an equitable proceeding, and in the equity branch of the case no issues had been framed for submission to the jury, but the hearing was nevertheless before a jury, and upon the court instructing the jury contrary to the views of the plaintiff as to the law of the case, the plaintiff elected to take a nonsuit without submission of the equity branch of the case to the court at all, — it was held that the Supreme Court would not interfere to set the nonsuit aside. The plaintiff still adhered to his abandonment of the ejectment branch of his suit, treating it as mere surplusage, and sought to have his standing in court restored merely as to the equity branch of the case. This prac-

[1] Hesse *v.* Missouri &c. Ins. Co., *supra.*

[2] Hesse *v.* Mo. &c. Ins. Co., *supra.*

[3] Gill *v.* Clark, 54 Mo. 415, 418.

[4] Conn *v.* Ferree, 60 Mo. 17.

tice, the court ruled, was not allowable; a nonsuit as to the equity side of the litigation was purely voluntary, and the case must be disposed of as in other instances of voluntary nonsuit.[1]

§ 2235. **In Proceedings for Partition.** — In a proceeding for a partition there are two judgments, the one interlocutory and the other final. The first is a judgment *quod partitia fiat inter partes de tenementis*, upon which a writ or commission goes, commanding that partition be made. Upon the return of this writ or commission executed, if the proceedings are approved by the court, a second judgment is given *quod partitio firma et stabilis in perpetum teneatur*. This is the principal judgment, and before it is given no writ of error lies.[2] The reason is said to be that, before final judgment, the plaintiff may become nonsuit; and it is accordingly held that, in a proceeding for partition, the petitioner may take voluntary nonsuit or dismiss the proceeding, at any time before the cause is finally submitted to the court on the question of confirming the report, though not afterwards, under the Missouri statute. The rule was applied in what was deemed a hard case, and was said to be too well settled to be disturbed.[3]

§ 2236. **In Statutory Actions to quiet Titles.** — So, also, in statutory actions, such as exist in Missouri, Indiana and some of the States, to quiet title, by compelling the plaintiff, who asserts an adverse title, to bring a suit in ejectment, the ordinary rule touching the plaintiff's right to take a nonsuit at any time before final submission obtains. And where, in an action brought under the statute to quiet title, a plaintiff had been forced by the action of the court to take a nonsuit, and then filed the usual motion to have the same set aside, and the court sustained this motion and then entered a judgment forever disbarring the plaintiff from claiming any rights adverse to the defendant, it was, of course, held that this was error.[4]

[1] Kirby *v.* Bruns, 45 Mo. 234.

[2] Gudgell *v.* Mead, 8 Mo. 53; Stephens *v.* Hume, 25 Mo. 349.

[3] Ivory *v.* Delore, 26 Mo. 505.

[4] Yankee *v.* Thompson, 51 Mo. 234.

§ **2237. Nonsuit set aside if Plaintiff driven to it by Erroneous Rulings.** — But where the plaintiff is driven to a nonsuit by an adverse ruling of the court which strikes at the merits of his case, and prevents a recovery in whole or in part, he may move to have the same set aside, and if this motion is overruled he may take a bill of exceptions, and if the ruling of the court is erroneous in point of law, the nonsuit will be set aside on appeal or error.[1] It has also been reasoned that, according to the usual course of a trial, the rejection of any material evidence offered by the plaintiff and necessary to his recovery, puts a stop to the trial at the point where the rejection occurs, the plaintiff taking a nonsuit and prosecuting an appeal or writ of error, if dissatisfied with the ruling of the trial court; and it was said in the Supreme Court of Missouri that the court had never refused to set aside a nonsuit in such a case where the evidence was improperly rejected, either on the ground that it did not appear on the record that the plaintiff was prepared with proof of the other material facts of his case, or because the evidence may have been rejected on account of its being introduced out of order of time, as prescribed by the court.[2] And the rule in Missouri may fairly be said to be that, where the plaintiff offers an instrument or element of evidence, which is necessary to establish his case as laid in his petition or declaration, and the court excludes this evidence, it is not necessary for him to do the vain thing of proceeding further, but he is at liberty to take a nonsuit and move to have the same set aside, and if his motion is refused, to take a bill of exceptions and prosecute his appeal or writ of error; in which case, if the appellate court is of opinion that the instrument or element of evidence was improperly rejected, they will reverse the verdict of nonsuit and remand the cause for another trial.[3] In another case, the plaintiff offered certain evidence, which the court excluded on the ground that it varied from the declaration, and the plaintiff thereupon took a nonsuit. After the entry of a nonsuit upon the min-

[1] Leimer *v.* Pac. R. R. Co., 26 Mo. 26.

[2] Dowd *v.* Winters, 20 Mo. 361.

[3] This was done in Hart *v.* Rector, 7 Mo. 531.

utes of the clerk and before the jury had dispersed, the plaintiff prayed the court to cancel the order of nonsuit and allow the case to proceed, so as to enable him to read from another deposition on file. This motion the court overruled, and afterwards overruled a formal motion to set aside the nonsuit and reinstate the cause. The Supreme Court held that, under the circumstances of the case, this was such an abuse of the discretion of the trial court as would warrant them in reversing the judgment of nonsuit and remanding the cause for another trial.[1]

§ **2238. Otherwise if Needlessly or Voluntarily Taken.** — It is therefore believed to be a general rule of procedure that a nonsuit will not be set aside because preceded by some erroneous ruling, unless the ruling was such as to preclude the plaintiff from a recovery.[2] Upon this question it has been well said: "It is only where the ruling of the court is such as strikes at the root of the case, and precludes the plaintiff from a recovery, that we will undertake to review the action of the court below after a voluntary nonsuit. A contrary practice would encourage parties to appeal upon every trivial dispute to the court, and thus keep the matter in controversy in endless litigation."[3] It has been so held, where the plaintiff took a nonsuit upon the *refusal of the court to strike out an insufficient answer*, and then moved to have the nonsuit set aside, and, his motion being overruled, prosecuted a writ of error.[4] The reason given for so holding was: "If it was allowed to plaintiffs to take *nonsuits* on every motion they might make and which the court might overrule, and then bring the case here to test the correctness of the decision upon the motion, this court would be filled with cases, in all different stages of progress, and every question of practice might be brought here to be settled before the merits of the case were reached. Although the court refused to give judgment on the answer, on the motion made by the plaintiff,

[1] Collier *v.* Swinney, 13 Mo. 478.
[2] Hageman *v.* Moreland, 33 Mo. 86.
[3] Layton *v.* Riney, 33 Mo. 87, 88.
[4] Hageman *v.* Moreland, *supra;* Layton *v.* Riney, *supra;* Schulter *v.* Bockwinkle, 19 Mo. 648; Louisiana &c. Plank Road Co. *v.* Mitchell, 20 Mo. 432.

there was still to be a hearing of the cause; and until that hearing, there could be no decision by which the plaintiff was obliged to take a *nonsuit*." [1] It was so held, under like circumstances, where the plaintiff voluntarily took a nonsuit upon the court's *rejecting* an instrument of *evidence* which the plaintiff had offered, which in no way affected the merits of the case.[2] So, where the plaintiff's cause of action was admitted and the *instructions* given for the defendant, and one refused upon the request of the plaintiff related solely to a matter of *set-off* pleaded by the defendant, and the plaintiff thereupon voluntarily took a nonsuit, it was held that the court would not relieve him.[3] So, also, where the court gave a declaration of law which would merely have the effect of cutting down the amount of damages claimed by the plaintiff.[4] In the last case it was said by Martin, C.: "It would be vain in the court to consume its time in settling questions relating to the measure of damages, when the plaintiff, by his voluntary act in withdrawing his case, renders it impossible to know whether they would have ever come before the trier of facts for consideration. If the plaintiff maintains his action by a verdict or finding of recovery, and fails to obtain the damages he is legally entitled to, it will be time enough then, to consider instructions which may possibly have curtailed the amount of his recovery. If the verdict goes against him, it is evidence that he cannot be injured by an erroneous ruling relating merely to the amount of damages incident to the rights of recovery in his cause of action."

[1] Gamble, J., in Schulter *v.* Bockwinkle, 19 Mo. 648; Ryland, J., in Dumey *v.* Schoeffler, 20 Mo. 323. The same ruling has been made, under like circumstances, where the plaintiff voluntarily took a nonsuit after the overruling of a motion to strike out a portion of the defendant's answer. Dumey *v.* Schoeffler, 20 Mo. 323; Koger *v.* Hays, 57 Mo. 329.

[2] Gentry Co. *v.* Black, 32 Mo. 542.

[3] Corby *v.* Taylor, 32 Mo. 374.

[4] Chiles *v.* Wallace, 83 Mo. 85, 93.

CHAPTER LXIII.

DIRECTING THE VERDICT.

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§ **2242. The Legal Sufficiency of the Evidence.** — It is often said that the evidence offered to a jury has a "twofold sufficiency — a *sufficiency in law*, and a *sufficiency in fact*. Of its sufficiency in law, the court, when applied to for that purpose, are the exclusive judges." [1] "It appertains to the court," it is said in another case, "to determine upon the legal sufficiency of evidence to prove a fact." [2] And the same court, in another case, thus expresses the doctrine: "It is the peculiar province of the court to determine all questions of law arising before them; and the undoubted right of the jury, to find all matters of fact, when evidence, legally sufficient for that purpose, is submitted to their consideration. And this legal sufficiency is a question of law, of which the court are the exclusive judges." [3] "When, assuming that all the testimony adduced by the one or the other party is true, it does not support his issue, it is the duty of the judge to declare this clearly and directly." [4] "The legal sufficiency of proof," says Ames, C. J., "and the moral weight of legally sufficient proof are very distinct in legal idea. The first lies within the province of the court, the last within the province of the jury." [5]

§ **2243. The Legal Sufficiency of the Facts.** — But this expression is not to be commended, because it is liable to be misunderstood. All judicial administration exhausts itself in the

[1] Cole *v.* Hebb, 7 Gill & J. (Md.) 20; Belt *v.* Marriott, 9 Gill (Md.), 331, 334; Davis *v.* Davis, 7 Harr. & J. (Md.) 36.

[2] Chase, C. J., in Tyson *v.* Rickard, 3 Harr. & J. (Md.) 109, 116.

[3] Davis *v.* Davis, 7 Harr. & J. (Md.) 36. To the same doctrine is Belt *v.* Marriott, 9 Gill (Md.), 331, 334.

[4] Campbell, J., in Chandler *v.* Von Roeder, 24 How. (U. S.) 227.

[5] Wheeler *v.* Schroeder, 4 R. I. 383, 392.

twofold office (1) of finding the ultimate or constitutive facts upon which the rights of the parties depend, and (2) in applying the law to those facts. In cases where the dual tribunal of judge and jury exists, the judge performs the twofold office of (1) determining whether any evidence has been presented *tending* to establish the constitutive facts advanced by the party sustaining the burden of proof, and (2) of applying the law to the facts so found. Where the judge ascertains that there is evidence tending to show the constitutive facts advanced by the party sustaining the burden of proof, it is for the jury to say whether the evidence is *sufficient* for that purpose.[1] Thus, where parol evidence is invoked to explain the meaning of a written instrument, — as, for instance, a *will*, — and the evidence, assuming that it is believed by the jury and allowed full effect in respect of all that it tends to prove, fails to alter the meaning of the will as found in the language used, the court may properly charge the jury to disregard such evidence entirely,[2] and generally, where there is no conflict in the evidence, no dispute as to the facts, there is nothing to submit to the jury, and the question is one of law, and can be decided only by the court. In such cases it is proper for the court to direct the verdict, and a verdict thus ordered will be sustained if the law, and the facts disclosed by the evidence, warrant it.[3]

§ **2244. Legal Effect of the Evidence.** — Another expression of the same doctrine is, that it is the province of the court to determine the *legal effect* of the evidence.[4] Thus, where the evidence is all in, and the judge sees that it does not have the

[1] The line which defines the relative provinces of the court and jury distinguishes between the sufficiency of evidence to prove certain facts, and the legal sufficiency of facts to invoke a certain judgment. It is the province of the jury to decide as to the former, but of the court, if invoked for the purpose, to decide as to the latter. Davis *v.* Miller, 14 Gratt. (Va.) 1, 22; reaffirmed in Burke *v.* Lee, 76 Va. 386, 391.

[2] Burke *v.* Lee, 76 Va. 386. Compare Pasley *v.* English, 10 Gratt. (Va.) 236.

[3] St. Johnsbury *v.* Thompson, 9 Atl. Rep. 571; *s. c.* 59 Vt. 300; Lindsay *v.* Lindsay, 11 Vt. 621; Wilder *v.* Wheeldon, 56 Vt. 344; Noyes *v.* Rockwood, 56 Vt. 647.

[4] Harris *v.* Woody, 9 Mo. 113.

effect in law to entitle the plaintiff to recover, it is his duty to to instruct the jury to find for the defendant. Therefore, in an action for slander, when all the evidence offered, admitting it to be true, shows simply that the defendant charged the plaintiff with having sworn to a lie, but there was no evidence that the charge was made with reference to any judicial proceeding, it was held proper for the court to instruct the jury that the plaintiff could not recover. Such an instruction was in the nature of a ruling on a demurrer to the evidence.[1] So, in an action for an illegal arrest, the presumption being that the arrest was legal, if there is no evidence which has the legal effect of overcoming this presumption, the case should not be submitted to the jury.[2]

§ **2245. Where there is no Evidence.** — The most frequent expression of the rule is that, where there is *no* evidence tending to prove the constitutive facts set up by the party who sustains the burden of proof, the court is bound, on request, to direct the jury to return a verdict for the opposite party.[3] On the other hand, where there is *any* evidence tending to prove such facts. the court cannot so direct the verdict, but must submit the evidence to the jury and leave it to them to determine whether it is sufficient to that end.[4] The rule has been thus expressed: "When the testimony is *all in one direction*, or when all the evidence for the plaintiff has been given, and it has *no tendency* whatever to

[1] *Ibid.*

[2] Stouffer *v.* Latshaw, 2 Watts (Pa.), 165.

[3] Tison *v.* Yawn, 15 Ga. 491; Boland *v.* Missouri R. Co., 36 Mo. 484, 491; Meyer *v.* Pacific R. R., 40 Mo. 151; Clark *v.* Hannibal &c. R. Co., 36 Mo. 202, 217; Lee *v.* David, 11 Mo. 114, 116; Callahan *v.* Warne, 40 Mo. 131; Charles *v.* Patch, 87 Mo. 450, 462; Russell *v.* Barcroft, 1 Mo. 662; Alexander *v.* Harrison, 38 Mo. 258; McFarland *v.* Bellows, 49 Mo. 311.

[4] Cook *v.* Hannibal &c. R. Co., 63 Mo. 397; St. Vrain *v.* Columbia Bottom Levee Co., 56 Mo. 590; Tutt *v.* Cloney, 62 Mo. 116; Halliday *v.* Jones, 59 Mo. 482, 484; Groll *v.* Tower, 85 Mo. 249; Moody *v.* Deutsch, 85 Mo. 237; Alexander *v.* Harrison, 38 Mo. 258, 266; Routsong *v.* Pacific R. Co., 45 Mo. 236; Hays *v.* Bell, 16 Mo. 496; Emerson *v.* Sturgeon, 18 Mo. 170; MacFarland *v.* Bellows, 49 Mo. 311; Smith *v.* Hutchinson, 83 Mo. 683; Bowen *v.* Lazalere, 44 Mo. 383; Williamson *v.* Fischer, 50 Mo. 198; Grady *v.* Ins. Co., 60 Mo. 116; Baum *v.* Fryrear, 85 Mo. 151.

prove the particular issue relied on to recover, and there is no question in regard to the credibility of the witnesses who have given the evidence, the court may determine the whole case as a question of law."[1] "But when the facts are disputed, or the credibility of witnesses is drawn in question, or a material fact is left in doubt, or there are inferences to be drawn from facts proven, the case, under proper instructions, should be submitted to the jury."[2] It is said that a nonsuit ought not to be granted, if the evidence is sufficient to *authorize* the jury to find for the plaintiff, although it may not be sufficient to *require* them to do so.[3] Again, it is said that if there is any evidence upon which a verdict can be rendered, it is error to award a nonsuit.[4] With equal vagueness, it is said in another case, that a nonsuit ought not to be granted, where the jury may have found facts from the evidence offered to support the action.[5] The judge merely decides whether there is, *prima facie*, any reason for allowing the evidence to be considered by the jury at all, and his decision on the point, if erroneous, may be reviewed on error.[6] The question whether there is *any* evidence *tending* to prove a fact in issue, is a *preliminary question* which the judge must decide, either at the close of the plaintiff's case or at the close of the whole evidence, before submitting the fact to the decision of the jury; since it is error to submit to the jury a question which there is no evidence tending to prove.[7]

§ 2246. The Doctrine of "Scintilla" of Evidence.—Those courts which uphold with jealousy the right of trial by jury, have agreed upon this doctrine: That where there is *any* evidence, however slight, *tending* to support a material issue, the case must go to the jury, since they are the exclusive judges of

[1] Boland *v.* Missouri &c. R. Co., 36 Mo. 484, 491. To the same effect is the language of Redfield, J., in Vinton *v.* Schwab, 32 Vt. 612.

[2] Kelly *v.* Hannibal &c. R. Co., 70 Mo. 604, 608; Richey *v.* Burns, 83 Mo. 362, 364.

[3] Phillips *v.* Brigham, 26 Ga. 617, 619.

[4] Tison *v.* Yawn, 15 Ga. 491.

[5] Biggers *v.* Pace, 5 Ga. 171, 175.

[6] Cleave *v.* Jones, 7 Exch. 421.

[7] Ryder *v.* Wombwell, L. R. 4 Exch. 32; *s. c.* 38 L. J. Exch. 8.

the weight of evidence.[1] And this is so, although the judge may be of opinion that the *weight of evidence* is insufficient to support the issue.[2] In other words, where the facts offered in evidence by the plaintiff, if true, make out a *prima facie* case, the jury, and not the judge, ought to pass upon them, however meager or improbable the evidence may be.[3]

§ 2247. **This Doctrine Denied in England.** — This doctrine seems at one time to have had a foothold in England, but in more recent times it has been denied by all the courts of that country. The doctrine which now prevails in that country was thus expressed by Mr. Justice Maule, in language which has been very much quoted: "Perhaps it cannot with strict propriety be said, where the facts proved are not inconsistent either with the affirmative or the negative of the allegation sought to be established, that there is *no* evidence, to go to the jury. That would exclude many cases where no doubt there would be evidence, though slight, which ought to be submitted to the jury. Applying the maxim *de minimus non curat lex*, when we say that there is no evidence to go to a jury, we do not mean that there is literally none, but that there is none which ought reasonably to

[1] Mercier *v.* Mercier, 43 Ga. 323; Johnston *v.* Crawley, 22 Ga. 348; Stamper *v.* Hayes, 25 Ga. 546; Phillips *v.* Brigham, 26 Ga. 617; Thornton *v.* Gibson, 43 Ga. 395; Denny *v.* Williams, 5 Allen (Mass.), 1; Brooks *v.* Somerville, 106 Mass. 271, 275; Hays *v.* Bell, 16 Mo. 496; Houghtaling *v.* Ball, 19 Mo. 84; Chambers *v.* McGiveron, 33 Mo. 202; Deere *v.* Plant, 42 Mo. 60; McKown *v.* Craig, 39 Mo. 156; Matthews *v.* St. Louis Grain Elevator Co., 50 Mo. 149; Chamberlin *v.* Smith, 1 Mo. 482; Speed *v.* Herrin, 4 Mo. 356; Obouchon *v.* Boon, 10 Mo. 442; Robbins *v.* Alton Marine &c. Ins. Co., 12 Mo. 380; Dooly *v.* Jinnings, 6 Mo. 61; Todd *v.* Boone County, 8 Mo. 432, 437; Winston *v.* Wales, 13 Mo. 569; Clark *v.* Hannibal &c. R. Co., 36 Mo. 202; Lee *v.* David, 11 Mo. 114, 116; Meyer *v.* Pacific Railroad, 40 Mo. 151; Glasgow *v.* Copeland, 8 Mo. 268; Way *v.* Illinois &c. R. Co., 35 Iowa, 585; Muldowney *v.* Illinois &c. R. Co., 32 Iowa, 178; Lewis *v.* Pratt, 48 Vt. 358; Hughes *v.* Ellison, 5 Mo. 110; Morton *v.* Reeds, 6 Mo. 64; Emerson *v.* Sturgeon, 18 Mo. 170; Rippey *v.* Friede, 26 Mo. 523; Cumberland Coal &c. Co. *v.* Scally, 27 Md. 589; Flori *v.* St. Louis, 3 Mo. App. 231. And whether direct or inferential, Charles *v.* Patch, 87 Mo. 450, 462.

[2] Bowen *v.* Lazalere, 44 Mo. 383, 388.

[3] Woods *v.* Atlantic Mutual Ins. Co., 50 Mo. 112.

satisfy a jury that the fact sought to be proved is established. There may be evidence upon which a jury may properly proceed, although the contrary is possible; for instance, when the question is whether a certain document is in the handwriting of A. B., and a witness conversant with the handwriting of that person states that he believes it was written by him, it is consistent with that evidence that the document may not be in the handwriting of A. B., and yet the jury would be well warranted in coming to the conclusion that it was, even though there might be witnesses on the other side to pledge their belief that it was not. In the case of presumptive evidence of a given fact, all possibility of the contrary is not necessarily to be excluded: a very high degree of probability must often be treated as an absolute certainty. Even in criminal cases, it constantly happens that evidence is acted upon, even to the infliction of the highest penalty of the law, which is not inconsistent with the innocence of the party charged."[1] The same doctrine was tersely expressed by Williams, J., when he said: "A scintilla of evidence or a mere surmise that there may have been negligence on the part of the defendants, clearly would not justify the judge in leaving the case to the jury; there must be evidence upon which they might reasonably and properly conclude that there was negligence."[2] In another case the question was said to be "whether the proof was such as that a jury could reasonably come to the conclusion" that the issue was proved.[3] "Such a question," said Willes, J., "is one of mixed law and fact. In so far as it is a question of fact, it must be determined by a jury, subject no doubt to the control of the court, who may set aside the verdict and submit the question to the decision of another jury. But there is in every case * * * a preliminary question, which is one of law, namely, whether there is any evidence on which the jury

[1] Jewell *v.* Parr, 13 Com. Bench, 909, 915, 916. Quoted with approval by Hand, J., in Claflin *v.* Meyer, 75 N. Y. 260, 266, and by Van Vorst, J., in Madan *v.* Covert, 13 Jones & S. (N. Y. Super.) 245, 250.

[2] Toomey *v.* London &c. R. Co., 3 C. B. (N. S.) 146, 150; approved in Coruman *v.* Eastern Counties R. Co., 4 Hurl. & N. 781, 786, per Bramwell, J.; and in Giblin *v.* McMullen, L. R. 2 P. C. 317, 335.

[3] Wheelton *v.* Hardisty, 8 El. & Bl. 231, 262.

could properly find the question for the party on whom the *onus* of proof lies. If there is not, the judge ought to withdraw the question from the jury and direct a nonsuit, if the *onus* is on the plaintiff, or direct a verdict for the plaintiff if the *onus* is on the defendant. It was formerly considered necessary in all cases to leave the question to the jury, if there was any evidence, even a *scintilla*, in support of the case; but it is now settled that the question for the judge (subject, of course, to review), is, as stated by Maule, J., in *Jewell* v. *Parr*,[1] 'not whether there is literally *no* evidence, but whether there is none that ought reasonably to satisfy the jury that the fact sought to be proved is established.'"[2]

§ **2248. And in the American Federal Courts.** — In the Federal courts, "the judges are no longer required to submit a case to the jury, merely because *some* evidence has been introduced by the party having the burden of proof unless the evidence be of such a character that it would warrant the jury to proceed in finding a verdict in favor of the party introducing such evidence. Decided cases may be found, where it is held that, if there is a *scintilla* of evidence in support of a case, the judge is bound to leave it to the jury; but the modern decisions have established a more reasonable rule, to wit: that before the evidence is left to the jury, there is, or may be in every case, a preliminary question for the judge, not whether there is literally *no* evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the burden of proof is imposed."[3] In a very early

[1] 13 C. B. 909, 916.

[2] Ryder *v.* Wombwell, L. R. 4 Exch. 32, 38; reaffirmed in the House of Lords in Metropolitan R. Co. *v.* Jackson, L. R. 3 App. Cas. 193, 207; *s. c.* 47 L. J. C. P. 303; 37 L. T. 679; 26 W. R. 175; reversing *s. c.* in Court of Appeal, 2 C. P. Div. 125; 46 L. J. C. P. 376; 36 L. T. 485; 25 W. R. 661; and also in Common Pleas, L. R. 10 C. P. 49; 44 L. J. C. P. 83; 31 L. T. 475; 23 W. R. 78, per Lord Blackburn, and in Dublin &c. R. Co. *v.* Slattery, L. R. 3 App. Cas. 1155, 1171, per Lord Hatherley. Similarly, the following American cases: Beaulieu *v.* Portland Co., 48 Me. 291; Greenleaf *v.* Illinois &c. R. Co., 29 Iowa, 14, 22; Lehman *v.* Brooklyn, 29 Barb. (N. Y.) 234.

[3] Commissioners *v.* Clark, 94 U. S. 278, 284, per Mr. Justice Clifford.

case, substantially the same rule was thus enunciated by Marshall, C. J.: "The general doctrine on a demurrer to evidence has been correctly stated at the bar. The party demurring admits the truth of the testimony to which he demurs, and also those conclusions of fact which a jury *may fairly draw* from that testimony. Forced and violent inferences he does not admit; but the testimony is to be taken most strongly against him, and such conclusions as a jury *might justifiably draw*, the court ought to draw."[1]

§ 2249. And in the Courts of many of the American States. — The old rule is likewise exploded in several of the States, whose courts are now in the constant habit of ordering nonsuits against the consent of the plaintiff,[2] of giving peremptory instructions to the jury to find for one party or the other,[3] or of sustaining demurrers to the evidence, in cases where there is confessedly *some* evidence *supporting* a material issue. This is often done under the disguise of various expressions which *seem* to leave the ancient prerogative of the jury intact. In Maryland, and perhaps other States, the judge achieves this result by determining the *legal sufficiency* of the evidence,[4] and in Missouri, by determining its *legal effect*.[5] The Supreme Court of the latter State, which in former years upheld the prerogative of juries to an absurd extent, has lately reproached, in expressive language, the weakness of the circuit judges in submitting cases to juries, in which a verdict ought not to be allowed to stand, if rendered for the plaintiff.[6] In North Carolina the

[1] Pawling *v.* United States, 4 Cranch (U. S.), 219, 222.

[2] Colt *v.* Sixth Av. R. Co., 49 N. Y. 671; Wombough *v.* Cooper, 4 Thomp. & C. (N. Y.) 586; Shirley *v.* Vail, 38 How. Pr. (N. Y.) 406; Brooks *v.* Buffalo &c. R. Co., 25 Barb. (N. Y.) 600; Bailey *v.* Kimball, 26 N. H. 351; Mason *v.* Lewis, 1 G. Greene (Ia.), 494; Brown *v.* European &c. R. Co., 58 Me. 384; Morton *v.* Frankfort, 55 Me. 46; Cooper *v.* Waldron, 50 Me. 80. See Brooks *v.* Somerville, 106 Mass. 271, 275.

[3] Wittkowsky *v.* Wasson, 71 N. C. 451; Fort Scott Coal & Mining Co. *v.* Sweeney, 15 Kan. 244; Reed *v.* Deerfield, 8 Allen (Mass.), 522, 524; Todd *v.* Old Colony R. Co., 7 Allen (Mass.), 207; Denny *v.* Williams, 5 Allen (Mass.), 1, 5; Gavett *v.* Manchester &c. R. Co., 16 Gray (Mass.), 501.

[4] *Ante*, § 2242.

[5] *Ante*, § 2244.

[6] Morgan *v.* Durfee, 69 Mo. 469, 476; *s. c.* 9 Cent. L. J. 12, opinion by Sherwood, C. J. In 9 Cent. L. J. 102, will be found a forcible article on this

English rule is conceded, that there must be some evidence from which the jury might reasonably come to the conclusion that the issue was proved.[1] In Maryland it was early ruled that whenever the testimony adduced by either party "is so light and inconclusive, that no rational, well-constructed mind can infer from it the fact which it is offered to establish, it is the duty of the court, when applied to for that purpose, to instruct the jury that that there is no evidence before them to warrant their finding the fact thus attempted to be proved."[2] In Maine it was forcibly said: "A jury cannot be permitted to find there is evidence of a fact when there is not any. A plaintiff cannot read his writ to the jury and claim a verdict without submitting *any* evidence. Nor can he do so where the evidence is too slight or trifling to be considered and acted upon by a jury. The evidence must have some legal weight. There is no practical or logical difference between no evidence and evidence without legal weight." "The old rule that a case must go to the jury if there is a *scintilla* of evidence has been almost everywhere exploded. There is no object in permitting a jury to find a verdict which a court would set aside as often as found. The better and improved rule is, not to see whether there is any evidence, a *scintilla*, or crumb, dust of the scales, but whether there is any upon which a jury can, in any justifiable view, find for the party producing it, upon whom the burden of proof is imposed."[3] Accordingly, the presiding judge directs a nonsuit where the jury would not be authorized to find for the plaintiff under the evidence adduced.[4]

subject by H. C. McDougal, Esq. For other Missouri cases tending the same way, see Maher *v.* Atlantic &c. R. Co., 64 Mo. 267; Fletcher *v.* Atlantic &c. R. Co., 64 Mo. 484; Railroad Co. *v.* Houston, 95 U. S. 697; *s. c.* 6 Cent. L. J. 132; 1 Thomp. on Neg. 444; Nolan *v.* Shickle, 3 Mo. App. 300.

[1] Wittkowsky *v.* Wasson, 71 N. C. 451.

[2] Belt *v.* Marriott, 9 Gill (Md.), 331, 334.

[3] Connor *v.* Giles, 76 Me. 132, 134, opinion of the court by Peters, C. J. The court cite Bouv. Law Dict., Scintilla of Evidence; Beaulieu *v.* Portland Company, 48 Me. 294; Brown *v.* European &c. R. Co., 58 Me. 384; Rourke *v.* Bullens, 8 Gray (Mass.), 549.

[4] Pray *v.* Garcelon, 17 Me. 145; Head *v.* Sleeper, 20 Me. 314.

§ 2250. **Further Explanations of the Rule: (*a.*) Where the Verdict would be set aside if found for the Party Sustaining the Burden of Proof.** — Several modern courts have united upon the rule that it is the duty of the judge to sustain a demurrer to the evidence, or grant a peremptory instruction or a nonsuit, according to the form of practice prevailing in the particular jurisdiction, where the state of the evidence is such that the judge can clearly see that it would be his duty to set aside a verdict if rendered in favor of the party sustaining the burden of proof,[1] even if there is some slight conflict in the testimony.[2] Other courts state the same rule less distinctly. In Georgia, a nonsuit is granted where there is no proof to support the issue,[3] or where the essential allegations in the declaration are not proved.[4] In Massachusetts, the practical line of distinction un-

[1] Herbert *v.* Butler, 97 U. S. 319; Improvement Co. *v.* Munson, 14 Wall. (U. S.) 442; Pleasants *v.* Fant, 22 Wall. (U. S.) 116; Randall *v.* Baltimore &c. R. Co., 109 U. S. 478; Bowditch *v.* Boston, 101 U. S. 16; Griggs *v.* Houston, 104 U. S. 553; Simmons *v.* Chicago &c. R. Co., 110 Ill. 340; Ryder *v.* Wombwell, L. R. 4 Exch. 39; Wilds *v.* Railroad Co., 24 N. Y. 433; Merchants' Bank *v.* State Bank, 10 Wall. (U. S.) 637; Giblin *v.* McMullen, L. R. 2 P. C. 335; Jewell *v.* Parr, 13 C. B. 916; Wheelton *v.* Hardisty, 8 El. & Bl. 266; Schuckardt *v.* Allens, 1 Wall. (U. S.) 359, 369; Toomey *v.* London &c. R. Co., 3 C. B. (N. S.) 146, 150; Jackson *v.* Hardin, 83 Mo. 175; Royer *v.* Schultz Belting Co., 29 Fed. Rep. 281; Powell *v.* Missouri &c. R. Co., 76 Mo. 80; Geary *v.* Simmons, 39 Cal. 224; Vanderford *v.* Foster, 65 Cal. 49; Jackson *v.* Hardin, 83 Mo. 175, 186; Landis *v.* Hamilton, 77 Mo. 554; Wright *v.* Malden &c. R. Co., 4 Allen (Mass.), 283; Todd *v.* Old Colony R. Co., 7 Allen (Mass.), 207; Steves *v.* Oswego &c. R. Co., 18 N. Y. 422; Morton *v.* Frankfort, 55 Me. 46; Cooper *v.* Waldron, 50 Me. 80; Ringgold *v.* Haven, 1 Cal. 108; Dalrymple *v.* Hanson, 1 Cal. 125; Mateer *v.* Brown, 1 Cal. 221; Ensminger *v.* McIntire, 23 Cal. 593; Shirley *v.* Vail, 38 How. Pr. (N. Y.) 406; Stuart *v.* Simpson, 1 Wend. (N. Y.) 376; Sheldon *v.* Hudson River R. Co., 29 Barb. (N. Y.) 226; Brotherson *v.* Jones, Hill & Denio, Supp. (N. Y.) 171; Deyo *v.* New York &c. R. Co., 34 N. Y. 9; Scott *v.* Simpson, 1 Sandf. (N. Y.) 601; Steves *v.* Oswego &c. R. Co., 18 N. Y. 422, 425; Hartfield *v.* Roper, 21 Wend. (N. Y.) 615; *s. c.* 2 Thomp. on Neg. 1121; Cooper *v.* Waldron, 50 Me. 80; Brown *v.* European &c. R. Co., 58 Me. 384. See, however, Labar *v.* Koplin, 4 N. Y. 546. Or if the verdict would be against the clear weight and effect of the evidence, Rudd *v.* Davis, 7 Hill (N. Y.), 529.

[2] Corning *v.* Troy Iron Factory, 44 N. Y. 577.

[3] Tison *v.* Yawn, 15 Ga. 491.

[4] Long *v.* Lewis, 16 Ga. 154. See Renwick *v.* La Grange Bank, 29 Ga. 200.

der this head is said to be, "that if the evidence is such that the court would set aside any number of verdicts rendered upon it, *toties quoties*, then the cause should be taken from the jury by instructing them to find a verdict for the defendant. On the other hand, if the evidence is such that, though one or two verdicts rendered upon it would be set aside on motion, yet a second or third verdict would be suffered to stand, the cause should not be taken from the jury, but should be submitted to them under instructions."[1]

§ 2251. (*b.*) **Where the Party sustaining the Burden of Proof alleges one State of Facts and proves an entirely Different State of Facts.** — Where there is merely what is termed a *variance* between the allegations and the proof of the party sustaining the burden of proof, the other party will not, according to modern practice, be entitled to a nonsuit or to a peremptory direction to the jury, unless he satisfies the court, by a seasonable objection, and, under some modern codes of practice by affidavit, that he has been actually *misled* thereby, in which case the opposite party will be entitled to *amend*, though upon such terms, either in respect of time or of costs, as to the court may seem reasonable.[2] Where a plaintiff avers a particular state of facts, he is entitled to a verdict only in virtue of giving evidence tending to prove the state of facts so averred. If his evidence tends to prove another and a different state of facts, it will not entitle him to go to the jury, although such state of facts may in them-

[1] Denny *v.* Williams, 5 Allen (Mass.), 1, 5.

[2] An objection to evidence on the ground of variance must be taken when the evidence is offered; it cannot be made for the first time on a motion for a new trial nor in an appellate court. Roberts *v.* Graham, 6 Wall. (U. S.) 578, 581 (citing Mosher *v.* Lawrence, Thomp. Carr. Pass. 554, note 7). If the objection is not taken when the evidence is offered, the court may instruct the jury upon the whole field of inquiry covered by the evidence. Boyce *v.* California &c. Stage Co., 25 Cal. 460. The cases, no doubt, bear out the rule stated by Cowan, J., that where the action is in tort or on the custom against a *common carrier*, instead of on the contract, formal variances will be disregarded at *nisi prius*, and on the motion for new trial the party will be allowed to amend. Weed *v.* Saratoga &c. R. Co., 19 Wend. (N. Y.) 534.

selves constitute a right of recovery. Of course, he may amend at the trial so as to make his allegations conform to his evidence, the defendant being entitled to a continuance in case the amendment works a surprise. But where he omits to do this, the court will direct a nonsuit on the ground that the case stated in his petition is left substantively unproved. It is regarded as not a mere case of variance, but as a total failure of proof.[1] So, it is held that a pleader cannot state a cause of action in his petition and then ask that, if he has mistaken his remedy and should fail to obtain the relief prayed for, another and different cause of action may be tried.[2] And where the plaintiff proves a *contract essentially different* from the one declared on,[3] or alleges one trespass and proves another,[4] the defendant is entitled to a nonsuit on the ground of failure of proof. Nor is he precluded from moving for a nonsuit for this reason, because he permitted the plaintiff's evidence to be admitted without objection.[5] Nor can he declare on a *parol contract* and then prove a contract *under seal;*[6] nor frame his petition or declaration in *tort* for the unlawful taking and conversion of personal property, and recover upon evidence which would raise an implied *contract* of sale and delivery.[7] On like grounds, where the declaration in a suit against a municipal corporation for a personal injury alleged *misfeasance* merely, and the defendant's proof made out no more than a case of *nonfeasance*, it was held a proper case for a nonsuit.[8] So, where a count in the declaration charged the defend-

[1] Waldhier *v.* Hannibal &c. R. Co., 71 Mo. 514; Nichols *v.* Larkin, 79 Mo. 264. See also Jackson *v.* Hardin, 83 Mo. 175, 187; Buffington *v.* Atlantic &c. R. Co., 64 Mo. 246; Capital Bank *v.* Armstrong, 62 Mo. 59; Chapman *v.* Callahan, 66 Mo. 299, 312; Carson *v.* Cummings, 69 Mo. 325; Railroad Co. *v.* Troesch, 68 Ill. 545; Dougherty *v.* Matthews, 35 Mo. 520; Harris *v.* Hannibal &c. R. Co., 37 Mo. 308; Jones *v.* Louderman, 39 Mo. 288; Merle *v.* Hascall, 10 Mo. 406; Robinson *v.* Rice, 20 Mo. 230.

[2] Pensennau *v.* Pensennau, 22 Mo. 27.

[3] Johnson *v.* Moss, 45 Cal. 515.

[4] Memphis &c. R. Co. *v.* Chastine, 54 Miss. 503.

[5] *Ibid.*

[6] Dougherty *v.* Matthews, 35 Mo. 520.

[7] Singleton *v.* Pacific Railroad, 41 Mo. 465; Carson *v.* Cummings, 69 Mo. 325.

[8] Flanagan *v.* Wilmington, 4 Houst. (Del.) 548.

ant, a factor, with "not selling for the best price," and the evidence merely showed that the defendant had been guilty of a delay in selling, but had obtained the best price to be had at the time of sale, it was held that this was a failure to prove the cause of action stated. The delay in selling should have been alleged as the ground of recovery.[1] So, where in an action on a contract to *buy* a note, there was no evidence of a contract to *buy*, but evidence of a contract to *pay*, which contract was void under the statute of frauds, the court erred in refusing a nonsuit.[2] Nor can a party be permitted at the trial to set up a state of facts *in contradiction of his own pleading*.[3] In order to bring the case within the rule entitling the objecting party to a nonsuit or a peremptory direction, the evidence must be such as leaves the affirmative allegations of his opponent *unproved in their entire scope and meaning*.[4]

§ 2252. This Rule not Affected by a Statute Curing Variances. — This rule is a fundamental one, and, when properly applied, is not affected by a statute designed to enable a party to a cause on trial to cure variances between his allegations and his evidence by amending his pleading. Thus, the Missouri statute provides: "No variance between the allegation in the pleading and the proof shall be deemed material, unless it has actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits. When it shall be alleged that the party has been so misled, that fact shall be proved to the satisfaction of the court by affidavit, showing in what respect he has been misled, and thereupon the court may order the pleading to be amended upon such terms as shall be just.[5] This statute has reference to mere discrepancies between the issues raised by the pleadings and the evidence offered in support of such issues, and not to cases where the substance of the issue,

[1] Merle *v.* Hascall, 10 Mo. 406.

[2] Hoefflinger *v.* Stafford, 38 Wis. 391.

[3] Bruce *v.* Sims, 34 Mo. 246; Currier *v.* Lowe, 32 Mo. 203. Neither can a defendant set up by a defense evidence which is not presented in his answer. Currier *v.* Lowe, *supra*.

[4] Ahrens *v.* State Bank, 3 S. C. 401, 411.

[5] Rev. Stat. Mo. 1879, sec. 3565.

so to speak, has no support in the testimony adduced.[1] An *affidavit* setting forth in what respect the party has been misled is the only test, under this statute, of the materiality of the discrepancy between the allegations and the proof.[2] The principle embodied in the statute is that what is termed a *variance* between the allegations and the evidence is *presumptively not material* or prejudicial to the opposite party, and is therefore to be disregarded by the court, unless the opposite party proves by affidavit that he has been misled by the variance, in which case the other party is to be allowed to amend upon terms.[3]

[1] Waldhier *v.* Hannibal &c. R. Co., 71 Mo. 514, 517.

[2] Turner *v.* Chillicothe &c. R. Co., 51 Mo. 501, 509; Fischer *v.* Max, 49 Mo. 404; Myer *v.* Chambers, 68 Mo. 626; Clements *v.* Maloney, 55 Mo. 353; Wells *v.* Sharp, 57 Mo. 56; Ely *v.* Porter, 58 Mo. 158.

[3] By the terms of another statute in the practice act of the same State, "Where the allegation of the cause of action or defense to which the proof is directed is unproved, not in some particular or particulars only, but in its entire scope and meaning, it shall not be deemed a case of variance, but a failure of proof." Mo. Rev. Stat. 1879, § 3702. These statutes are plain enough, and when properly applied result in the doing of obvious justice. They are a part of the reformed statutory system of civil procedure in Missouri, one of the primary objects of which is that pleadings shall be so framed as fairly to notify the opposite party of the pleader's substantial ground of action or defense, to the end that he may know the case or the defense which he is called upon to meet. But it is confidently submitted that, in the application of these statutes, the Supreme Court of Missouri has been in the habit of refining too much for the purposes of practical justice, so much so, indeed, as to create the impression that its efforts have been to educate lawyers as pleaders, instead of settling controverted questions of right between man and man. Thus, in a case decided in 1853, the petition stated in substance that the defendant was indebted to plaintiff for stall No. 20 in the North Market, which had been purchased by plaintiff from a third party for defendant at his special instance and request. The plaintiff's evidence tended to show that the plaintiff had bought the stall for himself and had afterwards sold it to the defendant. It was held that this was an entire failure of proof within the meaning of the statute last cited (Beck *v.* Ferrara, 19 Mo. 30); and this decision was cited with approval by the same court as late as the year 1880. Waldhier *v.* Hannibal &c. R. Co., 71 Mo. 514, 518. But it seems quite obvious that this was a mere case of variance. The essential fact stated was that the defendant was indebted to the plaintiff for stall No. 20 in the North Market, and the plaintiff's evidence tended to prove that fact. The variance related merely to the inquiry *how* the indebtedness came to arise, and it ought to have been treated as a case within the statute which cures immaterial vari-

§ 2253. Instances of Material Variances. — Under a declaration that the defendant "*negligently drove*, conducted and managed his coach," it was held that there could be no recovery, if the negligence proved consisted in sending out an *insufficient coach*.[1] So, where the allegation was that the injury was produced by *defective ties*, a defective wheel and the unskillfulness of the company's servant, it was held error to permit the plaintiff to introduce evidence tending to show that the accident was caused by the *high rate of speed* of the defendant's train.[2] Where the carrier *fails to transport* the passenger according to the contract, passage money may be recovered under account for money had and received, but not under a count for *money loaned* and advanced, or for money paid, laid out and expended.[4] Under a count setting out a contract to transport the plaintiff in a *particular vessel*, it was held that the plaintiff could not recover damages for failing to transport him in *any vessel*, — the particular vessel having been wrecked. He could

ances, which statute is stated in the above text. So, in an action against a railroad company for damages for negligence, the allegation in the plaintiff's petition was that he had received the injuries complained of through the negligence of the defendant, in having and using defective machinery and in running and managing its railroad and cars, and the evidence was that the injury was caused by a broken frog. The court strained the rule of the statute so far as to hold that this was not a case of variance merely, but a case of an entire failure to prove the allegations of the petition. The court could not understand that a broken frog could come within the meaning of the term defective machinery, nor could the court see the propriety of a rule which would require the defendant to object to the evidence *in limine*, and which would apprise the plaintiff of the variance, if any, and give him an opportunity to amend his pleading at the trial so as to conform to his proof. Waldhier *v.* Hannibal &c. R. Co., 71 Mo. 514. Upon any fair and just view of the statute, the plaintiff's allegations in this case were not left unproved, "in their entire scope and meaning." The essential averment of the petition was an injury happening to the plaintiff through the negligence of the defendant in and about its railroad. The matters of which the negligence consisted, whether of mismanagement in the operation of its train, or want of care in the construction or reparation of its machinery or of its road-bed, were, within any fair and just view of the statute, "particulars only," and a variance between the allegations and the proof in these particulars ought only to have been held such a variance as may be cured by amendment under the provisions of the statute quoted in the preceding section.

[1] Mayor *v.* Humphries, 1 Carr. & P., 251.

[2] Toledo &c. R. Co. *v.* Beggs, 85 Ill. 80. Compare Union Pacific R. Co. *v.* Hand, 7 Kan. 380.

[3] Briggs *v.* Vanderbilt, 16 Barb. (N. Y.) 222.

only recover the passage money which he paid, with interest.[1] Where the plaintiff, suing for rent, counted upon a *written lease*, and offered in evidence the making of the *lease by parol* and a written agreement to pay a stated rent thereunder, it was held that the evidence was not admissible.[2] A petition alleged that the plaintiff and defendant "jointly leased" certain premises of one A., and that the defendant collected the rents and failed to account to the plaintiff for his share, one-half of such rents. Upon the trial, the plaintiff offered in evidence a lease of the premises from a third person to A. and an assignment by A. to the plaintiff and the defendant. It was held that this was a variance, and that the court might properly refuse to receive the assignment in evidence, unless the plaintiff would amend his petition so as to make it correspond with the proof.[3] In a proceeding by *scire facias* to revive a judgment, the *scire facias* described the judgment as follows: "As well the sum of $1200 a certain debt, as the sum of $248 for his damages, which he had sustained, as well by reason of the detention of that debt as for his costs," etc. The record, when offered in evidence, showed a recovery of $1200 debt and $248 damages and costs. It was held that the variance was fatal under a plea of *nul tiel record*.[4] A substantial variance between the *names of the parties* as recited in the *writ and declaration* and as recited in the *verdict and judgment*, will require a reversal of the judgment and the award of a new trial. It was so held where the writ, declaration and plea described one of the defendants as *David Sharpe*, and the verdict and judgment described him as *Daniel Sharpe*.[5]

§ 2254. INSTANCES OF IMMATERIAL VARIANCES. — Under a declaration which states that the defendant contracted to carry the plaintiff from London to Blackheath, evidence was given that the coach ran from Charing Cross to Blackheath, that it was inscribed, "London to Blackheath," and that the plaintiff got on at the Elephant and Castle, that being within what is commonly called London. This was held no variance.[6] So, a declaration that the plaintiff delivered a trunk to the defendant, to be put into a coach at Chester in the County of Chester,

[1] *Ibid.*

[2] Browning *v.* Walbrun, 45 Mo. 477.

[3] Deickman *v.* McCormick, 24 Mo. 596.

[4] Blakey *v.* Saunders, 9 Mo. 742. See also Bibbins *v.* Noxon, 4 Wend. (N. Y.) 207.

[5] Sweazy *v.* Nettles, 2 Mo. 6.

[6] Ditcham *v.* Chivis, 4 Bing. 706; *s. c.* 1 Moore & P. 735.

was held supported by evidence that it was delivered in the city of Chester, which is a county of itself, separate from the county of Chester at large, there being no evidence of the existence of any other place called Chester.[1] And where the complaint charged the defendants as common carriers generally, without defining their route, evidence that they confined themselves to New York and Brooklyn was held to create no variance.[2] Where two persons, A. and B., jointly undertook the management of a stage wagon, each with his own horses, for a specified distance, and were jointly interested in the profits, and an action was brought by a passenger against A. only, for an injury which he had sustained while being transported by servants of A. and B., an averment that the negligence was that of a driver of A. was sustained by proof that the driver was actually employed by B. in conducting the wagon for his own stages.[3] In such an action, evidence to the effect that the wheel of a stage coach ran off, in consequence of the nut which secured it being unfit for that purpose, was held admissible under an allegation that the coach was so carelessly provided, fitted out, etc., that it broke down.[4] An allegation that the passage money was paid by the plaintiff was held sustained by proof that it was paid by the charterers of the ship, to whom the plaintiff was clerk, and for whom he acted as supercargo on the voyage.[5] So, an allegation of the delivery of baggage to a carrier *by the plaintiff*, is supported by evidence of its delivery *by an agent* of the plaintiff.[6]

§ 2255. Variances Under the Missouri Statute. — The Missouri statute provides that "When the variance between the allegation in the pleading and the proof is not material, the court may direct the facts to be found according to the evidence, or may order an immediate amendment without costs."[7] Where such a statute exists, it will become an important subject of inquiry, which must frequently be settled during the conduct of a trial, what variances between the pleadings and evidence are to be deemed material. In the first place, it should be stated that mere *verbal differences of expression* which convey the same meaning, are of course immaterial variances. It was so held where the pleadings recited the name of the plaintiff as the "International Insurance

[1] Woodward *v.* Booth, 7 Barn. & Cres. 301.

[2] Richards *v.* Westcott, 2 Bosw. (N. Y.) 589.

[3] Waland *v.* Elkins, 1 Stark. 272.

[4] Ware *v.* Gay, 11 Pick. 106.

[5] Young *v.* Fewson, 8 Carr. & P. 55.

[6] Richards *v.* Westcott, 2 Bosw. (N. Y.) 589.

[7] Mo. Rev. Stat. 1879, § 3566.

Company of New York," and an instrument offered to prove the plaintiff's incorporation gave its name as the "International Insurance Company of the City and State of New York."[1] It ought also to be stated that the fact that the evidence recites the *mode* in which an act alleged in the pleading was done, does not constitute a variance. If the constitutive fact was the doing of the particular act, the mode in which it was done was merely an *evidential matter*, which, upon well settled principles, ought not to be pleaded, but is to be supplied by the evidence. So, where the plaintiff declared on a judgment of the "County Court" of Louisa County, Va., and the plaintiff, to support this allegation, offered in evidence the record of the judgment rendered by the Court of "Quarterly Session" of such county, but the record in another case contained the recital, "at rules held in the clerk's office of the County Court at Louisa County," etc., following with a recital of the judgment, — it was held that there was no variance, since the record indicated that the Court of Quarterly Session was the County Court."[2] So, where a petition described certain writings as *promissory notes*, and it appeared in proof that they were *negotiable notes*, there was no variance, since negotiable notes are promissory notes.[3] When, therefore, the petition charged generally that the defendant *executed a deed*, and the evidence showed that he executed it *through an attorney* in fact who held his power of attorney, this it was held, was no variance.[4] So, in declaring upon a promissory note, it is sufficient to state that the defendant made the note, and it is not necessary to state *how or by what agent* he made it; since that would be an evidentiary matter; and such a declaration or petition would be sustained by evidence that the signature was that of the defendant or of his duly authorized agent.[5] It should further be stated that the fact that the evidence tends to *prove more* than the fact alleged in the pleading, does not make a case of variance, where the additional matter is *irrelevant* and hence *surplusage*. Thus, where the petition stated a judgment and execution under which a sale was made, as being a judgment and execution against B., and the sheriff's deed described them as a judgment and execution against B. and two others, — it was held that this was not such a variance as to prevent the deed being read in evidence.[6] So, where the petition undertook to recite a *sealed obligation* according to its substance

[1] International Ins. Co. *v.* Davenport, 57 Mo. 289.

[2] Chandler *v.* Garr, 8 Mo. 428.

[3] Beech *v.* Curle, 15 Mo. 105, 115.

[4] Murphy *v.* Price, 48 Mo. 247, 250.

[5] Slevin *v.* Reppy, 46 Mo. 606.

[6] Erfort *v.* Consalus, 47 Mo. 209.

and effect, but did not recite that it contained the words "*without defalcation or discount*," and the instrument, when offered in evidence, was found to contain these words, it was held that the variance was immaterial.[1] Where the action alleged a sale and delivery of four carts to a partnership firm, of which the defendant was a member, and the evidence tended to show that the firm had received the carts upon a promise, on a certain day, to deliver to the plaintiffs four other carts of equal goodness and make and of equal value, which promise they had not kept,— it was held that this was a variance, within the meaning of the statute; and as the defendant had acknowledged his indebtedness to the plaintiffs, the variance was to be deemed immaterial in the absence of any affidavit showing that he had been misled by it.[2]

§ 2256. VARIANCES IN THE SPELLING OF NAMES WHICH ARE IDEM SONANS. — Again, a variance between the pleading and the evidence in respect of the spelling of a name will be deemed immaterial, if the names are *idem sonans*.[3] There is a great deal of decided law upon the question which names are *idem sonans*, and the courts have gone to great lengths in holding that different spellings represent names similar in sound, in order to save substantial rights. Thus, in an action on a foreign judgment, the petition described the one of the plaintiffs as J. McJunkin, while the transcript of the judgment gave his name as J. M. Junkin. It was held that this was no variance.[4] So, Dierges has been held *idem sonans* with Dierkes, it being a German name.[5] So, where the petition, in a suit on a foreign judgment, recited that the judgment had been recovered by Jas. J. Randolph and Carman Randolph, and the transcript of the foreign judgment recited the names of the plaintiffs as James F. Randolph and Carman F. Randolph, it was held that the variance was immaterial.[6] In a suit upon a promissory note, where the petition alleged a promise to pay "David A. Ely," but the evidence showed that the note was payable to "D. A. Ely," it was held that this variance was presumptively immaterial, and the defendant having failed to prove that it was material and that he was misled by it by affidavit as was required by the statute, could not be heard afterwards to complain.[7]

§ 2257. VARIANCES IN RESPECT OF MATTERS OF INDUCEMENT NOT THE FOUNDATION OF THE ACTION. — Moreover, a variation between the alle-

[1] Powers *v.* Browder, 13 Mo. 155.
[2] Wells *v.* Sharp, 57 Mo. 56.
[3] See *ante*, § 1526.
[4] Campbell *v.* Wolf, 33 Mo. 459.
[5] Gorman *v.* Dierkes, 37 Mo. 576.
[6] Randolph *v.* Keiler, 21 Mo. 557.
[7] Ely *v.* Porter, 58 Mo. 158.

gations and the evidence in respect of mere matter of inducement, or a description of instruments and records which are not the foundation of the action, will be held immaterial.[1] Treating of this point of practice, Chief Justice Marshall said: "Examining the subject with a view to the great principles of justice, and to those rules which are calculated for the preservation of right and for the prevention of injury, no reason is perceived for requiring the proof of a perfectly immaterial averment, unless that averment be descriptive of a written instrument which, by being untruly described, may by possibility mislead the opposite party. Where then, the averment in the declaration is of a fact *de hors* the written contract, which fact is in itself immaterial, it is the opinion of the court that the party making the averment is not bound to prove it."[2] So, in an action for verbal slander, the petition charged that the defendant had said that the plaintiff had forged the words, "that the work shall be done in a workmanlike manner," in a certain contract between the defendant and the directors of *School District No. 7.* The instrument, when offered in evidence, appeared to be a contract executed on the part of the school directors of *School District No. 8*, and was only signed by the plaintiff as a director of such district. The court overruled objections to this evidence and it was held that this was not error. It was regarded merely as a case of technical variance between the allegations and the proof in respect of an instrument which was only referred to in the petition of a preliminary inducement to explain the nature of the slanderous charge made by the defendant against the plaintiff. It was hence not necessary to set it out in the petition with any great particularity, but was sufficient to refer to it in a general way, so as to notify the defendant of the particular charge intended to be proved. The defendant not having proved by affidavit, as required by the statute, that he had been misled by the variance, it was too late to complain of it on appeal.[3]

§ 2258. VARIANCES IN RESPECT OF DATES. — The rule then may be said to be that variances between the pleadings and evidence, in respect of the dates of judgments is to be regarded as immaterial in the absence of a state of the pleadings making the date a matter of essence or sub-

[1] Ward *v.* Steamboat, 7 Mo. 582; Cunningham *v.* Kimball, 7 Mass. 65; Wilson *v.* Codman, 3 Cranch (U. S.), 193; denying Bristow *v.* Wright, Doug. (Mich.) 665.

[2] Wilson *v.* Codman, 3 Cranch (U. S.), 193.

[3] Clements *v.* Maloney, 55 Mo. 352, 60.

stance.[1] The old rule was said to be, that when a particular fact is to be tried, a variance from the date will not be material, although it is proved by the record, or other written instrument, provided the same is not alleged as descriptive of the record, by means of a *prout patet per recordam* or otherwise; and therefore where, in an action for malicious prosecution, the plaintiff alleged that he was acquitted on a particular date, it was held that the precise day was not material, the substance of the allegation being that the plaintiff was acquitted before the commencement of the present action.[2] So, in an action on a sheriff's bond, the judgment, in respect of which the alleged misprision arose, was recited in the petition as having been rendered on the 14th day of April, 1839, whereas the record produced in evidence showed that it was rendered on the 15th day of April, 1840. But this variance was held immaterial, since the action was not upon the judgment but upon the sheriff's bond.[3] So, where the allegation stated that the contract sued on was made about the *first of September*, and the plaintiff's evidence tended to show that it was made about the *first of October*, the answer having denied that it was made at any time, it was held that the evidence was admissible; that it had no tendency to mislead the defendants to their prejudice, and that if they were misled they should have followed the statute and obtained an order compelling the amendment of the petition upon terms. If they were surprised, an amendment might have entitled them to a continuance, at the costs of the plaintiff.[4]

§ 2259. Variance between Allegation and Record Evidence Explainable by Parol. — Moreover, where the fact is correctly alleged in the petition or declaration, and is to be supported by evidence of a judicial record, the fact that the record is imperfect and that it does not precisely correspond to the plaintiff's allegation, will not defeat his right of recovery, but he may help out the deficiency of the record by parol evidence. Thus, where Joseph J. Stone brought an action for a malicious prosecution, and in support of his declaration offered in evidence the transcript of a justice of the peace, which showed that the defendant had instituted a criminal prosecution against —— Stone, it was held that the plaintiff was entitled to show that he was the person described therein, and that the tran-

[1] Martin *v.* Miller, 3 Mo. 135; State *v.* Martin, 8 Mo. 102.

[2] Purcell *v.* MacNamara, 9 East, 157.

[3] State *v.* Martin, 8 Mo. 102.

[4] Fischer *v.* Max, 49 Mo. 404.

script, together with his explanation, ought to have gone to the jury.[1] So, where, in an action for slander, there was a variance between the allegation of a judicial proceeding and the record of the proceeding produced in evidence, in that the record showed that S. & W. were plaintiffs, whereas the declaration recited that S. was plaintiff, it was held that the variance was not material, and that parol evidence was admissible to identify the record with the proceeding referred to in the declaration.[2]

§ 2260. VARIANCES IN ACTIONS FOR SLANDER. — The question frequently arises as to what discrepancies between the allegations and the evidence, in actions for slander, will be regarded as variances merely, or as a failure of proof. In an early case in Missouri it was said by Scott, J.: "The rule is stated in the books, that the slander proved must substantially correspond with that charged in the declaration. By this, it is not to be understood, that if certain words are employed to convey a slanderous imputation, those words will support a declaration containing the same imputation in different words. The meaning of the rule seems to be that if the words charged to have been spoken are proved, but with the omission or addition of others not at all varying or affecting their sense, the variance will not be regarded. Although the words proved are equivalent to the words charged in the declaration, yet, not being the same in substance, an action cannot be maintained; and although the same idea is conveyed in the words charged and those proved, yet if they are not substantially the same words, though they contain the same charge, but in different phraseology, the plaintiff is not entitled to recover."[3] The principle upon which all the cases seem to unite is, that the words which are alleged to have been uttered by the defendant must be proved as laid, and that, although it may not be necessary to prove all of them as laid, yet *so much of them must be proved as is sufficient to sustain the cause of action*,[4] and that it is not enough to prove words of equivalent meaning.[5] The rule has been carried to the extent of holding that, in

[1] Stone *v.* Powell, 5 Mo. 435.

[2] Hibler *v.* Servoss, 6 Mo. 24.

[3] Berry *v.* Dryden, 7 Mo. 324, quoted with approval in Birch *v.* Benton, 26 Mo. 153, 161.

[4] Maitland *v.* Goldney, 2 East, 438; Creelman *v.* Marks, 7 Blackf. (Ind.) 281; Iseley *v.* Lovejoy, 8 Blackf. (Ind.) 462.

[5] *Ibid.*; Fox *v.* Vanderbeck, 5 Cow. (N. Y.) 515; Olmsted *v.* Miller, 1 Wend. (N. Y.) 506; Creelman *v.* Marks, 7 Blackf. (Ind.) 281; Iseley *v.* Lovejoy, 8 Blackf. (Ind.) 462; Williams *v.* Bryant, 4 Ala. 44; Easeley *v.* Moss, 9 Ala. 267.

order to sustain the action, it is necessary to prove so many of the "identical words charged as are necessary to constitute of themselves the slanderous accusation;"[1] and it has been held that a declaration in an action for slander is not supported by evidence tending to show the utterance of words of *precisely the same meaning* as those charged.[2] Thus, where the declaration charged that the defendant had said of the plaintiff's wife that she was a "whore" and the evidence tended to show that he had said that she was a "strumpet," this was not a mere variance, but a failure of proof.[3]

§ 2261. Other Instances of Immaterial Variance. — It is not a material variance for the pleader in setting out a written instrument to *correct erroneous spelling* of words therein.[4] The rule is said to be that where a fact is simply alleged without vouching any instrument, and the *instrument is used as mere evidence*, a variance will not be material if the substance is proved.[5] It is scarcely necessary to say that variance between the allegations and the evidence in respect of matters which are *not necessary to be pleaded at all*, will be regarded as immaterial. Another way of stating the same rule is that, where such a discrepancy arises, the immaterial matter in the pleading will be rejected as *surplusage*. Thus, in an action upon a judgment, the declaration recited the name of the judge by whom judgment had been rendered, but the record of the judgment, when offered in evidence, failed to show by what judge it had been rendered. It was held that this was an immaterial variance.[6] Where a *second trial* takes place upon the same evidence which was adduced on the *first trial*, the objection that there is a variance between the petition or declaration and the evidence is regarded as immaterial, since from the nature of the case it could produce no surprise.[7]

§ 2262. (*c.*) Where the Facts are Undisputed or Admitted. — It follows from the foregoing statements, that[8] where

[1] Iseley *v.* Lovejoy, *supra*.

[2] Easeley *v.* Moss, 9 Ala. 267.

[3] Williams *v.* Bryant, 4 Ala. 44.

[4] Dent *v.* Miles, 4 Mo. 419.

[5] Bell *v.* Scott, 3 Mo. 212; 3 Stark. Ev. 1603, old edition.

[6] Hutchinson *v.* Patrick, 3 Mo. 65.

[7] Carroll *v.* Paul, 16 Mo. 226, 239. Variance as to the *mode* in which the *negligence* of the defendant operated to produce the result; Reeves *v.* Larkin, 19 Mo. 192. In actions commenced before justices of the peace: Metz *v.* Eddy, 21 Mo. 13. Variance between writ and declaration or petition no ground of dismissal: Jones *v.* Cox, 7 Mo. 173; Freeman *v.* Camden, 7 Mo. 298; Hite *v.* Hunton, 20 Mo. 285.

[8] *Ante*, § 2242.

the facts are undisputed or admitted, the only questions for decision are questions of law. In such a case, it only remains for the judge to apply the law to the facts and to decide whether they constitute a cause of action or defense.[1] But *where the facts are disputed*, and the evidence in respect to them is conflicting, such is not the case. Here it is not for the court to find the facts, and from them to say whether the law is for the one party or the other.[2]

§ 2263. (*d.*) **Where the Evidence leaves a single Material Fact unproved.** — The failure to prove a single material fact which is necessary to the plaintiff's right to recover, will, of course, prevent the case from going to the jury. Thus, where the plaintiff sought to recover damages for the death of her husband, alleged to have been produced by a fall caused by the negligence of the defendant, his employer, in furnishing a defective platform, and the evidence failed to show that the plaintiff fell at all, a demurrer thereto was properly sustained.[3]

§ 2264. (*e.*) **Where the Plaintiff's Evidence is Irreconcilable with Existing Physical Facts.** — It is conceived that, in an action for damages for negligence, if the evidence of the plaintiff is irreconcilable with physical facts, the existence of which is conclusively proved or admitted, the court will instruct the jury that the plaintiff cannot recover. But the court will be very cautious in holding that the testimony of witnesses, as to facts to which they distinctly testify, is irreconcilable with physical facts.[4]

§ 2265. (*f.*) **In Actions upon Bills of Exchange where nothing is required but a Computation, etc.** — When there is nothing for the jury to determine, except the amount of the

[1] Hall *v.* Durham (Ind.), 10 N. East. Rep. 581. See also Adams *v.* Kennedy, 90 Ind. 318; Carver *v.* Carver, 97 Ind. 497; Wabash Ry. Co. *v.* Williamson, 104 Ind. 154; 3 N. East. Rep. 814.

[2] Chicago &c. R. Co. *v.* Lewis, 109 Ill. 121.

[3] Groll *v.* Tower, 85 Mo. 249.

[4] See for illustration, Coudy *v.* St. Louis &c. R. Co., 85 Mo. 79, 84; affirming *s. c.* 13 Mo. App. 587.

principal and interest due on a note, it is competent for the court to instruct them as to the character of their verdict.[1] Where the question in controversy depends wholly on documentary evidence, such as the terms of a bill of exchange and the sufficiency of its protest, and there are no controverted facts, it is no invasion of the province of the jury, for the court to instruct them to find for one or the other of the parties.[2]

§ 2266. (*g.*) In Equitable Actions in Pennsylvania. — In Pennsylvania, an action of *ejectment* brought to enforce *specific execution* of a contract to convey land, is governed by the same rules as a bill in equity for that purpose. If, in such an action, in the opinion of the judge, the facts would move a chancellor to decree a specific execution of the contract, the judge should give a binding instruction to that effect to the jury. The province of the jury in such cases is not to administer equities, but to find facts, and, in a proper case, the judge may properly tell them that the plaintiff has no equity.[3]

§ 2267. Office of an Instruction in the Nature of a Ruling sustaining a Demurrer to the Evidence. — The demurrer to evidence, used in the ancient common-law practice, seems to have passed, for the most part, out of use in American jurisdictions. In the place of it, the defendant moves for a nonsuit, or requests the court to give a peremptory instruction to the jury to return a verdict for the defendant. In either case, the effect is substantially the same as a demurrer to the evidence under the ancient practice. An order of nonsuit, or a peremptory instruction given in compliance with such a motion does not undertake to decide any question of fact, but simply pronounces the law arising upon the evidence, admitting the same to be true.[4] In this way the court pronounces upon the legal effect of the facts which the evidence may, in the opinion of the jury, prove. If there is *no evidence* tending to support the allegations of the plaintiff's declaration, petition or complaint, it is, under all theories of

[1] Potter *v.* Wooster, 10 Ia. 334.

[2] Thorp *v.* Craig, 10 Ia. 461. Compare Huff *v.* Cole, 45 Ind. 300.

[3] Piersol *v.* Neill, 63 Pa. St. 420.

[4] Harris *v.* Woody, 9 Mo. 113, 116.

procedure, the duty of the court to instruct the jury that he cannot recover.[1] Like the ancient demurrer to evidence, a motion for a judgment of nonsuit or for a peremptory instruction to return a verdict for the defendant, *admits everything which the evidence fairly tends to prove*, but challenges its sufficiency in law.[2] Everything will be taken against the party demurring, which the evidence tends to prove, including every fair inference of fact deducible therefrom.[3] The court is required to make every inference of fact in favor of the party offering the evidence which a jury might, with any degree of propriety, have inferred in his favor; and if, when received in this light, it is insufficient to support a verdict in his favor, the demurrer should be sustained." [4] The reason is that the judge is not permitted to determine controverted facts, or to say what inferences of fact shall be drawn from the facts which the evidence proves or tends to prove. The sole object of such a demurrer or motion is so to present the case to the judge that he shall determine what inferences of law are to be drawn from the facts which the evidence tends to prove. It is, therefore, analogous to a demurrer to a pleading which admits all the facts to be true which are yet pleaded; or to a special verdict, where, the jury having found the facts, the judge announces what conclusions of law shall be drawn therefrom. This being so, it is never safe, where the ancient common-law rule of procedure prevails, to demur to the evidence, if there is any evidence tending to prove negligence on the part

[1] Lee *v.* David, 11 Mo. 114; Clark *v.* Hannibal &c. R. Co., 36 Mo. 202, 213; Harris *v.* Woody, 9 Mo. 113.

[2] Chicago &c. R. Co. *v.* Lewis, 109 Ill. 121; Stone *v.* Chicago &c. R. Co., 47 Iowa, 82; *s. c.* 10 Ch. Leg. N. 78; 6 Reporter, 489; McClenaghan *v.* Brock, 5 Rich. L. (S. C.) 17; Wolf *v.* Washer, 32 Kan. 533; Bequillard *v.* Bartlett, 19 Kan. 382; Brown *v.* Atchison &c. R. Co., 31 Kan. 1; Doane *v.* Lockwood, 115 Ill. 490; Bartelott *v.* International Bank, 119 Ill. 259, 271.

[3] Nordyke &c. Co. *v.* Van Sant, 99 Ind. 188; Pinnell *v.* Stringer, 59 Ind. 555; Atherton *v.* Sugar Creek &c. Co., 67 Ind. 334; Willcuts *v.* Northwestern Mut. Life Ins. Co., 81 Ind. 300; Ruff *v.* Ruff, 85 Ind. 431; Kincaid *v.* Nicely, 90 Ind. 403; Bethell *v.* Bethell, 92 Ind. 318.

[4] Buesching *v.* St. L. Gas Light Co., 73 Mo. 219, 231. See also Wilson *v.* Board of Education, 63 Mo. 137; Smith *v.* Hannibal &c. R. Co., 37 Mo. 287; Smith *v.* Hutchinson, 83 Mo. 683, 690; Woods *v.* Atlantic &c. R. Co., 50 Mo. 112.

of the defendant; for then the judge will accept the evidence as true, and determine therefrom as a conclusion of law, that there was negligence;[1] although he cannot, on overruling a demurrer to the evidence, enter a judgment, but must direct an inquiry of damages.[2]

§ 2268. When such a Motion should not be granted. — It is scarcely necessary to recall the principle that a nonsuit cannot be granted, or a peremptory instruction for the defendant given, where there is evidence tending to show a right of recovery in the plaintiff, although the court may believe that the *weight of evidence* is with the defendant;[3] or, to state it more loosely, though in language which is found in judicial opinions, where, from the evidence, the jury may properly find a verdict for the plaintiff.[4] So, where certain facts are established by the plaintiff from which *other facts* tending to support his case may be *inferred*, the court should not direct a verdict for the defendant.[5] So, in an action on a due bill, if the instrument is introduced in evidence, a verdict for the defendant ought not to be directed, although the only witness who has testified to the defendant's *signature* is not familiar with his *handwriting*.[6]

§ 2269. Whether a Nonsuit may be ordered or a Peremptory Instruction given upon New Matter elicited upon Cross-examination of Plaintiff's Witnesses. — It is apprehended that this question will be resolved either way, according to the view

[1] As to the practice under a demurrer to the evidence, see Wright *v.* Pindar, Style, 34; Copeland *v.* New England Ins. Co., 22 Pick. (Mass.) 138; Young *v.* Black, 7 Cranch (U. S.), 568; Fowle *v.* Alexandria, 11 Wheat. (U. S.) 322; Mobile &c. R. Co. *v.* McArthur, 43 Miss. 180; Fent *v.* Toledo &c. R. Co., 1 Thomp. on Neg., p. 136; *s. c.* 59 Ill. 349.

[2] Mobile &c. R. Co. *v.* McArthur, 43 Miss. 180.

[3] Chicago &c. R. Co. *v.* Lewis, 109 Ill. 121; Jones *v.* Pashby (Mich.), 29 N. W. Rep. 374.

[4] Stanford *v.* Davis, 54 Ind. 45; Nordyke &c. Co. *v.* Van Sant, 99 Ind. 188.

[5] Re Ripp (Mich.), 29 N. W. Rep. 517.

[6] Buler *v.* Granger (Mich.), 29 N. W. Rep. 718; *s. c.* 56 Mich. 209; 58 Mich. 274. Compare Fourth Nat. Bank *v.* Olney (Mich.), 29 N. W. Rep. 513; Egbert *v.* Peters (Minn.), 29 N. W. Rep. 134; *s. c.* 35 Minn. 312.

which is taken in the particular jurisdiction of the right of a party to cross-examine his opponent's witnesses upon new matter not touched upon in their direct examination. This subject is elsewhere considered.[1] Where the so-called English rule obtains, which permits the defendant to cross-examine the plaintiff's witnesses, not only as to the matter embraced in their direct examination, but as to any new matter relevant to the issues, without making them his own, there is possibly room for the conclusion that if, from the new matter thus elicited, it unavoidably appears that the plaintiff cannot recover, the judge may so direct the jury. This has been held in Missouri, as already seen, in respect of contributory negligence, — the Supreme Court of that State, in one or two recent cases, going so far as to hold that, where, in an action grounded upon negligence, an unavoidable inference of contributory negligence arises out of the testimony of the plaintiff, or out of the testimony of the plaintiff's witnesses, either upon their direct or their cross-examination, — the court must instruct the jury, if so requested, that he cannot recover.[2] But where the so-called American rule [3] obtains, which strictly confines the cross-examination to the matter drawn out in the direct-examination, the contrary conclusion would seem to follow. Accordingly, in a late case in Pennsylvania, the rule of that State is thus formulated: "Where the defendant is improperly allowed to cross-examine the plaintiff's witness and educe matter of defense, the jury should consider the testimony so drawn out as if the witness had been called and examined in chief on the part of the defendant. Under such circumstances, it is error for the court to order a nonsuit on the ground that the plaintiff's own witnesses had testified to matters constituting a good defense." [4]

§ 2270. At what Stage of the Trial Nonsuit granted or Peremptory Instruction given. — After the plaintiff has closed

[1] *Ante*, § 430, *et seq.*
[2] *Ante*, § 1680.
[3] *Ante*, § 432.
[4] Hughes *v.* Westmoreland Coal Co., 104 Pa. St. 207, 213; Jackson *v.* Litch, 62 Pa. St. 451; Hopkinson *v.* Leeds, 78 Pa. St. 396; Fulton *v.* Central Bank, 92 Pa. St. 112.

his evidence, the defendant may, as a matter of right, demand the opinion of the court on the plaintiff's case, and the court cannot refuse a peremptory instruction, requested by the defendant, merely on the ground that the defendant intends to give further evidence. The plaintiff cannot insist upon having the opportunity of cross-examining the defendant's witnesses, in order to present evidence in chief to help out his own case.[1] Nor is it error for the trial court to give such a direction before the defendant formally announces that he has closed his defense. After the plaintiff has closed his case the defendant is at liberty to take his own course. He has a right to ask instructions without saying that he has closed. If his instructions are refused, this may render it necessary for him to introduce evidence on his part. To allow him to ask for a peremptory instruction in the nature of a demurrer to the plaintiff's evidence, without closing his own case, contributes to the dispatch of business and tends to shorten trials, which might otherwise be unnecessarily prolonged. This is a matter of practice so entirely within the *discretion* of a trial court, that an appellate court will not interfere with it.[2] Nor does a statute, which provides that "when the evidence is concluded, and before the case is argued, or submitted to the jury, either party may move the court to give instructions on any point of law arising in the cause,"[3] change this rule. The object of such a statute is to authorize the giving of written instructions, and to require a court to give them at the instance of either party, at the conclusion of the evidence, or before submitting the cause to the jury, rather than to fix the exact order of practice; and when the plaintiff has concluded his evidence, it may well be said that the evidence is concluded for all the purposes of instructions such as these.[4] On the other hand, the defendant does not *waive* his right to such an instruction at the close of the whole case, by not asking for it at the close of the plaintiff's evidence. A nonsuit may sometimes be ordered at the close of the defendant's evidence, although at the

[1] Rucker *v.* Eddings, 7 Mo. 115.
[2] Harris *v.* Woody, 9 Mo. 116.
[3] Rev. Stat. Mo. 1855, p. 1268.
[4] Clark *v.* Hannibal &c. R. Co., 36 Mo. 202, 216.

close of the plaintiff's there was a *prima facie* case.[1] In a late case in Illinois, it was said by Mr. Justice Scholfield, in giving the opinion of the court: "It would certainly be proper, and, where the motion can rightly be sustained, most convenient, to present the motion at the conclusion of the plaintiff's evidence, so as to at once terminate the trial; but we know of no reason or authority why it may not be made after evidence is heard on behalf of the defendant. At most, so far as is now perceived, delaying the motion until after the introduction of defendant's evidence could only affect the question of costs incident to the examination of the defendant's witnesses, — and this, obviously, would appeal only to the discretion of the court, on a motion to re-tax costs, as in case of the examination of unnecessary witnesses."[2]

§ 2271. Defendant's Evidence helping out Plaintiff's Case. — Whether or not the trial court errs in refusing to grant a nonsuit or to give a peremptory instruction for the defendant, according to the practice in the particular jurisdiction, at the close of the plaintiff's case, is not to be determined by the state of the evidence as it then stood, but by the state of the evidence as it stood at the end of the trial; the rule, in such cases, being that a judgment will not be reversed for this cause, if either party afterwards supplied the evidence necessary to make out the plaintiff's case.[3]

§ 2272. When Plaintiff estopped on Appeal to insist that he was entitled to go to the Jury. — In New York the rule is that

[1] Unger *v.* Forty-second Street R. Co., 51 N. Y. 497; *s. c.* 1 Thomp. Neg. (1st ed.), 392. See also Cooper *v.* Waldron, 50 Me. 80, 82. In the following cases the practice seems to have been to entertain the motion after hearing the evidence of the defendant: Reed *v.* Inhabitants, 8 Allen (Mass.), 524; Improvement Co. *v.* Munson, 14 Wall. (U. S.) 442; Randall *v.* Baltimore &c. R. Co., 109 U. S. 478; Herbert *v.* Butler, 97 *Id.* 319. And that practice is recommended in City of Mattoon *v.* Fallin, 113 Ill. 249.

[2] Bartelott *v.* International Bank, 119 Ill. 259, 269.

[3] Schenectady &c. R. Co. *v.* Thatcher, 11 N. Y. 102; Kent *v.* Harcourt, 33 Barb. (N. Y.) 491; Colvin *v.* Burnet, 2 Hill (N. Y.), 620; Hearsey *v.* Pruyn, 7 Johns. (N. Y.) 179; Dean *v.* Corbett, 51 N. Y. Super. (19 J. & S.) 103.

where parties have, by motion for a nonsuit or by resting their defense upon certain propositions of law, *waived* their right to go to the jury, and have not requested to go to the jury after the motion for a nonsuit is denied or the law held adversely to them, they are estopped from making the point in an appellate court that there were questions to be passed upon by the jury.[1] Where a verdict was directed in favor of the defendant, it was held that where there was a general exception, in the absence of anything from which it might be implied that the right to go to the jury had been waived, a special request was not required.[2]

§ 2273. Verdicts how Considered on Appeal or Error. — A slight digression will here be made merely to speak of a subject which is not within the plan of this work. Courts of error or appeal are more reluctant to disturb the verdicts of juries than trial courts are, — and this for the obvious reason that the judges of the appellate courts do not see and hear the witnesses and observe the manner of their giving their testimony, which the trial judge does. It is believed that the following four propositions may be safely stated: 1. That courts of error or appeal will set aside a verdict in every case where the record discloses that there was *no substantial evidence* to support it.[3] 2. That they will not in general set aside a verdict where the *evidence is conflicting*.[4] 3. That they will not in general set aside a verdict because the jury have disregarded testimony of apparently credible witnesses.[5] 4. By analogy to a rule which obtains in respect of the

[1] Ormes *v.* Dauchy, 82 N. Y. 443, 448; Trustees *v.* Kirk, 68 N. Y. 459, 464; Winchell *v.* Hicks, 18 N. Y. 558; O'Neill *v.* James, 43 N. Y. 84.

[2] Trustees *v.* Kirk, *supra*. See also Muller *v.* McKesson, 73 N. Y. 198; Train *v.* Holland Purchase Ins. Co., 62 N. Y. 598.

[3] Hacker *v.* Brown, 81 Mo. 68; Foster *v.* Foster, 77 Mo. 227; Schooling *v.* St. Louis &c. R. Co., 75 Mo. 518.

[4] People *v.* Moore, 52 Mich. 563; Willis *v.* Whitsitt (Tex.), 4 S. W. Rep. 253, 256; Fleckenstein *v.* Drydock &c. Co. (N. Y.), 11 N. East. Rep. 950.

[5] McAfee *v.* Ryan, 11 Mo. 364, 366; Steamboat *v.* Matthews, 28 Mo. 248; Rosecrans *v.* Wabash &c. R. Co., 83 Mo. 678, 682. In one of the appellate courts of Missouri the following rule was laid down: "Where the testimony offered in support of the allegations of the party who sustains the burden of proof is, if believed, sufficient to make out his case, and is

award of damages made made by juries,[1] an appellate court will set aside the verdict where the evidence against it preponderates to such an extent as to create an unavoidable conclusion that the verdict was the result of passion or prejudice.[2]

clear, consistent with itself, delivered by an unimpeached witness, and no circumstance is developed to cast suspicion upon it, and no substantial countervailing evidence is offered by the other party, — if the jury nevertheless disregard it and return a verdict against it, it will be the duty of the trial court, on a motion for a new trial, and of an appellate court on appeal or error, to set it aside as being the result of a manifest mistake." Lionberger *v.* Pohlman, 16 Mo. App. 392, 398; Boatmen's Savings Bank *v.* Overall, 16 Mo. App. 510, 514; Borgraefe *v.* Supreme Lodge, 22 Mo. App. 127, 148. The Supreme Court of Missouri laid down a rule quite parallel to this in a civil case which involved the right of the defendant to commit an assault upon the plaintiff in the necessary defense of his property. The court, referring to an English *nisi prius* case on the question of the right of defense of property (Hinchcliff's case, 1 Lewin C. C. 161; *s. c.* Cases Self Defense, 125) said: "That case is also authority for the exercise of the power by a trial court, seldom brought into requisition, however, owing to a pitiable and painful weakness in the dorsal region, of directing a verdict for either party where the facts are undisputed and the witnesses unimpeached, or where the verdict, if returned for the opposite party, would be set aside as against the law and evidence. This doctrine is well established." Morgan *v.* Durfee, 69 Mo. 469, 476; citing Proffat Jur. Tr., §§ 351, 352, 354.

[1] *Ante*, § 2067.

[2] Rosecrans *v.* Wabash &c. R. Co., 83 Mo. 678, 680. Decisions on this subject can be accumulated almost without limit, and no uniform rules could possibly be stated, unless the decisions in each State were separately arrayed. Some of the rules, so called, are no rules at all, but remit the whole subject to the *discretion* of the appellate court. Thus, in New York the Court of Appeals follows the conclusions of fact of the trial court, *unless for some obvious and sufficient reason.* Field *v.* Field, 77 N. Y. 294; Johnson *v.* Myers (N. Y.), 9 N. East. Rep. 55. Again, in Nebraska where the evidence is conflicting and *nearly equally balanced*, a verdict will not be set aside on appeal as being against the weight of evidence. Driscoll *v.* Troughton (Neb.), 34 N. W. Rep. 497. Nor do we gain anything by such a statement as that, where an action at law is tried by the court, its findings have the force and effect of a verdict and will not be disturbed on appeal, "if there is evidence which, fully considered, *warrants the finding.*" Swayne *v.* Waldo (Iowa), 33 N. W. Rep. 78.

TITLE VI.

CHARGING THE JURY.

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CHAPTER LXIV.

INVADING THE PROVINCE OF THE JURY.

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§ 2280. Judges Prohibited from Charging on Questions of Fact. — In addition to what has been already given,[1] the constitutions of some of the States contain this provision: "Judges shall not charge juries with respect to matters of fact, but may state the testimony and declare the law."[2] A statute of Massachusetts is in the same language.[3] A statute of North Carolina is of like import, but in more explicit terms.[4] A statute of Georgia prohibits the judge, during the progress of the trial, or in his charge to the jury, from expressing or intimating his opinion as to what has or has not been proved, or as to the guilt of the accused; and requires the Supreme Court to reverse the decision and grant a new trial for a violation of its provisions.[5] A statute of Alabama provides that "the court may state to the jury the law of the case, and may also state the evidence where the same is disputed, but shall not charge upon the effect of the testimony, unless required to do so by one of the parties.[6]

[1] *Ante* § 2226.

[2] Cal. Const. of 1879; art. 6, § 19; Nev. Const. of 1864, art. 6, § 12; S. C. Const of 1868, art. 4, § 26; Tenn. Const. of 1870, art. 6, § 9.

[3] Pub. Stats. Mass. 1882, ch. 153, § 5.

[4] Rev. Code N. C. 1883, § 413.

[5] Ga. Act of 1850, p. 271. Cobb Ga. Stats. p. 462; Rev. Code Ga., § 418; Rev. Stats. Ga. 1873, § 3284.

[6] Ala. Code 1886, § 2754.

§ 2281. **But may State the Testimony and Declare the Law.** — This prohibition as to charging on matters of fact, coupled with the license of stating the testimony and declaring the law, means that the judge is at liberty, in his charge, to review the evidence, — that is, to recall to the minds of the jury what the witnesses for the opposing parties have sworn to, or what other evidence has been adduced for their consideration; carefully refraining, at the same time, from expressing or intimating his opinion to them as to the conclusion of fact which the evidence proves; in other words, it leaves the judge at liberty to sum up the evidence according to the practice at common law, but with the restraint that he is to refrain from expressing his opinion as to whether the evidence proves, or leaves unproved, any essential contested fact, or as to what their verdict should be.[1] Such constitutional and statutory provisions, where there are no restraining words, extend to criminal as well as to civil cases;[2] but they prohibit him from expressing to the jury his opinion whether the defendant is or is not guilty upon the evidence.[3] He cannot, for instance, tell them that it has been sufficiently proved that the mortal blow was given without adequate provocation, or that it was given after the prisoner had received a blow, where these facts are contested; but he may properly recall to their minds that the State's witnesses have given one account of the transaction, and the defendant's witnesses another; and it has been said that he is bound, by the terms of the statute, in summing up, to draw the attention of the jury to any conflict in the testimony and to explain the import of it.[4] Such a provision does not prohibit him, in a civil case, from ordering a nonsuit or directing a verdict, where, under the principles of common-law procedure, already explained,[5] he would be at liberty to do it, — that is, where the party sustaining the burden of proof, has adduced no evidence, sufficient in point of law, to entitle him to take the opinion of the jury upon his case.[6]

[1] Com. *v.* Barry, 9 Allen (Mass.), 276.

[2] People *v.* Welch, 49 Cal. 174, 181.

[3] State *v.* Dixon, 75 N. C. 275.

[4] State *v.* Angel, 7 Ired. L. (N. C.) 27.

[5] *Ante*, § 2227.

[6] People *v.* Welch, 49 Cal. 174, 181.

§ **2282. Further of Stating the Testimony.** — It has been held that this power to "state the testimony"[1] may be exercised by the judge in a criminal case by telling the jury, in answer to their request, after they have been out for a time deliberating upon their verdict, what the testimony of a particular witness was upon the point of inquiry; and that, when so stating the testimony, the court may properly stop the counsel for the defendant and prevent him from giving his version of it to the jury.[2] Referring to the provisions of the constitution of California, already quoted,[3] it has been held that it is always safer for the judge to read testimony from his notes, or from the short-hand reporter's notes, if he can adopt them as correct; but if testimony has been introduced to prove a certain matter, the court may instruct the jury that testimony has been introduced to prove such matter, and such instruction is not an expression of the opinion of the court as to the weight or effect of evidence, or as to what has been proved.[4] Accordingly, these expressions in a charge: "The testimony there certainly could be no misunderstanding with regard to;" "I state as testimony in the case, the only testimony in the case touching the time when the watch was taken, is that tending to show it was taken near the door, and that of the defendant that he picked it up in front of counter," etc.—were held not to amount to a charge with respect to matters of fact, within the meaning of the constitutional inhibition. It was not denied that there was testimony tending to prove that the watch was taken near the door, nor was it denied that the defendant alone testified that he "picked it up near the counter." The court said: "The use of the word 'taken,' in the connection in which it was employed, did not imply an opinion of the judge that there had been a felonious taking. Nor was there fatal error in the statement that there could be no misunderstanding in regard to the testimony, which was merely a declaration that the words and meaning of the witnesses

[1] Tenn. Const. of 1870, art. 6, § 9.

[2] Atchison *v.* State, 13 Lea (77 Tenn.), 275, 279.

[3] *Ante*, § 2280.

[4] People *v.* Perry, 65 Cal. 568; citing People *v.* Vasquez, 49 Cal. 560.

were clear and unambigous." [1] It has been well ruled that this provision is violated by the judge charging the jury, in a criminal case, that the testimony *shows* a certain state of facts prejudicial to the defendant. "To state the testimony is one thing; to declare what it shows is another and very different thing. It is for the jury exclusively to determine what the testimony shows." [2] Nor is it error, in some jurisdictions, for the court to instruct the jury that the evidence *tends* to prove a certain matter in issue.[3] So, in Iowa, the court is at liberty to tell the jury that the facts claimed by the plaintiff are "briefly as follows" (stating them), — where the facts were stated not as facts *proved* but merely facts *claimed* to be established by the evidence.[4] Another court has held, on even more obvious grounds, that "where the existence of a fact is established by the evidence without any conflict, contradiction or dispute whatever, it is not an available error for the court to instruct the jury that there is evidence tending to prove such fact. [5]

§ 2283. Decisions Under the Georgia Statute. — Under the Georgia statute, already spoken of, it is error for the judge, in an action of ejectment, to tell the jury that the plaintiff's title was "uninterrupted, continuous, notorious, sufficient and adverse;" [6] or that the "plaintiff had shown sufficient title to enable him to recover, *prima facie;*" [7] or even at the request of the jury, that there had been no evidence introduced on the trial to establish a particular fact; [8] or to state, giving his reasons therefor, that, in his view, the testimony of a certain witness was not material; [9] or to assume in his charge that a certain material fact, as to which there was evidence, had not been proved; [10] or in any case, civil or criminal, at law or in equity, to state or to intimate his

[1] People *v.* Perry, 65 Cal. 568.

[2] People *v.* Casey, 65 Cal. 260.

[3] Morris *v.* Lachman, 68 Cal. 109, 113; People *v.* Perry, 65 Cal. 568; People *v.* Vasquez, 49 Cal. 560.

[4] Hawley *v.* Chicago &c. R. Co. 71 Iowa, 717; *s. c.* 29 N. W. Rep. 787.

[5] Koerner *v.* State, 98 Ind. 13.

[6] Beverly *v.* Burke, 9 Ga. 440, 447. "All the authorities," said the court, "concur in holding that the question of adverse possession is not for the court to decide, but exclusively for the jury."

[7] Ratteree *v.* Nelson, 10 Ga. 439, 442.

[8] Rushin *v.* Shields, 11 Ga. 636, 642.

[9] Jessup *v.* Gragg, 12 Ga. 261, 264.

[10] Roberts *v.* Mansfield, 32 Ga. 228; Buttram *v.* Jackson, 32 Ga. 409; Whitley *v.* State, 38 Ga. 50.

opinion as to what had, or had not been proved; or in a criminal case, to give his opinion as to the guilt or innocence of the accused;[1] or to say, in the hearing of the jury, "Never mind reading the testimony taken down on cross-examination; it does not amount to much any way,—"[2] though if the evidence alluded to was entirely irrelevant, such a remark would not require a reversal of the judgment.[3] So, of course, it was error, where the evidence was conflicting, to tell the jury that they were bound to find in a particular way;[4] but this would have been so before the statute. Nor can the judge recount certain facts, and tell the jury that, if they believe those facts, they are bound to find the prisoner guilty;[5] nor tell the jury that, if they believe certain witnesses, they ought to find for the plaintiff in the amount which he claims.[6] Nor can the judge say to the jury, where the evidence is conflicting, that there is no ground of recovery against a particular defendant under the law and evidence in the case;[7] nor say "that he was surprised that no demurrer had been filed to the bill, or some motion made to dimiss it; but as no one had made any such motion, he would go on and charge them the law in the case."[8] Nor ought the judge to charge the jury that, in the opinion of the court, the plaintiff had an insurable interest; he ought to put the case hypothetically: "If the jury believe from the evidence," so and so, "then, in the opinion of the court, under the law, you will find that he had an insurable interest;" but where the verdict was right, such an error was not sufficient to reverse.[9] Nor ought he to tell them that certain evidence, which had been introduced, was of little value, and to give his reasons therefor;[10] nor charge them that they must find according to the testimony of a particular witness;[11] nor charge them what presumptions they ought to draw from certain evidence.[12] But he might, as stated in another section,[13] lay down general rules to them, as to the weighing of the testimony. He might explain to them

[1] Stephenson *v.* State, 40 Ga. 291.

[2] Crawford *v.* State, 12 Ga. 142.

[3] Fitzgerald *v.* State, 12 Ga. 213.

[4] Scott *v.* Winship, 20 Ga. 429.

[5] Ells *v.* State, 20 Ga. 438; McLeland *v.* State, 25 Ga. 477; Parker *v.* State, 34 Ga. 262.

[6] Jarrett *v.* Arnold, 30 Ga. 323.

[7] King *v.* King, 37 Ga. 205.

Ibid. 219.

[9] Southern Ins. & Trust Co. *v.* Lewis, 42 Ga. 588.

[10] Wannack *v.* Mayor of Macon, 53 Ga. 162; Southern Life Ins. Co. *v.* Wilkinson, 53 Ga. 535, 548.

[11] Moore *v.* Stone, 50 Ga. 157.

[12] Mitchell *v.* Mayor of Rome, 49 Ga. 19; *infra*, § 2290. See also Deupree *v.* Deupree, 49 Ga. 325; Johnson *v.* Wright, 48 Ga. 648; Gardner *v.* Lamback, 47 Ga. 133.

[13] *Infra*, § 2414, *et seq.*

the nature and effect of direct and circumstantial evidence, such as "the act of the accused in absconding or concealing himself for the purpose of escaping the laws; or his being possessed of, or using, large sums of money which he could not honestly account for."[1] He may properly tell them that they are bound to regard the law, as stated by him, to be the law of the case; for the fact, that the jury are sworn in Georgia a true verdict to give, according to equity and the opinion they entertain of the evidence produced to them, to the best of their skill and knowledge, etc., does not change the rule that the jury is bound to take the law from the court.[2] In this instance, the word "equity" means the same as the word "law."[3] It was not error for him to tell the jury that he had received an anonymous letter, charging him with corruption in connection with the case on trial. Such a statement was looked upon more as a matter of taste and manners, than of law.[4] Nor does the statute prohibit him from reciting such facts in the evidence, as are undisputed.[5] Nor does it prevent him from stating to the jury that certain portions of the testimony, which had been offered and objected to during the trial, were competent proof, leaving its sufficiency to be passed upon by them.[6] Nor does the statute prohibit the judge from summing up the evidence, provided he do it without intimating an opinion as to the weight to be given to the whole or any part of it;[7] nor from deciding, on a motion for a nonsuit, whether the proof is or is not sufficient to support the action;[8] but, of course, he cannot, where there is a conflict of testimony, charge them that they are bound to find in a particular way.[9] Nor was it within the inhibition of the statute, for the court to tell the jury, that the evidence on a certain point was such that it was impossible to come to any correct conclusion upon the point.[10] From these and other cases, it would seem that the statute does not prohibit the judge from commenting upon the evidence, so that he do not express or intimate an opinion as to what has or has not been proved.[11] Nor do statements of fact to the jury, which are wholly immaterial, afford ground for reversing a judgment.[12] Nor was it error

[1] Bulloch *v.* State, 10 Ga. 47, 61.

[2] Thornton *v.* Lane, 11 Ga. 459.

[3] *Ibid.*

[4] *Ibid.*

[5] Marshall *v.* Morris, 16 Ga. 368, 376.

[6] Carroll *v.* Roberts, 23 Ga. 492.

[7] Shiels *v.* Stark, 14 Ga. 429.

[8] Perry *v.* Banks, 14 Ga. 699; *ante*, § 2228.

[9] Scott *v.* Winship, 20 Ga. 429.

[10] Wyley *v.* Stanford, 22 Ga. 385.

[11] Reinhart *v.* Miller, 22 Ga. 403, 417.

[12] Johnson *v.* State, 30 Ga. 426. See also Anderson *v.* State, 14 Ga. 709; Grant *v.* State, 45 Ga. 477; Compton *v.* Cassada, 54 Ga. 74; Johnson *v.* Sims, 50 Ga. 119.

for the court to express its opinion to the jury as to the grade of homicide, where it was not done by way of direction, but simply as a reason for declining to instruct them as to the law relating to a particular grade. Accordingly, the following charge was held not erroneous: "There are several grades of homicide recognized by the law, involving different degrees of punishment, such as murder, voluntary and involuntary manslaughter, and justifiable homicide. The defendant in this case is indicted for murder, and, in the opinion of the court, there can be no intermediate verdict between that of guilty of murder and that of not guilty; and it is therefore unnecessary to charge you as to the minor grades of homicide."[1] So, it has been held that if the judge in a criminal case charge that, if certain facts are true, the prisoner is guilty, is not error, if the charge is supported by proof.[2] Nor is it error for the judge, at the request of the jury, to read from the evidence of the witnesses, the parties being present.[3]

§ 2284. RULE UNDER THE TEXAS STATUTE. — Under the Texas statute, "a charge is perfectly unexceptionable only when it expresses the law applicable to the case, without expressing or intimating any opinion as to the weight of evidence, or the credibility of the statements made by the party accused, or by the witnesses."[4] "A charge which extends beyond a plain statement of the *law* of the case made," it is said in another case, "invades the province of the jury, a full and independent exercise of which has been so plainly and earnestly sought by the legislature."[5] Other cases uphold the statute with equal stringency.[6]

§ 2285. Must not Charge as to the Credibility of Particular Witnesses. — Under the foregoing and similar constitutional and statutory provisions, for the judge to express an opinion to the jury, or in their hearing, as to the credibility of a particular witness, or as to the weight which they should attach to his testimony, is error.[7] The law imposes no obligation on a juror to believe a witness who is unimpeached. It gives to the testimony

[1] Choice *v.* State, 31 Ga. 424, 469.
[2] Kitchens *v.* State, 41 Ga. 217.
[3] Green *v.* State, 43 Ga. 368.
[4] Ross *v.* State, 29 Tex. 499.
[5] Brown *v.* State, 23 Tex. 195, 202.
[6] Jones *v.* State, 13 Tex. 175; Butler *v.* State, 3 Tex. App. 48; Bishop *v.* State, 43 Tex. 390; Searcy *v.* State, 1 Tex. App. 440; Murray *v.* State, 1 Tex. App. 415; Rice *v.* State, 3 Tex. App. 451, 455.
[7] Crutchfield *v.* Richmond &c. R. Co., 76 N. C. 320.

of such a witness no artificial force, but leaves it to operate on the mind of each juror with that force only which it may naturally have upon his mind in producing belief. It has, therefore, been held error for the judge to instruct the jury that they are bound to believe a witness unless he is impeached either by the testimony of another witness or by some other fact or circumstance in the case.[1]

§ 2286. Instances under this Rule. — Thus, where a witness was introduced for the purpose of impeaching a former witness, and the judge told the jury that the former witness was a man of high character in his profession, and that he appeared to be a man of culture, but said nothing concerning the latter, it was held error.[2] So, on a trial, the judge stated that a particular witness was one of the most respectable women in his neighborhood. This was objected to by counsel, to which the judge replied, that he did not mean to say she was one of the most respectable, but a woman of respectability. This was held error. Had the judgment depended in any degree upon this witness, it would have been reversed.[3] So, in a case of homicide, the judgment was reversed, because the judge told the jury to find the prisoner guilty, if they believed from the evidence that the deceased was killed under the circumstances detailed by a designated witness.[4] So, where in a criminal case, the credit of witnesses, who were policemen, was assailed on account of their occupation, and the judge told the jury that, in very many of the cases which had been tried at that term of court, policemen had been the principal witnesses, and he thought the jury would agree with him in the opinion that in all those cases they had manifested great intelligence and testified with apparent candor and impartiality, it was held error, and a verdict of guilty was, for that reason, set aside.[5] So, in a suit brought by a landlord against a tenant and a sub-tenant by attachment of the crop, on the ground that they were removing it without paying the rent, it was held that the court could not have properly given the following instructions: "In determining whether such was the intention of the defendants, or either of them, evidence of the statement of either of them, as to his or their determination to remove and continue

[1] State *v.* Smallwood, 75 N. C. 104; Noland *v.* McCracken, 1 Dev. & B. (N. C.) 594.

[2] Crutchfield *v.* Richmond &c. R. Co., 76 N. C. 320.

[3] McMinn *v.* Whelan, 27 Cal. 300, 319.

[4] Rice *v.* State, 3 Tex. App. 451, 455.

[5] Com. *v.* Barry, 9 Allen, 276.

to remove corn until stopped by law, is *prima facie* sufficient to establish the fact that the landlord was in danger of losing his rent."[1] So, in a case of murder it was urged that the trial court erred in not complying with the request of the prisoner to charge the jury that boasting and threatening remarks by a person in an intoxicated condition are entitled to very little weight or consideration in determining the question of his intent. But it was held that, this being a fact exclusively for the jury, and not being a question of law, it was not the duty of the court to say anything about it. The court was not bound to argue the case for the prisoner.[2]

§ 2287. Must not Charge as to the Weight of Evidence. — It is little more than a repetition of the foregoing statements to say that the judge must not charge the jury (except in those jurisdictions where the English rule prevails)[3] upon the weight or sufficiency of the evidence to establish issuable or essential facts.[4] To judge of the credibility of witnesses, and how far evidence is of weight in the establishing of a given fact, is a matter exclusively within the province of the jury.[5] It is, therefore, error for a judge to instruct the jury that certain evidence is or is not sufficient to establish a given fact.[6] In several of the States it is error for the judge to intimate an opinion upon the weight of the evidence, unless it is of a character which the law deems conclusive, and such as will warrant a peremptory instruction;[7] or to define the character and amount of testimony necessary to warrant a verdict;[8] or, in effect, to tell the jury that

[1] Gilliam *v.* Ball, 49 Mo. 249.

[2] State *v.* Smith, 49 Conn. 376, 387.

[3] *Post*, § 2292.

[4] Ledbetter *v.* State, 21 Tex. App. 344; Payne *v.* State, 21 Tex. App. 184.

[5] Otterback *v.* Brown, 2 MacArthur, (D. of C.) 541; Jones *v.* State, 65 Ga. 506.

[6] Sopris *v.* Truax, 1 Col. 91; Napper *v.* Young, 12 Iowa, 450; Boyd *v.* McIvor, 11 Ala. 822; Buffington *v.* Cook, 35 Ala. 312; Battersby *v.* Abbott, 9 Cal. 565; Stacy *v.* Cobbs, 36 Ill. 349; Schneer *v.* Lemp, 17 Mo. 142; Clapp *v.* Bromagham, 9 Cow. (N. Y.) 530; Kimbro *v.* Hamilton, 28 Tex. 560; Saunderson *v.* Lace, 1 Chand. (Wis.) 231; Mariner *v.* Pettibone, 14 Wis. 195; Berry *v.* State, 10 Ga. 512; Morris *v.* Lachman, 68 Cal. 109, 113.

[7] Frame *v.* Badger, 79 Ill. 441; Jenkins *v.* Tobin, 31 Ark. 307; Wannack *v.* Mayor of Macon, 53 Ga. 162.

[8] Thus, in an action against a railway company for the killing of the plaintiff's cattle, it was not error for the judge to refuse to instruct the jury "that it devolved upon the plaintiff to prove that the damages alleged were inflicted by the trains of the defendant, and if it did not *fairly* and with

they must find in a particular way, when to do so, would be to disregard a part of the testimony in the case; [1] or to tell them that certain evidence is sufficient to authorize a judgment in favor of the plaintiff, unless it is overbalanced by the evidence of the defendant, — for this is assuming that the plaintiff's evidence is indisputable, and of this the jury are to judge; [2] or, on the trial of an issue of *devisavit vel non*, to couple together a number of circumstances having a bearing on the capacity of the testator at the time of making the will, and to tell the jury that they were all strong circumstances to disprove capacity.[3] Where the evidence as to a fact in dispute is conflicting it is error for the court to state to the jury a conclusion as to the fact.[4] It is not error to refuse an instruction requested by the defendant in a criminal trial, which singles out a particular inculpatory fact, and tells the jury that "it is by no means conclusive of his guilt;" that "standing by itself, it is not sufficient to justify the jury in finding him guilty." [5] But where the plaintiff makes out his case by undisputed testimony, it is not error to instruct the jury that, if they believe such testimony, to find for the plaintiff, and to point out to them the fact that the defendant has seen fit to offer no countervailing testimony.[6] But under any theory of the relative province of court and jury, where there are questions of fact for the determination of the jury, it is error even in those jurisdictions where the court is allowed to sum up the evidence to give a charge which virtually decides the questions of fact and withdraws that from the consideration of the jury.[7]

§ 2288. INSTANCES UNDER THIS RULE. — In a trial for murder, the closing sentence in the paragraph of an instruction was as follows: "If, however, you shall have a reasonable doubt of his being guilty of mur-

certainty appear from the testimony that such was the fact, the finding should be for the defendant." Nall *v.* St. Louis &c. R. Co., 59 Mo. 112.

[1] Reid *v.* Piedmont &c. Life Ins. Co., 58 Mo. 421.

[2] Huff *v.* Cox, 2 Ala. 310

[3] Jenkins *v.* Tobin, 31 Ark. 307.

[4] Re Kipp (Mich.), 29 N.W. Rep 517.

[5] Hughes *v.* State, 75 Ala. 31, 33.

[6] Rasch *v.* Bissell, 52 Mich. 455.

[7] Ranney *v.* Barlow, 112 U. S. 207; Adams *v.* Roberts, 2 How. (U. S.) 486; Reese *v.* Beck, 24 Ala. 651; Grube *v.* Nichols, 36 Ill 92; Chappell *v.* Allen, 38 Mo. 213, 220.

der in the first degree, you will acquit him of murder in the first degree and find him guilty of murder in the second degree, and assess his punishment at confinement in the penitentiary for any number of years not less than five;" the substantial reason being that the court cannot, in a criminal case, direct a verdict of guilty as to any grade of the offense charged.[1] - - - - In an action for damages caused by an overflow of water through the breaking of the defendant's dam, it was held error for the court to instruct the jury, as being an invasion of their province, that, "if you find from the evidence that the defendant did not have sufficient gates to let out the water, so as to prevent any break that occurred below the top of the dam from being enlarged by the continual flow of the waters through it, then said dam is insufficiently and negligently constructed. It should have had gates sufficient to let all the water out by degrees, so as to prevent a flood below by a sudden breaking of the dam."[2] - - - - In such an action it also error to instruct the jury that it was the duty of the defendant constantly to examine the dam during the freshets. Whether or not such a duty would devolve upon the defendant depended upon the circumstances surrounding the case, and should furnish a question of fact to be decided by the jury.[3] - - - - It has been held error for the court, on the trial of an indictment, for an assault with an intent to murder, to charge the jury, "If you believe from the testimony that he committed the assault under circumstances as detailed by the witnesses that would have made the crime murder (if death had ensued) then death not having ensued the crime is an assault with intent to murder." There were no *punctuation marks* in the record of this charge, and the court held it to mean, as it stood, that if the jury believed the circumstances detailed and the assaulted person had died, the case was murder; and he not dying, it was assault with intent to murder. It was, therefore, regarded as a charge upon the weight of evidence, and the conviction was accordingly reversed.[4] - - - - Thus, where, in a trial of murder depending upon cir-

[1] Smith *v.* State, 19 Tex. App. 96; Des Art *v.* Leggett, 5 Duer (N. Y.), 156, 161. Compare Smith *v.* Rockwell, 2 Hill (N. Y.), 482.

[2] Weiderkind *v.* Tuolumne Water Co., 65 Cal. 431.

[3] *Ibid.*

[4] Ross *v.* State, 59 Ga. 249. An instance of a charge which was held erroneous because it withdrew from the jury the question of premeditation and deliberation, the indictment being for murder, is found in People *v.* Kelley, 35 Hun (N. Y.), 295. The court cited in support of its conclusion Stokes *v.* People, 53 N. Y. 164; McKenna *v.* People, 81 N. Y. 360; People *v.* Conroy, 20 Week. Dig. (N. Y.) 242; *s. c.* 33 Hun (N. Y.), 119.

cumstantial evidence, the court, in charging the jury, pronounced a eulogy upon a judge of the Supreme Court, and read to them an extract from an opinion delivered by him, wherein he used this language: "Juries are generally too reluctant to convict on circumstantial evidence,"[1] and then read the law laid down in the remaining paragraph of the opinion, it was held error. "What is here stated," said Crawford, J., in giving the opinion of the Supreme Court, "was never intended as anything more than a fact, and as such was not proper to have been given to the jury in a charge, as it was calculated to affect their minds adversely to the interests of the prisoner. Whilst we we would not hold it sufficient to authorize the granting of a new trial, we think it should have been eliminated from the principle charged."[2] In a case where contributory negligence is to be submitted to the jury as a question of fact,[3] on the question when contributory negligence is for the jury,[4] the court charged the jury, submitting to them this question, and then made this remark: "I do not see that the question whether or not a person driving at a certain gait along a road known to him after night is an unreasonable act — something which an ordinary man would not do." It was held that this was in effect telling them that there was no contributory negligence by the plaintiff, and that, as there was a question for the jury upon this point, the remark was an invasion of their exclusive province and ground of new trial.[5] - - - - A theory is found in some of the books that all the facts essential to the judgment must be submitted to the decision of the jury in their special verdict, not only those which are disputed, but those which are not disputed. Accordingly, where the trial court told the jury that it had been agreed that they should return a special verdict on the disputed facts, and that the court should enter judgment thereon, and on the facts not disputed, and a verdict was rendered and judgment entered accordingly, it was reversed and a new trial ordered.[6]

§ 2289. Instances: Not a Charge upon the Weight of Evidence. — In Texas, where the province of the jury is guarded with great jealousy, in a trial of title to land, the plaintiff's alleged title consisted of a number of facts establishing a continued

[1] See Newman *v.* State, 26 Ga. 637.

[2] Jones *v.* State, 65 Ga. 506, 511.

[3] See Fernandez *v.* Sacramento City R. Co., 52 Cal. 45.

[4] *Ante*, § 1664.

[5] Andrews *v.* Runyan, 65 Cal. 629, 633. Compare Lee *v.* Troy &c. Gaslight Co., 98 N. Y. 115.

[6] Wallingford *v.* Dunlap, 14 Pa. St. 31.

possession and claim, under a color of title, with defined boundaries, for ten years. The judge, in his charge, enumerated the various facts thus alleged, and instructed the jury to find for the plaintiff, if they had been proved. It was held that this was not a charge upon the weight of the evidence.[1] It is not an invasion of the province of the jury, for the judge to tell them that they may consider certain evidence as tending to prove a certain fact, without making any comment as to the weight of such evidence,[2] or that testimony has been introduced to prove a certain matter, if such is the fact.[3] Nor was it deemed error for the judge, in an action for damages for seduction, to recite the testimony in the case, and then to ask the jury if they have found any, or can lay their fingers on any portion of it, which can satisfy them that the plaintiff consented to, or connived at, the prostitution of his daughter, or was guilty of such gross negligence as amounted to such connivance. "It is certain," said Gaston, J., "that this question might have been proposed in such a tone and manner as to manifest the clear conviction of the inquirer how it ought to be answered; but we cannot intend any circumstances of this sort; and, without some peculiarity of tone or manner, intimating the opinion of the speaker, and influencing or tending to influence the judgment of those addressed, the question submitted very properly directed the attention of the jury to a material inquiry of fact." [4]

§ 2290. Nor Draw Presumptions or Inferences of Fact. — A presumption of fact differs from a presumption of law in this: A presumption of law is a conclusive or indisputable inference which the law, by a settled rule, draws from a given fact. Such an inference is therefore made by the judge, and not by the jury. But a presumption of fact is simply an inference or conclusion of the existence of a fact from some other fact. It is always drawn by the jury, who are the triers of questions of fact. It is, therefore, merely a repetition of what has already been said,

[1] Andrews *v.* Parker, 48 Texas, 94, 99.

[2] Beattie *v.* Hill, 60 Mo. 72, 78.

[3] People *v.* Vasquez, 49 Cal. 560.

[4] McRae *v.* Lilly, 1 Ired. L. (N. C.) 118.

to say that it is for the jury, and not for the judge, to draw presumptions of fact; and that, for the judge to tell the jury what presumptions of fact they ought to draw from a given fact or series of facts, is a usurpation of their functions.[1]

§ 2291. Nor construe the Language of Witnesses. — In like manner, it has been held that a judge cannot construe the language of a witness, when it is susceptible of different interpretations; it is for the jury to do that.[2] So, of course, an in-

[1] The following cases state and illustrate the doctrine of the text: Bond *v.* Warren, 8 Jones L. (N. C.) 191; Easterling *v.* State, 30 Ala. 46; Williams *v.* Cannon, 9 Ala. 348; Knight *v.* Vardeman, 25 Ala. 262; White *v.* Hass, 32 Ala. 430; Glover *v.* Duhle, 19 Mo. 360; State *v.* Lynott, 5 R. I. 295; Burt *v.* Gwinn, 4 Harr. & J. (Md.) 507; Case *v.* Weber, 2 Ind. 108; Union Mutual Life Ins. Co. *v.* Buchanan, 100 Ind. 63, 81 (where the doctrine of the above text is quoted with approval); Woolen *v.* Whitacre, 91 Ind. 502; Millner *v.* Eglin, 64 Ind. 197; Newman *v.* Hazelrigg, 96 Ind. 73; Finch *v.* Bergins, 89 Ind. 360; Works *v.* Stephens, 76 Ind. 181; Davis *v.* Hardy, 76 Ind. 272; Garfield *v.* State, 74 Ind. 60; Voss *v.* Prier, 71 Ind. 128; Evansville &c. R. Co. *v.* Wolf, 59 Ind. 89; Pratt *v.* State, 56 Ind. 179; Veatch *v.* State, 56 Ind. 584; Nelson *v.* Vorce, 55 Ind. 455; Greer *v.* State, 53 Ind. 420; Lee *v.* Troy Citizens' Gaslight Co., 98 N. Y. 115; Lanigan *v.* New York &c. Co., 71 N. Y. 30. See the observations of Scott, J., in Chouquette *v.* Barada, 28 Mo. 491, 499, and also Anderson *v.* Kincheloe, 30 Mo. 520, 525; Fine *v.* St. Louis Pub. Schools, 39 Mo. 59, 67; Rose *v.* Spies, 44 Mo. 20; Jones *v.* Jones, 57 Mo. 138; State *v.* Breeden, 58 Mo. 307; Schneer *v.* Lemp, 17 Mo. 142, 145. The same conclusion is embodied in the statement frequently met with in decisions in Missouri that the judge is not to "comment on the evidence" or to give instructions which are a mere commentary on the evidence. State *v.* Breden, *supra;* Schneer *v.* Lemp, *supra.* Illustrations of improper comments on the evidence for which convictions were reversed will be found in State *v.* Dancy, 78 N. C. 437 (prosecution for rape on a child), and Smith *v.* State, 43 Tex. 103 (prosecution for larceny, a good illustration of the difference between the Texas rule and the English rule), where, on the trial of an indictment for rape, the prosecutrix held her head down much affected, and the court declined, at the request of the prisoner's counsel, to compel her to speak loudly, saying in the hearing of the jury that "some allowance must be made for the woman, as she is overcome with emotion," — this, in the view of the court, was not invading the province of the jury. State *v.* Laxton, 78 N. C. 564. An example of a most extravagant charge in a prosecution for rape in North Carolina which was held not sufficient to work a reversal of a conviction is found in State *v.* Brown, 67 N. C. 435, 442, and is quoted in Thomp. Charg. Jur., § 133.

[2] Prairie State &c. Co. *v.* Doig, 70 Ill. 52.

struction which misrepresents the evidence before the jury, is erroneous.[1] And where, in a criminal case, the counsel disagreed as to what the witnesses had said, the judge said that he intended to state the testimony of the witnesses to the jury in such a way that it would be moral perjury in the jury to accept the statement of the defendant's counsel as the correct one, it was held that he had invaded the province of the jury, and the judgment was, therefore, reversed.[2]

§ 2292. English Rule that the Judge may Comment on the Facts and Express his Opinion thereon. — The English rule on this subject is totally different from that which obtains in most of our State courts. In that country, the judges in summing up, are in the constant habit of intimating to the jury their opinions upon the weight of the evidence; and even where the question is purely one of fact, it is no ground for a new trial, that the judge expressed his opinion in strong terms upon the facts, provided he left the jury to the exercise of their discretion.[3] On the contrary, it is held to be the undoubted right of the judge to state to the jury his own impressions of the evidence, even though he do it in strong terms.[4] And it has even been held in that country, that a wrong observation of the judge upon a question of fact, which was left as a question of fact to the jury, is no ground for a new trial.[5] Nor, in the view of those courts, is it good ground for a new trial, that the judge intimated in the presence of the jury that it would be better for the parties

[1] Frame *v.* Badger, 79 Ill. 441.

[2] State *v.* Sykes, 79 N. C. 618.

[3] Belcher *v.* Prittie, 4 Moore & Scott, 295; *s. c.* 10 Bing. 408; Foster *v.* Steele, 5 Scott, 28; Solarte *v.* Melville, 7 Barn. & Cres. 430, 435. "Lord Ellenborough was not one of those judges who, in directing the jury, merely read from their notes and let them guess at the opinions they have formed, leaving them without any help or recommendation in forming their own judgments. Upon each case that came before him, he had an opinion; and, while he left the decision to the jury, he intimated how he thought himself. This manner of performing the office of a judge is now generally followed and most commonly approved." 2 Brougham's Miscellanies, "Public Characters," p. 39.

[4] Davidson *v.* Stanley, 3 Scott, N. R. 49; *s. c.* 2 Man. & Gr. 721.

[5] Taylor *v.* Ashton, 11 Mees. & W. 401; *s. c.* 12 L. J. Exch. 363.

to withdraw a juror, and the jury afterwards found for the defendant. This observation, it was thought, did not have a tendency improperly to influence the verdict of the jury.[1]

§ 2293. **This Rule in Force in the Federal Courts.** — In the Federal courts, a rule obtains similar to that in the English courts. In these courts, the propriety of the judge leaving to the jury questions of fact which are fairly in doubt, is not questioned. He may, if in his discretion he judge proper, sum up the facts to the jury, as the English judges are in the habit of doing, and submit them to the free judgment of the jury, together with proper instructions as to the inferences of law deducible therefrom. But he should, in all cases, take care to separate the law from the facts, and to leave the latter in unequivocal terms to the judgment of the jury, as their true and peculiar province.[2] He may not only thus present to the jury the facts proved, but he may give his opinion as to those facts for their consideration. But, as the jurors are the triers of the facts, such an explanation of opinion by the court should be so guarded, as to leave the jury free to exercise their own judgment. They should be made distinctly to understand that the instruction was not given as a point of law by which they were to be governed, but as a mere opinion as to the facts, to which they should give no more weight than it was entitled to.[3]

[1] Lloyd *v.* Jones, 7 Best & S. 475.

[2] McLanahan *v.* Universal Ins. Co., 1 Pet. (U. S.) 170, 182, per Mr. Justice Story.

[3] Tracy *v.* Swartout, 10 Pet. (U. S.) 80, 96, per Mr. Justice McLean; Games *v.* Stiles, 14 Pet. (U. S.) 322; (affirming *s. c.* 1 McLean (U. S.), 321. That it is not error for a judge to give his opinion to the jury upon the weight of the evidence, see Mitchell *v.* Harmony, 13 How. (U. S.) 115; Richardson *v.* City of Boston, 24 How. (U. S.) 188; United States *v.* Fourteen Packages, Gilpin, 235; Consequa *v.* Willings, Pet. C. C. (U. S.) 225. That he must not instruct them on the sufficiency of evidence to show a controverted fact, or as to the credibility of witnesses, see Chesapeake &c., Canal Co. *v.* Knapp, 9 Pet. (U. S.) 541; Van Ness *v.* Pacard, 2 Pet. (U. S.) 137. That he should not give such instructions as to supersede an inquiry into the facts by the jury, see Chesapeake &c. Canal Co. *v.* Knapp, *supra*. That the judge is not *bound* in any case to give his opinion to the jury on a question of fact, or as to the weight and sufficiency of evidence, is ruled in Smith *v.* Carrington, 4 Cranch (U. S.), 62; and United States *v.* Burnham, 1 Mason (U. S.), 57.

In a recent decision of the Supreme Court of the United States, this rule was thus stated by Mr. Justice Gray: "Trial by jury in the courts of the United States is a trial presided over by a judge, with authority, not only to rule upon objections to evidence, and to instruct the jury upon the law, but also, when in his judgment the due administration of justice requires it, to aid the jury by explaining and commenting upon the testimony, and even giving them his opinion upon questions of fact, provided only he submits those questions to their determination." [1]

§ **2294. And in the Courts of Several of the States.** — This rule prevails in the courts of several of the States, and may be summed up by the statement that under it it is the office of the judge, in the exercise of a sound discretion, to review the evidence in his charge to the jury, — arraying the testimony of the opposing witnesses, pointing out the bearings of different elements of the evidence upon the questions in issue, intimating his opinion as to the weight of each and illustrating his meaning and enforcing his observation in such manner as he thinks proper, — his manner of exercising this discretionary power not being the subject of exception, so long as he gives the jury distinctly to understand that his observations are advisory merely, and that the responsibility of deciding the facts rests entirely with them.[2] In

[1] United States *v.* Philadelphia &c. R. Co., 123 U. S. 113, 114; *s. c.* 8 Sup. Ct. Rep. 77; citing Railroad Co. *v.* Putnam, 118 U. S. 545; *s. c.* 7 Sup. Ct. Rep. 1; St. Louis &c. Co. *v.* Vickers, 122 U. S. 360; *s. c.* 7 Sup. Ct. Rep. 1216.

[2] Ware *v.* Ware, 8 Me. 42, 59; Mansfield *v.* Corbin, 4 Cush. (Mass.) 213; Flanders *v.* Colby, 28 N. H. 34, 39; Patterson *v.* Colebrook, 29 N. H. 94; Bruch *v.* Carter, 32 N. J. L. 554, 555; Rowell *v.* Fuller's Estate (Vt.), 5 N. Eng. Rep. 217; Gardner *v.* Picket, 19 Wend (N. Y.) 186; People *v.* Rathbun, 21 Wend. (N. Y.) 509. See also Maybee *v.* Fisk, 42 Barb. (N. Y.) 327; Lansing *v.* Russell, 13 Barb. (N. Y.) 510; Nolton *v.* Moses, 3 Barb. (N. Y.) 31; McKee *v.* People, 36 N. Y. 113, 118; Winne *v.* McDonald, 39 N. Y. 233. But it is laid down that, in such cases, the judge must accompany such commentary with explicit instructions that it is the duty of the jury notwithstanding, to consider the evidence and decide as they think the truth requires. Gardner *v.* Picket, *supra;* Maybee *v.* Fisk, *supra;* Allis *v.* Leonard, 58 N. Y. 288, 291. To be free from legal objection it must be advisory merely, and must not be put in the form of a direction as matter of law. Allis *v.* Leonard, *supra;* People *v.* Rathbun, *supra.*

Pennsylvania, the court, while conceding that it is right and proper for the judge to express his opinion upon the evidence,[1] yet are careful to hold that this must not be done so as to mislead or control their deliberations,[2] or in a manner which is one-sided and unfair.[3] "When there is sufficient evidence upon a given point to go to the jury, it is the duty of the judge to submit it calmly and impartially; and if the expression of an opinion upon such evidence becomes a matter of duty under the circumstances of the particular case, great care should be exercised that such expression should be so given as not to mislead, and especially, that it should not be one-sided. The evidence, if stated at all, should be stated accurately — as well that which makes in favor of a party, as that which makes against him: deductions and theories, not warranted by the evidence, should be studiously avoided." [4]

§ **2295. Assuming Material Facts.** — It is error for the judge in instructing the jury: 1. To assume the existence of material facts which are in issue by the pleadings and which are controverted upon the evidence.[5] 2. To assume the existence of

[1] Ditmars *v.* Com., 47 Pa. St. 335.

[2] Mohney *v.* Evans, 51 Pa. St. 84.

[3] Ralston *v.* Groff, 55 Pa. St. 276.

[4] Burke *v.* Maxwell, 81 Pa. St. (31 P. F. Smith) 139, 153.

[5] McDonald *v.* Beall, 55 Ga. 288; American *v.* Rimpert, 75 Ill. 228; Walters *v.* Chicago &c. R. Co., 41 Iowa, 71; Bond *v.* People, 39 Ill. 26; Schwartz *v.* Germania Life Insurance Co., 21 Minn. 215; Hopkinson *v.* People, 18 Ill. 264; Smith *v.* Dukes, 5 Minn. 373; Sherman *v.* Dutch, 16 Ill. 283; Eames *v.* Blackhart, 12 Ill. 195; Wall *v.* Goodenough, 16 Ill. 415; Kinney *v.* Williams, 1 Col. 191; State *v.* Kennedy, 7 Nev. 374; Bullitt *v.* Musgrave, 3 Gill (Md.), 31; Ellicott *v.* Peterson, 4 Md. 476, 493; Baltimore &c. R. Co. *v.* Woodruff, 4 Md. 242, 252; Gaither *v.* Martin, 3 Md. 162; Moffat *v.* Conklin, 35 Mo. 453; Merritt *v.* Given, 34 Mo. 98; Chouquette *v.* Barada, 28 Mo. 491; Thompson *v.* Botts, 8 Mo. 710; Peck *v.* Ritchie, 66 Mo. 114; New Jersey Life Ins. Co. *v.* Baker, 94 U. S. 610; Gladmon *v.* Railroad Co., 15 Wall. (U. S.) 401; Boddie *v.* State, 52 Ala. 395; Straus *v.* Minzesheimer, 78 Ill. 492; Siebert *v.* Leonard, 21 Minn. 442; Maxwell *v.* Hannibal &c. R. Co., 85 Mo. 95; Scott *v.* State, 64 Ind. 400; Conaway *v.* Shelton, 3 Ind. 334; Reynolds *v.* Cox, 11 Ind. 262; Staats *v.* Burke, 16 Ind. 448; Smathers *v.* State, 46 Ind. 447; Barker *v.* State, 48 Ind. 163; Doering *v.* State, 49 Ind. 56; Matthews *v.* Story, 54 Ind. 417; Killian *v.* Eigenman, 57 Ind. 480; Koerner *v.* State, 98 Ind. 7, 13; Finch *v.* Bergens, 89 Ind. 360; Grove *v.* Brien, 1 Md. 439; Brown *v.* Ellicott, 2 Md. 75,

material facts which there is no evidence tending to prove.[1] The former species of error is aggravated where the judge assumes the existence of all the facts in controversy and leaves nothing for the jury to determine,[2] and the latter error is more flagrant where there is evidence strongly tending to disprove the facts, the existence of which the judge assumes.[3] But whilst it is improper for the judge to assume the existence of a fact in issue, yet, where the evidence is clear and conclusive as to the existence of the particular fact, and there is no evidence to the contrary, an instruction, assuming it as true, will not work a reversal of the judgment.[4] It follows that, where the evidence is in such a state as to warrant the court to direct a jury to find certain facts,

81; Ragan *v.* Gaither, 11 Gill & J. (Md.) 479; Moore *v.* Watts (Ala.) 2 South. Rep. 278; White *v.* State, 21 Tex. App. 339; Hogsett *v.* State, 40 Miss. 522; Smith *v.* Arsenal Bank, 104 Pa. St. 512.

[1] Washington Mut. Fire Ins. Co. *v.* St. Mary's Seminary, 52 Mo. 480, 492; Andreas *v.* Ketcham, 77 Ill. 377; Chase *v.* Horton, 143 Mass. 118; State *v.* Harrington, 12 Nev. 125.

[2] Glasgow *v.* Lindell, 50 Mo. 60.

[3] Moffatt *v.* Conklin, 35 Mo. 453, 457. Illustrations of the error of assuming controverted facts will be found in the following cases: Bond *v.* People, 39 Ill. 26; Scarborough *v.* State, 46 Ga. 26; State *v.* Kennedy, 7 Nev. 374; People *v.* Welch, 49 Cal. 174; People *v.* Doyell, 48 Cal. 85. For an instance of an instruction erroneous under this rule because it assumed that the defendant had committed the homicide, see Walker *v.* State, 42 Tex. 360, 371. For an instance where on the trial of an indictment for an assault with intent to kill, the judge gave an instruction assuming that the assault had been committed, and an objection to it, upon this ground, was regarded as "too trivial to require further consideration," see People *v.* McFadden, 65 Cal. 445.

[4] Thomp. Charg. Jur., § 47, p. 74; Fields *v.* Wabash &c. R. Co., 80 Mo. 203; Barr *v.* Armstrong, 56 Mo. 577; Caldwell *v.* Stephens, 57 Mo. 589; Hughes *v.* Monty, 24 Iowa, 499; Heirn *v.* McCaughan, 32 Miss. 17; Lemar *v.* Williams, 39 Miss. 342; Farquhar *v.* Toney, 5 Humph. (Tenn.) 502. In Koerner *v.* State, 98 Ind. 7, 13, the Supreme Court of Indiana approve the above statement of doctrine and say that it is a very good summary of the doctrine of the following cases: Carver *v.* Carver, 97 Ind. 497; Hazzard *v.* Citizens' Bank, 72 Ind. 130; Moss *v.* Witness Printing Co., 64 Ind. 125; Dodge *v.* Gaylord, 53 Ind. 365; American Ins. Co. *v.* Butler, 70 Ind. 1; Adams *v.* Kennedy, 90 Ind. 318; Steinwetz *v.* Wingate, 42 Ind. 574; Hynds *v.* Hayes, 25 Ind. 31; Crookshank *v.* Kellogg, 8 Blackf. 256; Millard *v.* Porter, 18 Ind. 502; State Bank *v.* Hayes, 3 Ind. 400; Nixon *v.* Brown, 4 Blackf. (Ind.) 157; Governor &c. *v.* Shelby, 2 Blackf. (Ind.) 26; Hughes *v.* Monty, 24 Ia. 499; Miller *v.* Kirby, 74 Ill. 242; Heartt *v.* Rhodes, 66 Ill. 351; Hannahan *v.* People, 91 Ill. 142.

which they do find, the manner of submitting those questions to them, or the expression of an opinion that there is no evidence which will justify different findings, cannot, on obvious grounds be assigned for error.[1] It equally follows that the judge must not assume that there is a doubt if there is really none, since this might mislead the jury into a conclusion not supported by the evidence.[2] It is everywhere conceded, that it is competent for the judge to determine whether there is any evidence or not, to support a given issue.[3] Indeed, in framing instructions, he is constantly called upon to do this; and it is not an invasion of the province of the jury, even in a criminal case, for him to decide that there is no evidence of a state of facts as to which an instruction is asked. Thus, in a trial for murder, if there is no evidence tending to prove a killing under such a state of facts as makes, in the law, manslaughter, it is no error for the judge to refuse to instruct the jury as to the law of manslaughter,[4] although one court has held otherwise.[5] Thus, under appropriate evidence, it was held proper to tell the jury: "In this case, if the killing was willful (that is intentional), deliberate and premeditated, it is murder in the first degree; otherwise it is manslaughter."[6] The judge must, on the contrary, ignore every hypothesis which is not founded upon the evidence, or he will mislead the jury, and afford ground for reversing the judgment.[7]

§ **2296. Rule in Federal Courts under this Head.** — In the Federal courts, where, as elsewhere seen, the English rule which permits the judge to give his opinion upon the weight and bearings of the evidence prevails, the following expression of a judge in an early case, no doubt indicates the correct rule of practice: "In summing up a cause to a jury, many facts are often so clearly proved, or remain uncontested, that the judge

[1] Wright *v.* Fort Howard, 60 Wis. 119, 123. Compare Berg *v.* Chicago &c. R. Co., 50 Wis. 419; Gammon *v.* Abrams, 53 Wis. 323; Schweitzer *v.* Connor, 57 Wis. 177.

[2] Wintz *v.* Morrison, 17 Tex. 372, 387.

[3] *Ante*, §§ 2243, 2245.

[4] People *v.* Welch, 49 Cal. 174, 185.

[5] Jackson *v.* State, Horr. & Thomp. Cas. on Self Def. 476, 486.

[6] People *v.* Welch, *supra*.

[7] *Post*, § 2315.

assumes them as a basis of argument, without suggesting to the jury their known and unquestionable right, that they are to determine as to the truth of the facts alleged. But an ultimate reference to the opinion of the jury as to any such facts is always understood to be implied. If the court, in their direction, should undertake to give a decided opinion as to the truth of an alleged fact, which is contested, it would undoubtedly be wrong, from its probable influence on a jury, though the right of the jury, notwithstanding such direction, would remain unimpaired." [1]

§ **2297. Incidental Expressions of Opinion as to the Facts.**— So jealous are the courts of the right of trial by jury in some of the States, particularly in criminal cases, that an expression of opinion, thrown out by the judge in the hearing of the jury, while deciding a question of law in the case, has been held ground for reversing the judgment. For it is evident that the opinion of the judge can be as effectively conveyed to the jury by expressing it in their hearing, while ruling on what purports to be a question of law, as by imparting it in what purports to be a declaration of law, framed for their guidance. It has accordingly been held, that a judge has no more right to volunteer before the jury his opinion upon a material fact in controversy, while deciding a question of law on the trial, than he has to charge in respect of such fact.[2]

§ **2298. Illustrations of this Rule.** — In a trial for murder it appeared that the defendant had kicked the deceased in the face; but the prosecution contended that the killing was by a kick upon the breast, and brought testimony to show bruises there. The judge, in overruling the objections to this testimony, remarked, in the hearing of the jury, "that there was as much testimony that the defendant had kicked the deceased upon the chest, as upon the face." This was held ground for reversing a conviction of murder in the second degree.[3] So, it has been

[1] Nason *v.* United States, 1 Gall. (U. S.) 53, 55, per Davis, J.

[2] State *v.* Harkin, 7 Nev. 377.

[3] State *v.* Harkin, *supra.*

ruled that, if the character of a material witness has been called in question during the trial, and the judge makes a remark from the bench, indorsing his respectability, it will be good cause for reversing the judgment.[1] So, where, in an action to recover a fine for the breach of a municipal ordinance, the judge interrupted the argument of counsel with the remark, that "this was a civil suit, but that, if the jury considered the evidence detailed before them, they would find it decidedly criminal," it was held that this was a remark which the judge ought not to have made, and when objection thereto was taken, it was his duty to do what he could, to prevent its having an injurious effect on the minds of the jury.[2] "In charging the jury in a criminal case the court should not ask, 'How did he conduct himself afterwards, as the deceased lay before him, *a victim?*' The use of the word victim is not favorable to a cool and dispassionate trial."[3] Where the plaintiff adduces evidence tending to show a right of action, the judge should not express the opinion, in the hearing of the jury, that the action should not have been brought, however vexatious or trivial it may seem to him.[4] So, it has been held an invasion of the province of the jury to give an instruction couched in the following language: "If you find from the evidence that defendant in his evidence testified he took the corn under the honest belief it was Simon's under the mortgage, and you find from the evidence the acts and conduct of the defendant in the transaction speak louder than the words thus testified by him, and show that the taking was not under such honest belief,"[5] etc. So, on the trial of an indictment for carrying concealed weapons, it has been held error for the court to instruct the jury that "when two men standing together face to face, one raising his hand from his side, exhibiting his pistol, and then dropping his hand, and the other did not see it before or after he raised it, having a fair chance to see it, it was not a slight but a strong

[1] McMinn *v.* Whelan, 27 Cal. 300, 319.

[2] Furhman *v.* Mayor of Huntsville, 54 Ala. 263.

[3] Hayes *v.* State, 58 Ga. 35, 49.

[4] Ludden *v.* Clemons, 16 Neb. 506; and note the judicious observations of Maxwell, J.

[5] Wilkinson *v.* Searcy, 70 Ala. 176, 182.

circumstance from which they could infer that the pistol was concealed."[1] So, for the court to instruct the jury, in an action depending upon the decision of the question of fraud, that certain concurring badges of fraud, which are separately enumerated, would, taken together, raise a *violent presumption* of a secret trust, demanding a close scrutiny of the transaction, has been held erroneous as invading the province of the jury.[2]

§ 2299. **Expressing Opinions on the Facts by Careless or Frivolous Remarks.** — In view of the known eagerness of jurors to catch every intimation of opinion on the merits of the case which may fall from the lips of the judge, some of the courts which uphold in a strict manner the independence of jurors have reversed judgments because of careless or trivial remarks let fall from the judge, having a tendency to convey to the jury his opinion as to the material facts in controversy. Thus, in a case in Alabama, the judge, in telling the jury that they might give exemplary damages, and explaining to them what such damages were, playfully remarked, "Such as would teach the old gentleman not to violate the Sabbath, nor injure his health by riding in the night, nor interfere with the rights of others." For this remark, the judgment was reversed. It was held "well calculated to mislead the jury — was an invasion of their province," and an instruction which could not be supported as a correct application of the rule of exemplary damages.[3] In a case in Illinois a maker of maps procured from the defendant an agreement to pay him $74 for printing, in an atlas map of Morgan County, a sketch of his residence. The defendant refused payment on the ground that the sketch was incorrect; and, on the trial, it became purely a question of fact, whether this was so or not. After the evidence had been submitted to the jury, the attorney for the defendant asked the judge "whether, or not, his Honor would know the view to be the residence of the defendant, with the defendant's name taken from the view;" to which the judge

[1] Warmock *v.* State, 56 Ga. 503. See also Stephenson *v.* State, 40 Ga. 291.

[2] Shealy *v.* Edwards, 75 Ala. 412, 419.

[3] Hair *v.* Little, 28 Ala. 236.

replied, "I do not know that I would." The jury found for the defendant. For this remark, the judgment was reversed.[1]

§ 2300. **Expressing Opinions upon the Facts by Manner and Emphasis.** — It is obvious that a judge may, by manner and emphasis, convey to the jury a distinct opinion as to the facts of the case, and yet the words used by him in instructing them, when embodied in a bill of exceptions, will not indicate to a revising court that any such opinion was conveyed.[2] But where the words themselves do not have this effect, but acquire it only from the animated tone, or peculiar emphasis with which they are spoken, and the record before the revising court fails to show that the words used were used with a peculiar emphasis, and in an animated tone, it will not be the ground for a new trial.[3] And where a man was tried for murder, and the proof was that his son struck the fatal blow, he being present, aiding and abetting, and the defense was that the son had reasonable ground to believe that his father's life was in peril, the judge, referring to this defense, asked the jury with emphasis, and in a somewhat animated tone, "Where was the evidence to establish this fact?" — it was held that, owing to the emphasis and tone in which the question was asked, the person was entitled to have it construed as if the judge had instructed the jury that there was no evidence of the fact; but the Supreme Court, finding no evidence on which such a defense could be predicated, affirmed a judgment of murder.[4]

§ 2301. **Giving Argumentative Instructions.** — For like reasons, argumentative instructions should not be given. The judge should hold the scales of justice evenly, and not assume the character of the advocate. Argumentative instructions trench upon the province of the jury, and therefore should not be given;

[1] Andrews *v.* Ketcham, 77 Ill. 377. These decisions are either trivial and foolish, or else they involve a serious impeachment of the system of trial by jury.

[2] Reiger *v.* Davis, 67 N. C. 185; State *v.* Simmons, 6 Jones L. (N. C.) 21.

[3] Reiger *v.* Davis, *supra*.

[4] State *v.* Simmons, *supra*.

and the giving of them is error.[1] One court has several times felt called upon to condemn the practice of counsel drawing up long instructions and injecting an argument into them, and of the court giving them to the jury.[2] It is not error to refuse argumentative instructions which embody deductions from facts, which, though they may be supposed by some to be matters of general cognizance, are not in evidence before the jury. Accordingly, it has been held no error in a criminal trial to refuse a requested instruction beginning with the words: "The law books are full of cases of mistaken identity."[3]

§ 2302. **Urging the Jury to Return a Verdict.** — There seems to be no end to the fantastic questions which the ingenuity of lawyers will bring before the courts of error for their decision. When we consider the rigor with which, under the old law, judges kept juries together till they should agree, we can scarcely credit that it was even assigned for error that the judge urged the jury to agree upon a verdict. But it was, and in a civil case. The Supreme Court of Georgia was asked to reverse a judgment, because the judge, in his charge, said to the jury: "This case has been troublesome, and has cost much time and trouble to investigate it, therefore there should be a verdict." The Supreme Court did not notice the point in its opinion; but the official syllabus, prepared by the judge who delivered the opinion, recites that it was overruled.[4]

§ 2303. **Advising the Jurors to Yield their Individual Opinions to each other.** — A more serious question, several

[1] Thorp *v.* Goewey, 85 Ill. 612; Thompson *v.* Force, 65 Ill. 370; Merritt *v.* Merritt, 20 Ill. 65, 80; Ludwig *v.* Sager, 84 Ill. 99; Chicago &c. R. Co. *v.* Griffin, 68 Ill. 499, 506; State *v.* Orr, 64 Mo. 339; Kirk *v.* Wolff Man. Co., 118 Ill. 567; *s. c.* 6 West. Rep. 510; Morris *v.* Lachman, 68 Cal. 109. A flagrant instance of an argumentative instruction, in a criminal case, will be found in Hayes *v.* State, 58 Ga. 35, 48.

[2] Merritt *v.* Merritt, 20 Ill. 65, 80. To the same effect are Thompson *v.* Force, 65 Ill. 370, 372, and Chapman *v.* Cawry, 50 Ill. 512; Coal Run Coal Co. *v.* Jones (Ill.), 6 West. Rep. 501.

[3] Hughes *v.* State, 75 Ala. 31, 35.

[4] Allen *v.* Woodson, 50 Ga. 53, 70. The Supreme Court of Michigan were obliged to rule the same point in Pierce *v.* Rehfuss, 35 Mich. 53. To the same effect see State *v.* Rollins, 77 Me. 380.

times presented to the appellate courts, has been whether, where the jury have been out a long time without being able to agree, it is permissible for the judge to advise them to yield their individual opinions to each other. In a criminal case in Massachusetts, the following charge was approved on exceptions: "The only mode provided by our constitution and laws for deciding questions of fact in criminal cases, is by the verdict of a jury. In a large proportion of cases, and perhaps, strictly speaking, in all cases, absolute certainty cannot be attained or expected. Although the verdict to which a juror agrees must, of course, be his own verdict, the result of his own convictions, and not a mere acquiescence in the conclusion of his fellows, yet, in order to bring twelve minds to a unanimous result, you must examine the questions submitted to you with candor, and with a proper regard and deference to the opinions of each other. You should consider that the case must, at some time, be decided; that you are selected in the same manner, and from the same source, from which any future jury must be; and there is no reason to suppose that the case will ever be submitted to twelve men more intelligent, more impartial, or more competent to decide it; or that more or clearer evidence will be produced on the one side or the other. And with this view, it is your duty to decide the case, if you can conscientiously do so. In order to make a decision more practicable, the law imposes the burden of proof on one party or the other, in all cases. In the present case, the burden of proof is upon the commonwealth to establish every part of it, beyond a reasonable doubt; and if, in any part of it, you are left in doubt, the defendant is entitled to the benefit of the doubt, and must be acquitted. But, in conferring together, you ought to pay proper respect to each other's opinions, and listen, with a disposition to be convinced, to each other's arguments. And, on the one hand, if much the larger number of your panel are for a conviction, a dissenting juror should consider whether a doubt in his own mind is a reasonable one, which makes no impression upon the minds of so many men, equally honest, equally intelligent with himself, and who have heard the same evidence, with the same attention, with an equal desire to

arrive at the truth, and under the sanction of the same oath. And, on the other hand, if a majority are for acquittal, the minority ought seriously to ask themselves, whether they may not reasonably, and ought not to doubt the correctness of a judgment, which is not concurred in by most of those with whom they are associated; and distrust the weight or sufficiency of that evidence which fails to carry conviction to the minds of their fellows." The Supreme Court did not regard this charge as equivalent to a direction to a minority of the jury to yield their own opinions and judgment to the views of the majority, and to render a verdict in conformity therewith. Mr. Justice Bigelow, in giving the opinion of the court, said: "Upon a careful consideration of these instructions, we are clearly of opinion, that, so far from being improper, or of a nature to mislead, they were entirely sound, and well adapted to bring to the attention of the jury one of the means by which they might be safely guided in the performance of their duty. A proper regard for the judgment of other men will often greatly aid us in forming our own. In many of the relations of life, it becomes a duty to yield and conform to the opinions of others, when it can be done without a sacrifice of conscientious convictions; more especially is this a duty, when we are called on to act with others, and when dissent on our part may defeat all action, and materially affect the rights and interests of third parties. Such is the rule of duty constantly recognized and acted on by the courts of justice. They not only form their opinions, but reconsider, revise, and modify their own declared judgments, by the aid and in the light of the decisions of other tribunals. But this could not be done, if it were not permitted to them to doubt and correct their opinions, when they were found to differ from those of other men, who have had equal opportunities of arriving at sound conclusions with themselves. The jury room is surely no place for pride of opinion, or for espousing or maintaining, in the spirit of controversy, either side of a cause. The single object to be there effected is to arrive at a true verdict; and this can only be done by deliberation, mutual concession, and a due deference to the opinions of each other. By such means, and

such only, in a body where unanimity is required, can safe and just results be attained; and without them, the trial by jury, instead of being an essential aid in the administration of justice, would become a most effectual obstacle to it."[1] In a civil action in Oregon, against a surgeon for malpractice, Upton, J.,[2] charged the jury as follows: "Counsel both for the plaintiff and for the defendant have remarked upon the propriety or impropriety of what they term a compromise verdict. In regard to that, it is my duty to say to you, that jurors should carefully and patiently canvass and examine all the evidence, with an honest and conscientious effort to reconcile any differences of opinion they may entertain of the truth of the matters put in issue. And it is sometimes the case, when only dollars and cents are involved, when it is probable the exact truth can never be known, and where there is an honest difference of opinion among jurors, — as, for an instance, when the matter between the parties is the state of their accounts, which have been loosely kept, and there is doubt as to the true balance, — that concessions may be made for the benefit of both parties, which are not fully in accord with the individual juror's view of the facts proved. But, in this class of cases, each party has a right to insist that the jury, and each juror, should render a verdict, if at all, literally 'according to the law and the evidence, as given on the trial.'"[3] Although this instruction was not passed upon by a court of appeal, yet it was quoted with apparent approval by the Supreme Court of Indiana in a case where the question was carefully considered; and that court added the following observations: "It is the duty of jurors to consider carefully every part of the evidence, and, if necessary, reconsider it: and to hear and consider the views and arguments of their fellow jurors; but at last each one of them must act upon his own judgment, and not upon that of another. This seems to be the rule contemplated by the statute,[4] which makes it a good ground for a new trial, when the verdict has been decided by other means than a fair expression

[1] Com. *v.* Tuey, 8 Cush. (Mass.) 1.

[2] Then a judge of the Supreme Court of that State.

[3] Boydston *v.* Giltner, 3 Ore. 113, 124.

[4] 2 Gav. & H. Ind. Stat., 424, § 142.

of opinion, on the part of all the jurors."[1] On the trial of an indictment for murder in Connecticut, error was assigned upon the refusal of the trial court to charge the jury that "each juror in this case must be governed by his own judgment, founded upon the law and the evidence, and must not be governed, controlled or influenced, by the judgment or opinions of others in agreeing to a verdict." It was held that this proposition was not sound law, and the trial court would not have been justified in giving it in charge to the jury. The Supreme Court said: "Although the verdict to which each juror agrees must, of course, be his own conclusion, and not a mere acquiescence in the conclusions of his fellows, yet, in order to bring twelve minds to a unanimous result, the jurors should examine with candor the questions submitted to them, and with due regard and deference to the opinions of each other. In conferring together, the jury ought to pay proper respect to each other's opinions, and listen with candor to each other's arguments. If much the larger number of the panel are for a conviction, a dissenting juror should consider whether the doubt in his own mind is a reasonable one which makes no impression on the minds of so many men equally honest, equally intelligent with himself, who have heard the same evidence, with the same attention, and with equal desire to arrive at the truth, and under the sanction of the same oath. And on the other hand, if a majority are for acquittal, the minority ought seriously to ask themselves whether they may not reasonably, and ought not to, doubt the conclusions of a judgment which is not concurred in by most of those with whom they are associated, and distrust the weight or sufficiency of that evidence which fails to carry conviction to the minds of their fellows."[2]

§ 2304. Distinction between Direction as to the Law and Advice as to the Facts.—Those courts, which uphold the right of the judge to comment upon the evidence and express his opinion to the jury upon the facts, are careful to distinguish between

[1] Clem *v.* State, 42 Ind. 420, 438. [2] State *v.* Smith, 49 Conn. 376, 386.

the *direction* of the judge as to the law of the case, and his *advice* to the jury as to the facts.[1] The direction of the judge as to the law is binding upon the consciences of the jury; they are bound to follow it, and if they do not, their verdict will be set aside. But the jury are not bound to follow his opinion as to the facts; that is given to aid and assist, not to control them; and, lest the jury should infer that they are bound to follow the judge's opinion on the facts, it is his duty to state to them distinctly that they are not, and that the responsibility of finding the facts is theirs.[2] The duty of the judge in summing up the evidence and instructing the jury, was well summarized by Chief Justice Parker, of Massachusetts, in the celebrated trial of Selfridge: "I hold the privilege of the jury to ascertain the facts, and that of the court to declare the law, to be distinct and independent. Should I interfere with my opinion on the testimony, in order to influence your minds to incline either way, I should certainly step out of the province of a judge into that of an ad-

[1] *Ante*, § 2296.

[2] Gardner *v.* Pickel. 19 Wend. (N. Y.) 186; New York Fire Ins. Co. *v.* Walden, 12 Johns. (N. Y.) 513; Holder *v.* State, 5 Ga. 441; Stiel *v.* Glass, 1 Ga. 475, 486; Potts *v.* House, 6 Ga. 324, 344; Solarte *v.* Melville, 7 Barn. & Cres. 430, 435. While the English rule of charging the jury prevailed in Georgia, a distinction was carefully observed between the *opinion* and *direction* of the judge, and many cases emphasize the principle that, while the judge is at liberty to express his opinion upon the facts, he should make the jury feel that upon them alone devolves the responsibility of their verdict, and should not permit them to feel that they can take shelter under his opinion. Holder *v.* State, 5 Ga. 441; Stell *v.* Glass, 1 Ga. 475, 487; Beall *v.* Mann, 5 Ga. 456, 471; Potts *v.* House, 6 Ga. 324, 344. Compare Johnson *v.* Kinsey, 7 Ga. 428, 431. In a celebrated capital case in that State it was held error for the judge, in charging the jury, to intimate doubts as to the competency of certain legal testimony which had been submitted to them, since this was calculated to weaken its effect in their minds. Monroe *v.* State, 5 Ga. 86; *s. c.* Horr. and Th. Self Def. 442. So it was held error to remind them of the existence of the Supreme Court, to which the defendant might carry the case, if evidence offered in his behalf had been improperly rejected, and an appeal in consequence thereof should become necessary; since this had a tendency to weaken their sense of responsibility. *Ibid.* In a later case the same court said: "As the jury have no concern with the reviewing powers of the Supreme Court, any reference to the same by the presiding judge in his charge, on the law of a criminal case, even if not positive error, should be omitted." Hayes *v.* State, 58 Ga. 35, 46.

vocate. All which I conceive necessary or proper for one to do in this part of the cause is, to call your attention to points of fact on which the cause may turn, state the prominent testimony in the case which may tend to establish or disprove those points, give you some rules by which you are to weigh testimony, if a contrariety should have occurred, and leave you to form a decision according to your best judgment, without giving you to understand, if it can be avoided, what my opinion of the subject is." [1]

[1] Com. *v.* Selfridge, Horr. & Thomp. Cases on Self Defense, 1, 19.

CHAPTER LXV.

OF THE ELEMENTS OF THE CHARGE.

SECTION
2309. View that the Instructions must be Confined to the Issues made by the Pleadings.
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§ 2309. View that the Instructions must be Confined to the Issues made by the Pleadings. — Several courts take the view that the instructions must confine the attention of the jury to the case made by the pleadings; and an instruction which authorizes them to consider matters foreign to the issue is erroneous.[1]

[1] Terry *v.* Shively, 64 Ind. 106.

Consequently, where the evidence makes out a case entitling the plaintiff to recover, but upon a different theory from that set up in his petition, it will be error to give an instruction in conformity with the case made by the evidence.[1] In one case that court, professing to state the whole matter "in a nutshell," said: "Instructions should not be given, unless there is evidence on which to base them; but there can be no evidence on which to base them if that evidence overthrows the pleadings of the party who introduces it."[2] In other cases it has been held, with obvious reason, that an instruction which contradicts a fact set up by the party's own pleading,[3] or which ignores the only real matter in issue under the pleadings,[4] is properly refused. The Supreme Court of Nebraska has adopted the doctrine of the Supreme Court of Missouri,[5] that the instructions must be confined to the case made by the evidence within the issues defined by the pleadings, and where the instructions which were given "manifestly diverted the attention of the jury from that which was to that which was not in issue, thus defeating the very object which the law has in contemplation in requiring pleadings to be filed," the judgment was reversed, the court adding that "the court does not possess the power to change by instructions the issues which the pleadings present."[6] In Oregon it is ruled that an instruction which directs the attention of the jury to a fact not in issue, and making their finding another fact decisive is erroneous, although the fact under proper issues might be material to or decisive of the rights of the parties.[7]

[1] Glass *v.* Gelvin, 80 Mo. 297; Capital Bank *v.* Armstrong, 62 Mo. 59; Moffat *v.* Conklin, 35 Mo. 453; Iron Mountain Bank *v.* Murdoch, 62 Mo. 70; Wade *v.* Hardy, 75 Mo. 394; Currier *v.* Lowe, 32 Mo. 203.

[2] Capital Bank *v.* Armstrong, 62 Mo. 59, 66.

[3] Bruce *v.* Sims, 34 Mo. 246, 251.

[4] Greer *v.* Parker, 85 Mo. 107.

[5] In Iron Mountain Bank *v.* Murdoch, 62 Mo. 70.

[6] Frederick *v.* Kinzer, 17 Neb. 366. The language quoted is from the Missouri case previously cited.

[7] Marx *v.* Schwartz (Ore.), 12 Pac. Rep. 253. In Parker *v.* Marquis, 64 Mo. 38, 42, an instruction was held properly refused, because it made a case for the defendant, not made in his answer, *nor in his evidence*. In Gilchrist *v.* Donnell, 53 Mo. 591, it was held proper to refuse instructions which did not touch the *issues tried*, and which were mere abstract propositions of law. In Camp *v.*

§ 2310. View that the Jury should be Instructed upon the Case made by the Evidence although Variant from the Issues made by the Pleadings. — This view ignores a principle which obtains in almost every situation in a civil trial, that the court is to disregard at every stage of the trial those errors or irregularities which it is competent for the party to waive, and which the party against whom they are committed does not object to at the time. The object of pleadings being merely to *notify* the opposite party of the ground of action or defense, if the party comes into court, it is not perceived why he may not *waive* the notice as in every other case, although the pleading may not advise him of the case or defense which is actually tendered in the evidence. Several of the best courts in the country proceed upon this enlightened view.[1] The sound view is believed to be

Heelan, 43 Mo. 591, it was held proper to refuse an instruction which presented an issue not raised by the pleadings; "but," the court added, "if this were otherwise, the instruction would still be bad, as not predicated upon the testimony." In Iron Mountain Bank *v.* Murdock, 62 Mo. 70, 73, it is said by Sherwood, J., in giving the opinion of the court: "In conformity with our previous ruling in the case above referred to, inasmuch as there was no issue made by the pleadings as to subsequent ratification, by Armstrong, of the alleged alteration, the third instruction, given at the plaintiff's instance must be held erroneous. It manifestly diverted the attention of the jury from that which was, to that which was not in issue, thus defeating the very object which the law has in contemplation, when requiring pleadings to be filed; and a court does not possess the power to change, by instructions, the issues which the pleadings present." In Moffat *v.* Conklin, 35 Mo. 453, 457, it is said by Dryden, J.: "A court has no right, by instructions to the jury, to change the issues, or mitigate the requirements of the pleadings." In Bernhard *v.* Washington Life Ins. Co., 40 Iowa, 442, it is held that the court cannot give an instruction upon an issue not raised by the pleadings. Thus, the action being on a policy of insurance, the answer denied payment of premiums, and there was no replication that payment of the premiums had been waived. It was held error for the judge to tell the jury, that they might inquire whether payment of the premiums had been waived. The plaintiff having, in his pleading, planted himself upon the issue of payment, and no other, he could not raise an issue by his evidence, and have an instruction thereon. So, in Lumbert *v.* Palmer, 29 Iowa, 104, it was held, that a plaintiff in an action upon a bill of exchange cannot aver payment, protest and notice, and recover upon proof of facts amounting to a waiver thereof.

[1] Bowers *v.* Thomas, 62 Wis. 480; Walker *v.* Ebert, 29 Wis. 194; Kellogg *v.* Steiner, *Id.* 626; Butler *v.* Carns, 37 Wis. 61; Chipman *v.* Tucker, 38

that the instructions have no connection with the pleadings, except *through* the evidence. The jury "find from the evidence," and not from the pleadings. The pleadings, are intended to apprise the opposite party of the ground of action or defense, and to guide the court in admitting or rejecting evidence. The jury have nothing to do with them;[1] are not permitted to take them to their room when they retire; and it is unprofessional for counsel to comment on them to the jury, nor should the judge permit it to be done. Suppose, then, that facts come out in the evidence *broader* than those alleged in the pleadings, or otherwise *varying* from them. Is the judge to instruct the jury upon the whole evidence, or is he to limit his instructions to so much of the evidence as is within the scope of the pleadings? The proper answer is believed to be this: If neither of the parties has objected to the evidence on the ground of variance, the judge is to instruct the jury upon the whole evidence;[2] the rule being, that a variance between the pleadings and the evidence is no ground of error, unless the evidence was objected to on this ground at the time it was offered.[3] If, however, the variance is such as to leave the pleading substantially improved, then, as in any other case where the claim, or the defense, is unsupported by the evidence, the judge will direct a nonsuit, or instruct the jury to find against the party who has the burden of proof.[4] But this danger can never arise, if the case has been properly tried, down to the point of time wherein it becomes necessary to charge the jury; for in this case, no evidence, not in conformity with the issues, will have been admitted, or, if inadvertently admitted, will be excluded from the consideration of the jury by the court

Wis. 43; Roberts *v.* McGrath, *Id.* 52; Roberts *v.* Wood, *Id.* 60; Griffiths *v.* Kellogg, 39 Wis. 290; Taylor *v.* Atchison, 54 Ill. 196; Wait *v.* Pomeroy, 20 Mich. 425; Burson *v.* Huntington, 21 Mich. 415; Whitney *v.* Snyder, 2 Lans. 477.

[1] *Post*, § 2314.

[2] Boyce *v.* California Stage Co., 25 Cal. 460.

[3] Roberts *v.* Graham, 6 Wall. (U. S.) 578, 581, (citing Mosher *v.* Lawrence, 4 Denio (N. Y.), 421; Lawrence *v.* Barker, 5 Wend. (N. Y.) 305; Newberry *v.* Lee, 3 Hill (N. Y.), 523; McMicken *v.* Brown, 6 Mart. (N. s.) (La.) 86; Goslin *v.* Corry, 7 Man. & G. 347; Doe *v.* Benjamin, 9 Ad. & E. 644).

[4] *Ante*, § 2251.

in instructing them to disregard it. The rule, frequently laid down, that instructions should be *pertinent to the issue*,[1] does not, it is believed, impugn the foregoing views; for this expression is used with reference to the assumption that the evidence conforms, as it should, to the issue made by the pleadings. With this qualification, the meaning of the expression becomes nothing more than that which is more frequently used, — that the giving of *abstract instructions* is error.[2]

§ 2311. In such Case the Court may direct the Proper Amendment. — If it is absolutely necessary that the pleadings, the object of which is to notify the opposite party *in advance* of the ground of action or defense which will be set up, should after such evidence is in without objection, be amended to make them conform to the evidence — a principle the very suggestion of which is nonsense, since there is no sense in writing a formal *notice* in order that a person may be informed of what he already *knows;* yet, if it is necessary, it is held that the trial court should direct the proper amendment in order to make the pleading conform to the evidence.[3]

§ 2312. Further of this Subject. — Assuming, of course, that there is relevant evidence upon the issue made by the pleadings, it has been held that it is not error to give an instruction upon such issue, although the pleadings, by which the issue is raised, may have been bad on demurrer. The party complaining of the defect in the pleading, having omitted to demur, cannot reach the same result by objecting to instructions.[4] In like manner, it is not proper for a judge, by an instruction to the jury, to perform the office of a demurrer on motion to strike out a defective pleading. If a valid defense has been defectively pleaded, and the pleading has not been demurred to, and there has been no motion to strike out under the statute, it is not

[1] Henry *v.* Davis, 7 W. Va. 715.

[2] *Post*, § 2315.

[3] Bowers *v.* Thomas, 62 Wis. 489, 484; Flanders *v.* Cottrell, 36 Wis. 564; Stetter *v.* Chicago &c. R. Co., 49 Wis. 613; Marschuetz *v.* Wright, 50 Wis. 175, 178.

[4] Low *v.* Getty, 18 Ill. 493; Miller *v.* Balthaser, 78 Ill. 302.

competent for the judge to instruct the jury to disregard such pleading; for this has the effect of depriving the party pleading it of his right of amendment.[1] There is, obviously, a limit to the application of this rule. If the pleading complained of sets forth no legal ground of action or defense, no amount of evidence in support of it can give the party pleading it a right to a verdict. A judgment in such a case will, on motion, be arrested. Accordingly, it has been ruled by the Supreme Court of the United States, with obvious propriety, that where a plea, which has been interposed as a defense to the action, sets up matter which constitutes no defense in point of law, and such plea has not been demurred to, and the judge has admitted evidence in support of it, this will not justify instructions to the jury in conformity with it; for no system of pleading can be appealed to to justify the court in giving instructions to the jury which are contrary to law.[2]

§ **2313. Rule in Criminal Cases.** — Criminal prosecutions rest upon a different footing from civil actions. Here the State is proceeding against the accused, charging him with the commission of an offense against society, a conviction for which entails disgrace, fine, imprisonment, or even death. The burden is upon the State at every stage of the proceeding. The accused is not presumed to waive his rights by mere silence or acquiescence; at least, the doctrine of waiver does not obtain to the same extent as in civil trials, and some courts seem disposed to deny it altogether. There is, then, in such a trial, obvious propriety in confining the attention of the jury to the crime charged in the indictment; otherwise, the grand jury might charge the accused of one offense, and he might be convicted of another and different offense, of which no grand jury had charged him. The indictment which he is required to answer sustains a different office from that of the declaration or complaint in a civil action. It is something more than a mere *notice* to him of what he is called upon to defend. It is a solemn accusation against

[1] Railroad *v.* Konk, 11 Heisk. (Tenn.) 575.

[2] United States *v.* Dashiel, 4 Wall. (U. S.) 182.

him, made by an inquisitorial body, charging him with a crime or misdemeanor. The general rule, therefore, is that the instructions in criminal cases must be confined to the crime laid in the indictment, or to some inferior grade of the same crime, of which, if the evidence warrants it, the jury may be authorized to convict; and an instruction which authorizes the jury to convict of a crime of a different nature is erroneous. Thus, where the defendant was charged with the crime of feloniously entering a dwelling-house with intent to commit larceny, it was error for the court to instruct the jury that they should find him guilty, if they believed from the evidence that he entered the house with intent to commit *any felony*.[1] So, where the information charged the playing of cards at a house for retailing spirituous liquors, it was error to give an instruction which authorized the jury to convict in case they should find that the card-playing was done at *any other place*.[2] But where the court states to the jury the facts alleged in the indictment, stating the crime charged and the law applicable to the grounds on which the defense is based, this is a sufficient instruction.[3]

§ 2314. The Judge must State the Issues, and not Refer the Jury to the Pleadings. — It is the duty of the court to determine what are the issues, and to state them to the jury, and it is error to refer them to the pleadings to determine the issues, in whole or in part.[4] Accordingly, it has been held error for the court, after a statement of the issues, to add the following: "For a more exact and complete statement of the allegations of the parties and the issues in the case, see the pleadings themselves."[5] But the same court has held that where the trial court in its charge has fully stated the issues to the jury, the remark that "they are referred to the pleadings for the issues," is not prejudicial error.[6] It has been held error for the judge to per-

[1] People *v.* Mulkey, 65 Cal. 501.

[2] Bacchus *v.* State, 18 Tex. App. 15.

[3] State *v.* Nadal (Iowa), 29 N. W. Rep. 451.

[4] Bryan *v.* Chicago &c. R. Co., 63 Ia. 464; Fitzgerald *v.* McCarty, 55 Ia. 702; Porter *v.* Knight, 63 Ia. 365.

[5] Porter *v.* Knight, *supra;* Bryan *v.* Chicago &c. R. Co., *supra.*

[6] Drake *v.* Chicago &c. R. Co. (Ia.) 29 N. W. Rep. 804.

mit the defendant to read his answer to the jury, where the plaintiff had not made it testimony, but had declined to make any use of it, and had submitted his case on other evidence.[1] It is error for the judge to instruct the jury that they are at liberty to construe and determine the effect of the pleadings;[2] or to leave them to determine whether there is a variance between the pleadings and the proofs.[3] But it is his duty to state the issues to them, without referring them to the pleadings to determine what the issues are.[4] It is not proper to blend a question of the sufficiency of a pleading, *i.e.*, the answer, with an instruction on the facts of the case. Such a practice can only be to lead to confusion and mistake.[5] Under the Missouri statute of jeofails,[6] authorizing amendments in case of variance, if the party benefited by the testimony which has been introduced, and which is not warranted by the pleadings, does not ask to have the pleadings amended so as to embrace the state of facts made by the testimony, the judge may refuse to instruct in conformity with such testimony, and confine his instruction to the case made by the pleading and so much of the evidence as conforms to it.[7] The rule, elsewhere stated,[8] that *non-direction* will be no ground of reversing a judgment, unless a specific direction upon the omitted point or element of the charge is requested and refused, has been applied to an *imperfect statement of the issues;* the party desiring a more specific statement of them must call the attention of the court thereto, by a request for a correct instruction, in order to secure a review of the instruction by an appellate court.[9] Moreover, in determining whether the jury have been properly instructed, the substance and effect of the instructions, taken as a whole, will be considered, and not merely their form or orderly arrangement.[10] It follows that the mere fact that the court in

[1] Fugate *v.* Carter, 6 Mo. 267, 273.

[2] Tipton *v.* Triplett, 1 Metc. (Ky.) 570; Hall *v.* Renfro, 3 Metc. (Ky.) 57.

[3] Oxley *v.* Storer, 54 Ill. 159.

[4] Dassler *v.* Wisley, 32 Mo. 498; Bradshaw *v.* Mayfield, 24 Tex. 481.

[5] Chiles *v.* Wallace, 83 Mo. 84, 89.

[6] 2 Wagn. Mo. Stat., p. 1034, § 3; 1 Rev. Stat. Mo. 1879, § 3567.

[7] Budd *v.* Hoffheimer, 52 Mo. 297, 303.

[8] *Post*, § 2341.

[9] Sioux City &c. R. Co. *v.* Finlayson, 16 Neb. 578.

[10] *Post*, § 2352.

stating the issues to the jury may have omitted to state fully the nature of the defense set up in answer, will not be prejudicial error, if the defense is fully and fairly presented in the subsequent instructions given.[1]

§ 2315. **Relation of the Charge to the Evidence.** — The judge instructs the jury hypothetically, upon whatever state of facts, within the limits of the issues, there is evidence tending to prove. It is error for him to submit to the jury a fact or a state of facts, which there is no evidence tending to prove,[2] unless it stands admitted by the pleadings or otherwise; and hence it is, of course, not error in any case to refuse such an instruction.[3]

[1] Siltz *v.* Hawkeye Ins. Co., 71 Iowa, 710; *s. c.* 29 N. W. Rep. 605.

[2] Swank *v.* Nichols, 24 Ind. 199; Ewing *v.* Runkle, 20 Ill. 448; Coughlin *v.* People, 18 Ill. 266; Galena &c. R. Co. *v.* Jacobs, 20 Ill. 478, 487; Harrison *v.* Cachelin, 27 Mo. 26; State *v.* Harrison, 5 Jones L. (N. C.) 115; Smith *v.* Sasser, 5 Jones L. (N. C.) 388; Powell *v.* Bradlee, 9 Gill & J. (Md.) 221; Herndon *v.* Bryant, 39 Miss. 336; Oliver *v.* State, 39 Miss. 526; Cothran *v.* State, 39 Miss. 541; Dickerson *v.* Johnson, 24 Ark. 251; Jeffersonville R. Co. *v.* Swift, 26 Ind. 459; Webster College *v.* Tyler, 35 Mo. 268; Dula *v.* Cowles, 4 Jones L. (N. C.) 519; Commissioners of Beaufort *v.* Duncan, 1 Jones L. (N. C.) 234; Bond *v.* Hall, 8 Jones L. (N. C.) 14; Cobb *v.* Fogalman, 1 Ired. (N. C.) 440, 444; Sutton *v.* Madre, 2 Jones L. (N. C.) 320; Urkett *v.* Coryell, 5 Watts & S. (Pa.) 61; Switland *v.* Holgate, 8 Watts (Pa.), 385; Jones *v.* Wood, 16 Pa. St. 25; Andrews *v.* Smithwick, 20 Tex. 111; Manwell *v.* Briggs, 17 Vt. 176; Evans *v.* Mengel, 1 Pa. St. 68; Haines *v.* Stouffer, 10 Pa. St. 363; Sartwell *v.* Wilcox, 20 Pa. St. 117; Bole *v.* Kreitzer, 46 Pa. St. 465; Kelso *v.* Townsend, 13 Tex. 140; Herdic *v.* Bigler, 47 Pa. St. 60; Gilchrist *v.* Rogers, 6 Watts & S. (Pa.) 488; Wakefield *v.* Smithwick, 4 Jones L. (N. C.) 327; Serio *v.* State, 22 Tex. App. 633; *s. c.* 3 S. W. Rep. 784; Williams *v.* State, 3 Heisk. (Tenn.) 376; State *v.* Parker, 77 Tenn. (13 Lea) 221; Gist *v.* Lowring, 60 Mo. 487; Huffman *v.* Ackley, 34 Mo. 277; Lellis *v.* St. Louis &c. R. Co., 64 Mo. 464; Krech *v.* Pacific Railroad, 64 Mo. 172; Weiland *v.* Weyland, 64 Mo. 168; Clark *v.* St. Louis etc. R. Co., 64 Mo. 440; Jones *v.* State, 65 Ga. 506; Spaulding *v.* Chicago &c. R. Co., 33 Wis. 583; *s. c.* 30 Wis. 110; Read *v.* Morse, 34 Wis. 315; Cockburn *v.* Ashland Lumber Co., 54 Wis. 619; Brusberg *v.* Milwaukee &c. R. Co., 55 Wis. 106; Gibbons *v.* Wisconsin &c. R. Co., 62 Wis. 546; Brown *v.* Covenant Mutual Life Insurance Co., 86 Mo. 51; Craighead *v.* Wells, 21 Mo. 404.

[3] Davis *v.* Fairclough, 63 Mo. 61; Snider *v.* Adams Express Co., 63 Mo. 376; Campbell *v.* Allen, 61 Mo. 581; Wells *v.* Halpin, 59 Mo. 92; State *v.* Hudson, 59 Mo. 135; State *v.* Harris, 59 Mo. 550; Royer *v.* Fleming, 58 Mo. 438; Barr *v.* Armstrong, 56 Mo. 577; Music *v.* Atlantic &c. R. Co., 57 Mo.

The reason is that the giving of such instructions may lead the jury to believe in the existence of a state of facts of which there is no evidence, and to base their finding thereon. But it does not follow from this that in all cases the error will work a reversal of the judgment. In many cases it will be favorable to the

134; Corby *v.* Butler, 55 Mo. 398; Fellows *v.* Wise, 55 Mo. 413; Glenn *v.* Lehnen, 54 Mo. 45; Doebling *v.* Loos, 45 Mo. 150; Goerges *v.* Huffschmidt, 44 Mo. 179; Camp *v.* Heelan, 43 Mo. 591; Turner *v.* Baker, 42 Mo. 13; Winters *v.* Hannibal &c. R. Co., 39 Mo. 468; Gelpke *v.* Pike, 33 Mo. 168; Harrison *v.* Cachelin, 27 Mo. 26; Rogers *v.* McCune, 19 Mo. 557; Vaulx *v.* Campbell, 8 Mo. 224; Waddingham *v.* Gamble, 4 Mo. 465; Haskings *v.* St. Louis &c. R. Co., 58 Mo. 302; Lester *v.* Kansas City &c. R. Co., 60 Mo. 265; State *v.* Bailey, 57 Mo. 131; Grigsby *v.* Fullerton, 57 Mo. 309; Hamilton *v.* Russell, 1 Cranch (U. S.), 309; Chirac *v.* Reinecker, 2 Pet. (U. S.) 613, 625; Clarke *v.* Kownslar, 10 Pet. (U. S.) 657; McNeil *v.* Holbrook, 12 Pet. (U. S.) 84; Roach *v.* Hulings, 16 Pet. (U. S.) 319, 326; Rhet *v.* Poe, 2 How. (U. S.) 458; Harper *v.* Smith, 1 Cranch C. C. (U. S.) 495; Dotty *v.* Strong, Burnett, 158; Latshaw *v.* Ter. of Oregon, 1 Ore. 140; Chicago &c. R. Co. *v.* Utley, 38 Ill. 410; State *v.* Rash, 12 Ired. (N. C.) 382, 386; State *v.* Stouderman, 6 La. Ann. 286, 287; Thompson *v.* Shannon, 9 Texas, 536; Hibler *v.* McCartney, 31 Ala. 501; Breese *v.* State, 12 Ohio St. 146, 154; State Bank *v.* Williams, 6 Ark. 156; Robins *v.* Fowler, 2 Ark. 133; State Bank *v.* Hubbard, 8 Ark. 183; Danley *v.* Edwards, 1 Ark. 437; Paschal *v.* Davis, 3 Ga. 256; Montgomery *v.* Evans, 8 Ga. 178; Mayeys *v.* Farish, 11 B. Mon. (Ky.) 38, 41; Garrett *v.* Holloway, 24 Ala. 376; Edelin *v.* Sanders, 8 Md. 118; American Trans. Co. *v.* Moore, 5 Mich. 368; Snyder *v.* Witt, 15 Pa. St. 59; Croft *v.* State, 6 Humph. (Tenn.) 317; McIntyre *v.* Kline, 30 Miss. 361; Drury *v.* White, 10 Mo. 354; Greely *v.* McKnabb, 13 Mo. 597; Webb *v.* Robinson, 14 Ga. 216; Knight *v.* Clements, 45 Ala. 89; Goodman *v.* Simonds, 20 How. (U. S.) 359; Michigan Bank *v.* Eldred, 9 Wall. (U. S.) 544, 553; Long *v.* State, 12 Ga. 294; Reed *v.* Greathouse, 7 T. B. Mon. (Ky.) 558, 560; U. S. *v.* Breitling, 20 How. (U. S.) 252; McClain *v.* Esham, 17 B. Mon. (Ky.) 156; Moffit *v.* Cressler, 8 Iowa, 122; Carlisle *v.* Hill, 16 Ala. 398; Case *v.* Illinois &c. R. Co., 38 Iowa, 581; Storey *v.* Brennan, 15 N. Y. 524; Rouse *v.* Lewis, 4 Abb. App. Dec. (N. Y.) 121; McLean *v.* Clark, 47 Ga. 25; Baker *v.* Robinson, 49 Ill. 299; Byington *v.* McCadden, 34 Iowa, 216; State *v.* Arthur, 23 Iowa, 430; Rindskoff *v.* Curran, 34 Iowa, 326; Stouty *v.* McAdams, 3 Ill. 67; Humphreys *v.* Collier, 2 Ill. 48; Hill *v.* Ward, 7 Ill. 285; Cowles *v.* Bacon, 21 Conn. 451; Atkinson *v.* Lester, 2 Ill. 407; Brown *v.* Isbell, 11 Ala. 1009; Donohoo *v.* State, 36 Ala. 281; Knox *v.* Easton, 38 Ala. 345; Conlin *v.* San Francisco &c. R. Co., 36 Cal. 404; People *v.* Roberts, 6 Cal. 214; Whitner *v.* Hamlin, 12 Fla. 18; Judge *v.* Moore, 9 Fla. 269; Mitchell *v.* Western &c. R. Co., 30 Ga. 22; Pendergrast *v.* Gullatt, 10 Ga. 218; McBain *v.* Smith, 13 Ga. 315; Harris *v.* Miner, 28 Ill. 135; Nealy *v.* Brown, 6 Ill. 10; Secor *v.* Pestana, 37 Ill. 525; Murphy *v.* People, 37 Ill. 447; Hessing *v.* McCloskey,

unsuccessful party, who will not thereafter have the right to complain of it. This will happen where the instruction submits to the jury the existence of a hypothetical state of facts which it would be beneficial to the unsuccessful party to establish, but in favor of which he has not been able to adduce any evidence.

37 Ill. 341; Henry *v.* Jones, 1 Idaho T. 38; Piatt *v.* People, 29 Ill. 54; Gover *v.* Dill, 3 Iowa, 337; Packer *v.* Cockayne, 3 G. Greene (Ia.), 111; Hypfner *v.* Walsh, 3 G. Greene (Ia.), 509; Pomroy *v.* Parmlee, 9 Iowa, 140; Tryon *v.* Oxley, 3 G. Greene (Ia.), 289; Newby *v.* Vestal, 6 Ind. 412; Rice *v.* Rice, 6 Ind. 100; Wayne &c. Co. *v.* Berry, 5 Ind. 286; Miller *v.* Gorman, 5 Blackf. (Ind.) 112; Amick *v.* O'Hare, 6 Blackf. (Ind.) 258; Fuller *v.* Wilson, 6 Blackf. (Ind.) 403; Linville *v.* Earlywine, 4 Blackf. (Ind.) 469; Grover *v.* Sims, 5 Blackf. (Ind.) 498; Shaw *v.* Brown, 13 Iowa, 508; Trustees *v.* Hill, 12 Iowa, 462; Pool *v.* Pool, 35 Ala. 12; Aikin *v.* State, 35 Ala. 399; Gunn *v.* Howell, 35 Ala. 144; McClintock *v.* Curd, 32 Mo. 411; McCamant *v.* Bush, 33 Mo. 544; Goodall *v.* Tricky, 33 Mo. 340; Muldrow *v.* Caldwell, 14 Mo. 523; Atkins *v.* Nicholson, 31 Mo. 488; Whiteford *v.* Munroe, 17 Md. 135; Keech *v.* Baltimore &c. R. Co., 17 Md. 32; Dawson *v.* Lambert, 8 Gill (Md.), 216; Walter *v.* Alexander, 2 Gill (Md.), 204; Mitchell *v.* Mitchell, 11 Gill & J. (Md.) 388; Philadelphia &c. R. Co. *v.* Harper, 29 Md. 330; Bower *v.* Earl, 18 Mich. 378; Sutton *v.* Floyd, 7 B. Mon. (Ky.) 3; Gilbert *v.* Woodbury, 22 Me. 246; Hammat *v.* Russ, 16 Me. 171; Hathhorn *v.* Stinson, 10 Me. 224; State *v.* Hall, 39 Me. 107; Treat *v.* Lord, 42 Me. 552; State *v.* Robinson, 39 Me. 150; Nicholas *v.* State, 6 Mo. 6; Owens *v.* Chandler, 16 Ark. 651; Thompson *v* Armstrong, 5 Ala. 383; Chicago &c. R. Co. *v.* George, 19 Ill. 510; McCoy *v.* State, 15 Ga. 205; Garrett *v.* Chambliss, 24 Texas, 618; McLaren *v.* Hall, 26 Iowa, 303; Bartholomew *v.* Merchants' Ins. Co., 25 Iowa, 518; Hite *v.* Blandford, 45 Ill. 9; American Ex. Co. *v.* Parsons, 44 Ill. 312; Brownfield *v.* Brownfield, 43 Ill. 147; Karriger *v.* Greb, 42 Mo. 44; Jemison *v.* Dearing, 41 Ala. 283; State *v.* McCurry, 63 N. C. 33; Whittaker *v.* Pullen, 3 Humph. (Tenn.) 466; Miles *v.* Douglas, 34 Conn. 393; Hill *v.* Canfield, 56 Pa. St. 458; Harvey *v.* Skipwith, 16 Gratt. (Va.) 405; Pollard *v.* Teel, 3 Ired. L. (N. C.) 470; Rowland *v.* Rowland, 2 Ired. L. (N. C.) 61; Thompson *v.* Shannon, 9 Texas, 536; State *v.* Rash, 12 Ired. L. (N. C.) 382; Ely *v.* Tallman, 14 Wis. 28; Morris *v.* Platt, 32 Conn. 75; Jones *v.* State, 13 Texas, 176; Hicks *v.* Bailey, 16 Texas, 229; Hagerty *v.* Scott, 10 Texas, 525; Ford *v.* Ford, 11 Humph. (Tenn.) 89; State *v.* Cain, 2 Jones L. (N. C.) 201; State *v.* Peace, 1 Jones L. (N. C.) 251; Pierce *v.* Negro John, 6 Md. 28; Marshall *v.* Haney, 4 Md. 498; Central R. Co. *v.* Hines, 19 Ga. 203; McDonald *v.* Bellamy, 18 Ga. 411; Dooman *v.* Mitchell, 26 Ga. 472; Dollner *v.* Williams, 29 Ga. 743; Johnson *v.* State, 26 Ga. 611; Daniel *v.* Johnson, 29 Ga. 207; Brown *v.* Cockerell, 33 Ala. 38; Fowler *v.* Smith, 2 Cal. 39; Austin *v.* Talk, 20 Texas, 164; Willis *v.* Bullitt, 22 Texas, 330; Gibson *v.* Tong, 29 Mo. 133; State *v.* Ross, 29 Mo. 32; Dwyer *v.* Dunbar, 5 Wall. (U. S.) 318; Etting *v.* Bank of United States, 11 Wheat. (U. S.) 59; Laber *v.* Cooper, 7 Wall.

Thus, where instructions are given in a criminal case upon the hypothesis of a defense which there was no evidence tending to prove, this is error in favor of the prisoner and the abstract propriety of such instructions will not be reviewed on appeal. It has been so held in respect of instructions touching the defense of insanity.[1] So, it has been held that an erroneous instruction as to the crime of *larceny*, where the indictment was for *robbery*, presented no available error, where the jury were properly instructed in respect of the crime of robbery.[2] The rule is that if it cannot fairly be inferred that the jury were misled by such instructions to the prejudice of the party complaining, the error of giving them will be overlooked.[3] Thus, if instructions are not based upon facts which the evidence tends to prove, and are also, when examined by the appellate court, found to have a tendency to mislead, the judgment will be reversed, because they were given, although they are correct as abstract propositions of law.[4] It is often loosely said that the giving of an instruction

(U. S.) 565; Patton *v.* Gregory, 21 Texas, 513; Connor *v.* State, 4 Yerg. (Tenn.) 137; Biard *v.* Trimble, Cooke (Tenn.), 289; McIntosh *v.* Smith, 2 La. Ann. 757; Allan *v.* Wanamaker, 31 N. J. L. 370; McKnight *v.* Rutcliff, 44 Pa. St. 156; Rushmore *v.* Hall, 12 Abb. Pr. (N. Y.) 420; Kiernan *v.* Rocheleau, 6 Bosw. (N. Y.) 148; New York *v.* Price, 5 Sandf. (N. Y.) 542; Wendell *v.* Moulton, 26 N. H. 41; New Brunswick Co. *v.* Tiers, 24 N. J. L. 697; State *v.* Rose, 32 Mo. 346; McDaniel *v.* State, 8 Smed. & M. (Miss.) 401; O'Reilly *v.* Hendricks, 2 Smed. & M. (Miss.) 268; Drake *v.* Curtis, 1 Cush. (Mass.) 395; Clark *v.* Vorce, 19 Wend. (N. Y.) 232; Leven *v.* Smith, 1 Denio (N. Y.), 571; Straus *v.* Minzesheimer, 78 Ill. 492; Ocheltree *v.* Carl, 23 Iowa, 394; Musselman *v.* Pratt, 44 Ind. 126; People *v.* Jones, 24 Mich. 216; Northern Pacific R. Co. *v.* Paine, 7 Sup. Ct. Rep., 323; Farmer *v.* State, 21 Tex. App. 424; State ex rel. *v.* St. L. Brokerage Co., 85 Mo. 411; Smith's Appeal, 52 Mich. 415; Seal *v.* State, 28 Tex. 491; Dreyfuss *v.* Tompkins, 64 Cal. 448; Rash *v.* Bissell, 52 Mich. 455. It does not help the case that the abstract instruction which is requested is entirely correct in point of law. Campbell *v.* People, 109 Ill. 565; People *v.* Turcott, 65 Cal. 126; People *v.* Herbert, 61 Cal. 544; Haskings *v.* St. Louis &c. R. Co., 58 Mo. 302; Reid *v.* Piedmont &c. Life Ins. Co., 58 Mo. 422; State *v.* Bailey, 57 Mo. 131.

[1] People *v.* Wheeler, 65 Cal. 77.

[2] People *v.* Riley, 65 Cal. 107.

[3] Moffitt *v.* Cressler, 8 Iowa, 122, 125.

[4] Beaver *v.* Taylor, 1 Wall. (U. S.) 637, 644; Clarke *v.* Dutcher, 9 Cowen (N. Y.), 674; Coughlin *v.* People, 18 Ill. 266; State *v.* Bailey, 57 Mo. 131; Bryan *v.* United States, 1 Black (U. S.), 140; McGregor *v.* Armill, 2 Iowa, 30, 33; Horner *v.* Wood, 16 Barb. (N. Y.) 386; United States *v.* Wright, 1 McLean (U. S.), 509; Smith *v.* Carr, 16 Conn.

not warranted by the evidence is a ground of reversal, since it cannot be known but that the jury have been thereby led to base their conclusion upon conceptions of fact of which there was no no evidence.[1] But this must be understood to be in subordination to the principle above stated; whether it will be ground of reversal or not, will depend upon the nature of the supposed facts — whether they are of a nature to be prejudicial to the party complaining. On the other hand, it is not error for the judge to state to the jury hypothetical facts not connected with the evidence, in order to explain points of law, or illustrate the case on trial, provided the jury are informed and understand that the facts stated are hypothetical merely, and not connected with the case on trial.[2]

§ 2316. Instructions on Illegal Evidence Admitted without Objection. — It has been laid down that, *if illegal evidence is given without objection*, it is not error for the court to consider it in charging the jury.[3] It is conceived, however, that this hold-

450; Cummings *v.* Chandler, 26 Me. 453; Stewart *v.* State, 1 Ohio St. 66; Caw *v.* People, 3 Neb. 357, 369; Ocheltree *v.* Carl, 23 Iowa, 394. See also the observations of Lipscomb, J., in Thompson *v.* Shannon, 9 Tex. 536. The following cases may also be referred to as supporting and illustrating the text: Houston &c. R. Co. *v.* Gilmore, 62 Tex. 391; Thompson *v.* Shannon, 9 Tex. 536; Andrews *v.* Marshall, 26 Tex. 212; Cravens *v.* Wilson, 48 Tex. 324; Lee *v.* Hamilton, 12 Tex. 413; Hampton *v.* Dean, 4 Tex. 455; Hancock *v.* Horan, 15 Tex. 507; Earle *v.* Thomas, 14 Tex. 583; Hutchins *v.* Masterson, 46 Tex. 551.

[1] Chicago &c. R. Co. *v.* Lewis, 109 Ill. 122; Caw *v.* People, 3 Neb. 357, 369; Harrison *v.* Cachelin, 27 Mo. 26; Grigsby *v.* Fullerton, 59 Mo. 309; Michigan Bank *v.* Elred, 9 Wall. (U. S.) 544.

[2] Masters *v.* Warren, 27 Conn. 293; Melledge *v.* Boston Iron Co., 5 Cush. (Mass.) 158, 180; Sharpe *v.* State, 48 Ga. 16. "This," said Ellsworth, J., in the Connecticut case, "is a common practice in our courts. No intelligent juror can be deceived by such illustrations. And whether the judge, in commenting upon the facts, has made use of too strong language, or has gone to far in using, by way of illustration, historical or personal incidents of a kindred character to those on trial, is not for us to say. He has a right to illustrate his views as he pleases, and a rule requiring that a rigid criticism should be applied to such expressions, would impose upon the judge an unreasonable restraint, and lead to great inconvenience."

[3] Scott *v.* Sheakly, 3 Watts (Pa.) 56.

ing can apply with propriety only in cases where the evidence is such as may be possessed of probative force, — as where secondary evidence is given of a matter which is embodied in a written instrument not produced. It cannot properly be applied to evidence to which the law ascribes no probative value at all, such as hearsay evidence and the like.[1]

§ 2317. Probative Force of the Evidence which will Warrant the Submission of an Hypothesis of Fact to the Jury. — Courts differ widely on this question. Those courts which go to an extreme in upholding the independence of juries proceed upon the view that a bare *scintilla* of evidence, sustaining an issuable fact, will warrant the judge in leaving the jury to say whether the fact has been established or not. Other courts go to the opposite extreme, but are unable to give us any better rule than those which have already been stated;[2] such as the formula that the evidence must be *legally sufficient* to establish the contested fact, — a rule which conveys to the mind no very definite idea, since what may be legally sufficient in one case will not be in another. The subject escapes definition; but it is believed to be a sound conclusion that the judge ought not to submit a proposition of fact to the decision of the jury, unless the evidence adduced to sustain it is of sufficient force that he can see that fair-minded men might be able to doubt or debate as to whether or not it has been proved. Taking up the subject as it rests in the decisions of the courts, we find that it has been declared to be a sound principle that, in order to warrant such a submission, there must be *a fair question for the jury*, so that if the jury were to find it either way, the court would not grant a new trial. It is not necessary that the court should be *satisfied* that the hypothetical case stated in the instruction is fully sustained by the testimony.[3] Even positive testimony is not always required.

[1] See Hensgen *v.* Donnelly, 24 Mo. App. 398, 401; Scharff *v.* Klein, 29 Mo. App. 549, 553.

[2] *Ante*, § 2246.

[3] Chicago &c. R. Co. *v.* Lewis, 109 Ill. 122, 131; Chicago &c. R. Co. *v.* Gregory, 58 Ill. 272; Missouri Furnace Co. *v.* Abend, 107 Ill. 44; Flournoy *v.* Andrews, 5 Mo. 513; Bradford *v.* Pearson, 12 Mo. 71.

It is sufficient if the assumed facts may be *reasonably inferred* from the circumstances proved.[1] If there is *any evidence* from which the jury may infer them to be true, it is his duty, in one view, to declare the law thereon;[2] and it is not error for him to do so, even where the evidence is very slight.[3] He ought not, however, to give instructions upon *trifling* and *indifferent statements*, irrelevant to the issue;[4] nor leave a fact to the jury, based upon evidence which goes no further than to raise a *mere guess*, *possibility*, or *conjecture* as to the truth of what is claimed.[5] "If its force is deemed to be *very weak*, *trivial*, *light*, and its *application remote*, the court is not required to give a charge upon it. If, on the other hand, it is so *pertinent* and *forcible* as that it might be reasonably supposed that the jury could be influenced by it in arriving at their verdict, the court should charge so as to furnish them with the appropriate rule of law upon the subject."[6] If evidence has been given to the jury upon an issue before them, which evidence is material, relevant and competent, it is for the jury and not for the court to determine the probative force thereof; and hence, instructions applying the law to such evidence, without respect to its weight or credibility, are not to be deemed irrelevant.[7]

§ 2318. Jury must "Believe from the Evidence." — The judge opens any hypothetical statement with the formal words, "If the jury believe from the evidence." To use only the words "if the jury believe," without conveying to their minds that they are to found their belief on the evidence, is an objec-

[1] Chicago &c. R. Co. *v.* Lewis, *supra;* Missouri Furnace Co. *v.* Abend, *supra.*

[2] Flournoy *v.* Andrews, 5 Mo. 513; Bradford *v.* Pearson, 12 Mo. 71.

[3] Camp *v.* Phillips, 42 Ga. 289; Thompson *v.* Duff, 119 Ill. 226.

[4] Dickerson *v.* Johnson, 24 Ark. 251.

[5] Cobb *v.* Fogalman, 1 Ired. (N. C.) 440; Sutton *v.* Madre, 2 Jones L. (N. C.) 320.

[6] Bishop *v.* State, 43 Tex. 390, 402 (opinion of the court by Roberts, C. J.). In an earlier case, it was said that "it is only necessary to give such instructions as are applicable to every *legitimate deduction* which the jury may draw from the facts." Johnson *v.* State, 27 Tex. 758, 766.

[7] Union Mutual Life Ins. Co. *v.* Buchanan, 100 Ind. 63, 73; Boots *v.* Canine, 94 Ind. 408, 411; Nave *v.* Flack, 90 Ind. 205; Hall *v.* Henline, 9 Ind. 256; Harbor *v.* Morgan, 4 Ind. 158; Thomp. Charg. Jury, § 62.

tionable way of giving an instruction;[1] but, as juries are supposed to have some small trace of sense, there is a presumption that they know that they are to find from the evidence, and accordingly, it is not necessary to repeat this expression at every turn in the charge.[2] So, an instruction, that the jury, in case they find for the plaintiff, must take into consideration all the surrounding circumstances of the case, was not regarded as authorizing them to consider facts not embraced in the pleadings or evidence, — the action being for damages for negligence.[3] So, an instruction, otherwise correct, as to the measure of damages and the elements to be taken into consideration in assessing the damages, is not bad because the judge omits to admonish the jury therein that they must assess the damages from the evidence in the case.[4] But an instruction is erroneous which begins, "if the jury believe from the evidence *and the instructions* in this case,"[5] etc. It has been held error in a prosecution for bastardy to instruct the jury that "if, upon a consideration of all the evidence, you are *inclined to believe* he is the father of such child, then you should so find your verdict; since very slight evidence might incline a juror to believe in such a state of facts, without producing that degree of belief which should be required in order to a verdict.[6] Where, in a criminal case, an instruction opens with the customary words, "if from the evidence you believe," etc., it is not error for the court to omit to add "to a moral certainty," or other equivalent words implying that the belief must be beyond a *reasonable doubt*, unless the court is requested to use greater particularity.[7]

§ 2319. Error to Submit to the Jury an Hypothetical State of Facts which on the Evidence Stands Uncontradicted. — On the other hand, he should not submit to them an hypothetical

[1] Mathews *v.* Hamilton, 23 Ill. 470; Toledo &c. R. Co. *v.* Ingraham, 77 Ill. 309.

[2] Toledo &c. R. Co. *v.* Ingraham, *supra*; Miller *v.* Balthasser, 78 Ill. 302.

[3] Dufour *v.* Central Pacific R. Co., 67 Cal. 320.

[4] Louisville &c. R. Co. *v.* Falvey, 104 Ind. 409, 429; Indianapolis *v.* Scott, 72 Ind. 196.

[5] Kranz *v.* Thieben, 15 Bradw. (Ill.) 482.

[6] Cox *v.* People, 109 Ill. 457.

[7] People *v.* Sheldon, 68 Cal. 434.

state of facts which, in the state of the pleadings and evidence, stands uncontroverted, but he should tell them that such facts are established. On the same principle, it is error to submit to the jury an hypothesis of fact which is directly opposed to all the evidence in the case.[1] Thus, in an action for damages caused by a railway fire, all the evidence in the case showed that the two engines from which alone the fire could have proceeded, were constructed with the most approved appliances for preventing the escape of fire, and there was no contradictory testimony on the subject. The court refused to instruct the jury that "the evidence in this action shows that the engines of the defendant company were in good condition, properly constructed, and provided with all the usual appliances for the prevention of the escape of fires, in use at the time the fire occurred," but submitted to the jury the question as to whether such engines were so constructed and in such condition. It was held that this was "plain error."[2]

§ 2320. Illustrations of the Foregoing Rule. — Accordingly, in an action for damages for the wrongful taking of property, it is error to instruct the jury that they may give *exemplary damages* if they find that the taking was wanton or malicious, when there is no evidence that the taking was of that character.[3] So, where two witnesses were the only ones who gave testimony in respect of a transaction were directly opposed to each other in their statements, an instruction that the testimony of one of them as to the bad habits of the other was to be considered in determining the weight to be given to the latter's testimony, was held erroneous, and ground of reversal, — there being no such testimony as to bad habits.[4] Where, on the trial of an indictment for murder, it appeared that the accused and deceased met at a certain place, and commenced firing at each other at so nearly the same time, that it was impossible to tell which fired the first shot, — this was obviously a case either of murder, or justifiable homicide in self-defense, and it was, therefore, error for the judge to instruct the jury as to the law of man-

[1] Carlisle *v.* Hill, 16 Ala. 398; Wright *v.* Fort Howard, 60 Wis. 119, 124; Cronin *v.* Delavan, 50 Wis. 375.

[2] Gibbons *v.* Wisconsin Valley R. Co., 62 Wis. 546.

[3] Hirshberg *v.* Strauss, 64 Cal. 272.

[4] Bulen *v.* Granger, 58 Mich. 274; *s. c.* 25 N. W. Rep. 718.

slaughter, although his instructions on that branch of the law were, in the abstract, correct.[1] So, where a farmer sustained an injury by reason of his wagon coming in contact with a railway train at a farm-crossing, and it appeared from the evidence that the collision was the result of a mere casualty, it was error to instruct the jury that, if they believed from the evidence that the injury complained of was willfully or recklessly done by the defendant, then they were not confined to the actual damages sustained by the plaintiff, and might give such exemplary damages as the circumstances of the case warranted. This instruction was correct as an abstract proposition of law; but it was misleading, because it intimated to the jury that they might give exemplary damages, in a case in which there was no evidence tending to show those facts which constitute a basis of exemplary damages.[2] So, in an action against a carrier by a passenger, for injuries alleged to have been caused by the negligence of the latter, the court should not give instructions upon the subject of contributory negligence, unless there is evidence tending to show that the plaintiff was negligent. If there was evidence of negligence against the carrier, such an instruction would be misleading, and would require a reversal of the judgment, if given for the defendant;[3] but if there was no evidence of negligence against the carrier, the instruction would be harmless; for the plaintiff would not be entitled to recover in any event. So, where the judge told the jury *to look into the facts*, and ascertain whether there had not been a distribution of an intestate's property, when there was no evidence of such distribution, this charge was held misleading and erroneous.[4]

§ **2321. Stating an Abstract Proposition of Law.**— There is a marked distinction between submitting to the jury an instruction based upon an *hypothetical state of facts* which there is no evidence tending to prove, and what is termed an *abstract instruction*. As a general rule, the former will be error, and the latter not. By the giving of an abstract instruction is understood the statement of an abstract proposition of law, which is irrelevant to the issues on trial. The general rule, perhaps, is that this is not ground of reversal in a civil case, even where the

[1] State *v.* Bailey, 57 Mo. 131; *ante*, § 2295.

[2] Kennedy *v.* North Mo. R. Co., 36 Mo. 351.

[3] Winters *v.* Hannibal &c. R. Co., 39 Mo. 468.

[4] Paschal *v.* Davis, 3 Ga. 256.

proposition of law may be erroneously stated, since it would not be likely to influence the jury either way. "Every charge of a court," said Willie, C. J., "must be tested by the facts to which it is applicable." The announcement, therefore, of a general principle in a charge which in the abstract may be wrong, will not be cause for reversing the judgment, if it be so modified by the charge in view of the facts of the case that it could not affect the rights of the party complaining.[1] Cases may occur, however, in which this principle will not apply, and in which, in a nicely balanced state of the evidence, a statement by the court to the jury of an abstract proposition of law may be prejudicial to the unsuccessful party, as having a tendency to turn the balance against him. It has been laid down that the giving of an instruction stating a proposition of law, not applicable to the evidence in a criminal case, is not error, unless the principle of law stated is erroneous.[2] But it is not perceived how the fact that the proposition is erroneous would make any difference, since in neither event would it be applicable to the case on trial. The rule that an instruction is improper which is expressed in general and abstract terms, is applicable only where the trial takes place before a jury. The reason is that such an instruction is apt to mislead the jury. No ground can exist for the enforcement of such a rule where the trial is *before the court*.[3] Another exception to the rule is that the judge may state, in charging the jury, abstract principles or propositions of law *by way of illustration*, although it embodies an hypothesis of facts not in evidence, provided he gives the jury distinctly to understand that he is doing it for the purpose of illustration merely.[4] And, it has even been said that the judge may give or refuse instructions upon abstract propositions of law, at his pleasure.[5] Whether an instruction is to be deemed abstract,

[1] Texas &c. R. Co. *v.* Wright, 62 Tex. 515.

[2] Upstone *v.* People, 109 Ill. 170, 176.

[3] Vigus *v.* O'Bannon, 6 West. Rep. 219; *s. c.* 118 Ill. 334, 348; Chicago &c. R. Co. *v.* Utley, 38 Ill. 410; McNair *v.* Platt, 46 Ill. 211.

[4] *Ante*, § 2315.

[5] "We hold in all cases an instruction, unless it be upon an abstract proposition of law, which the court

within the meaning of this rule, is tested by the principle which has been already considered touching the probative force of evidence which will warrant the submission of an hypothesis of fact to the jury.[1] Those courts which deny the right of the judge to take a question of fact from the jury, where there is any evidence to support it, even a "scintilla," will, with consistency, hold that a charge is not abstract, where there is any evidence, however weak, at all tending to support it,[2] and that the judge cannot properly refuse to charge the jury upon such facts, on the ground that, in his opinion, they have not been proved.[3]

§ 2322. Instructing on the Lower Degrees of Crime.— The principle that the judge may, in all cases, rightfully refuse a requested instruction upon an hypothesis which there is no evidence tending to prove, finds frequent illustration in the rule that, on the trial of an indictment for a crime which admits of a conviction of a lower grade of the offense charged in the indictment, the judge is not bound to instruct the jury on the hypothesis of the defendant having committed the lower grade of the offense, or upon the law relating thereto, unless the evidence tends to show that the offense committed may have been of such lower grade. Thus, on the trial of an indictment for murder, the court is not bound to instruct the jury as to the law concerning the lower grades of homicide, where there is no evidence tending to show a lower grade than that of murder in the first degree.[4] He is not bound to instruct the jury as to the law of

may give or refuse at his pleasure, must have some evidence on which to base it, and spring out naturally from the evidence." Galena &c. R. Co. *v.* Jacobs, 20 Ill. 478, 485. To the same effect is Parker *v.* Fergus, 52 Ill. 419.

[1] *Ante*, § 2317.

[2] Hair *v.* Little, 286 Ala. 23; Mc Neill *v.* Arnold, 22 Ark. 477, 480; Bradford *v.* Pearson, 12 Mo. 71; Breese *v.* State, 12 Ohio St. 146, 155.

[3] Morris *v.* Platt, 32 Conn. 75.

[4] Smith *v.* State, 15 Tex. App. 139; Darnell *v.* State, *Id.* 70; Davis *v.* State, 14 Tex. App. 645; Benevides *v.* State, *Id.* 378; Rhodes *v.* State, 17 Tex. App. 579; Bryant *v.* State, 18 Tex. App. 107; Johnson *v.* State, *Id.* 385; Jackson *v.* State, *Id.* 586; May *v.* State, 22 Tex. App. 595; *s. c.* 3 S. W. Rep. 781; Leggett *v.* State, 21 Tex. App. 382. See also Burkhard *v.* State, 18 Tex. App. 599, 619; Brown *v.* State, 6 Tex. App. 286; Smith *v.* State, 8 Tex. App. 141;

manslaughter, where there is no evidence which would warrant them in finding the defendant guilty of that grade of the crime.[1] So, unless there is evidence fairly tending to raise the hypothesis of murder in the second degree,[2] or of self-defense,[3] he is not bound to instruct the jury upon such hypothesis. So, in Texas, on principles elsewhere explained,[4] a charge in a case of aggravated assault, which omits to charge as to the law of simple assault, has been held erroneous, *if excepted to* at the time;[5] but the failure so to charge will not work a reversal, when not so excepted to.[6]

§ 2323. When a Verdict Renders such an Error Immaterial. — So, in many cases, the verdict will render such an error immaterial. Thus, in a prosecution for murder, an instruction as to what is necessary to reduce an unlawful killing from murder to manslaughter, will not warrant a reversal, if the defendant was only convicted of manslaughter, since in such a case there could have been no prejudice.[7] So, where, in a trial for murder, the conviction is for murder in the second degree, an appellate court will not revise the instructions given to the jury upon the subject of murder in the first degree and express malice; since the conviction of the lower grade of the crime has rendered any errors which may have been committed in giving instructions as to the higher grade, immaterial and without prejudice.[8]

§ 2324. Instructions should be Hypothetical where the Evidence is Conflicting. — Where the facts are in dispute, the judge should give hypothetical instructions; applying the law to such

Berry *v.* State, 8 Tex. App. 515; Evans *v.* State, 13 Tex. App. 225; Neyland *v.* State, 13 Tex. App. 536; Smith *v.* State, 15 Tex. App. 139; Reynolds *v.* State, 8 Tex. 412; Reed *v.* State, 9 Tex. App. 317; Bramlette *v.* State, 21 Tex. App. 611, 619.

[1] Cunningham *v.* State, 17 Tex. App. 89; Wallace *v.* State, 20 Tex. App. 360; Jackson *v.* State, 18 Tex. App. 586; Taylor *v.* State, 17 Tex. App. 46. See also Anderson *v.* State, 15 Tex. App. 447.

[2] Burkhard *v.* State, 18 Tex. App. 599, 619.

[3] Wallace *v.* State, *supra*.

[4] *Post*, § 2400.

[5] Pederson *v.* State, 21 Tex. App. 485.

[6] Pierce *v.* State, 21 Tex. App. 540.

[7] People *v.* Swift, 66 Cal. 348.

[8] Miles *v.* State, 18 Tex. App. 156.

facts as there is evidence tending to prove, leaving the facts to be determined by the jury.[1] The judge should instruct the jury as to the law applicable to all the reasonable hypotheses furnished by the evidence, leaving the jury to find the facts and apply the law to the facts as found,[2] taking care not to *assume*, in framing his hypothesis of fact, the existence of a state of facts as to which the evidence is conflicting.[3]

§ 2325. Instructions should be Accurate, Clear, Pointed and Definite. — It is not necessary to dilate upon the propositions, which are very much expanded in the admonitions given by the appellate courts to the trial judges, that the instructions should be accurate,[4] clear,[5] pointed and definite;[6] that the court should "place the law fairly before the jury in a few plain, forcible, pointed and pithy instructions,"[7] or in a few "plain, direct instructions, embracing the law of the case."[8] But the court is not obliged to illustrate every point of law, given in charge, in every conceivable way: it will be enough, if the illustrations given do not inculcate any false principle.[9] But what is here said

[1] King *v.* King, 37 Ga. 205; Linville *v.* Welch, 29 Mo. 203; Carlisle *v.* Hill, 16 Ala. 398; Hibler *v.* McCartney, 31 Ala. 501; Willis *v.* Willis, 18 Ga. 13; Hopkinson *v.* People, 18 Ill. 264; Southern Ins. & Trust Co. *v.* Lewis, 42 Ga. 589; Watson *v.* Musick, 2 Mo. 29; Wilson *v.* Williams, 52 Miss. 487; Bartley *v.* Williams, 66 Pa. St. 329.

[2] Bartling *v.* Behrends (Nebraska), 29 N. W. Rep. 472.

[3] *Ante*, § 2295; King *v.* King, 37 Ga. 205.

[4] Bank *v.* Eitemiller, 14 Bradw. (Ill.) 22; reaffirmed in Kranz *v.* Thieben, 15 Bradw. (Ill.) 482.

[5] Cothran *v.* State, 39 Miss. 541; Eyser *v.* Weissgerber, 2 Iowa, 463, 482.

[6] McKinney *v.* Snyder, 78 Pa. St. 497; Gas Co. *v.* Wheeling, 8 W. Va. 323; Rollings *v.* Cate, 1 Heisk. (Tenn.) 97 (judgment reversed because charge on the subject of taking Confederate money under duress too indefinite). In one case the judgment was reversed in a prosecution for perjury because the court instructed the jury that, if the defendant swore falsely to the statement contained in the indictment, they will find him guilty, "if the case is otherwise made out," — this being too indefinite. Cothran *v.* State, 39 Miss. 541. Another case, according to the official syllabus, involves the incongruous proposition that a judgment will be reversed, although the charge be literally correct, if its language is calculated, in any point, to mislead the jury. Smith *v.* Overby, 30 Ga. 241.

[7] Talbot *v.* Mearns, 21 Mo. 427, 431.

[8] Crole *v.* Thomas, 17 Mo. 329, 332; State *v.* Floyd, 15 Mo. 349.

[9] Whitcomb *v.* Fairlee, 43 Vt. 671.

must be taken in subordination to the principle elsewhere explained[1] that mere *incompleteness* in an instruction, — that is, *partial non-direction*, — is no ground of new trial, at least, in civil cases, unless an appropriate complimentary instruction was requested and refused.

§ 2326. **Should not be Ambiguous, Inconsistent, or Contradictory.** —Instructions should not be so framed as to be capable of two interpretations, one correct in point of law, or in relation to the facts, and the other incorrect. Such instructions are well classed among those which are calculated to mislead the jury.[2] And when such an instruction has been given, if the attention of the judge is called to it at any stage of the trial, before the jury have returned their verdict, it will become his duty to remove the ambiguity and to make its meaning plain.[3] On similar grounds, the giving of instructions which are inconsistent with or contradictory to each other is error, for the reason that the jury will be as likely to follow the good as the bad, and it cannot be known which they have followed,[4] and which way so ever they go, if there is an appeal or writ of error, the judgment must be reversed. Therefore, an erroneous instruction is not cured by another instruction on the same subject, which is correct,[5] unless the former is, by the latter, specifically withdrawn;[6] and this is especially true of a correct general instruction, coupled with an erroneous specific instruction; the latter is obviously not cured by the former.[7]

[1] *Post*, § 2341.

[2] Belt *v.* Goode, 31 Mo. 128; Henry *v.* Davis, 7 W. Va. 715; Gas Co. *v.* Wheeling, 8 W. Va. 323; Va. Central R. Co. *v.* Sanger, 15 Gratt. (Va.) 231. Compare Siebert *v.* Leonard, 21 Minn. 442.

[3] Balt. & O. R. Co. *v.* Boyd, 67 Md. 32; *s. c.* 7 Cent. Rep. 435, 438.

[4] Wagner, J., in Henschen *v.* O'Bannon, 56 Mo. 289, 292; Pond *v.* Wyman, 15 Mo. 175, 181; Jones *v.* Talbot, 4 Mo. 285; Chicago &c. R. Co. *v.* Payne, 49 Ill. 499; Clem *v.* State, 31 Ind. 480; Selin *v.* Snyder, 11 Serg. & R. (Pa.) 319; Whitfield *v.* Westbrook, 40 Miss. 311; Ferguson *v.* Fox, 1 Metc. (Ky.) 83.

[5] Mackey *v.* People, 2 Colo. 13; Murray *v.* Com., 79 Pa. St. 311; Rice *v.* Olin, 79 Pa. St. 391.

[6] Toledo &c. R. Co. *v.* Shuckman, 50 Ind. 42.

[7] Pittsburgh &c. R. Co. *v.* Krouse, 30 Ohio St. 222, 240.

An obscure answer to a point, submitted to the judge for an instruction, may be cured by the general charge, but not one that is palpably erroneous:[1] for a subsequent instruction does not by implication revoke a previous one.[2] The practice, hereafter spoken of,[3] established by statute in some jurisdictions, of requiring the judge to give or refuse instructions requested, without alteration, has a direct tendency to lead to the giving of contradictory instructions. A fair-minded judge, having given instructions for the plaintiff, drawn, as they generally are, in strong language, will be naturally desirous of presenting the other side of the case to the jury in language equally forcible, and in a light equally favorable to the defendant. In the hurry of a trial, there will not be time to weigh accurately the effect of conflicting instructions asked for; and the result will be the giving of instructions which contain contradictory propositions of law.[4]

§ **2327. Nor Couched in Technical Language.** — The judge ought to instruct the jury in plain English, and avoid, as far as possible, the use of technical terms, especially of technical legal terms. For instance, the trial court may properly refuse an instruction which is "theoretical and impractical," such as an instruction which attempts a *comparison of legal presumptions*.[5] So, the use of such expressions as "*prima facie*," [6] and "*preponderance of evidence*," [7] has been criticised. So, an instruction which uses the word "*malice*" without defining it, should not be

[1] Murray *v.* Com., 79 Pa. St. 311, 317; Rice *v.* Olin, 79 Pa. St. 391.

[2] Adams *v.* MacFarlane, 65 Me. 143. Illustrations of this will be found in Harrison *v.* Spring Valley Hydraulic Gold Co., 65 Cal. 376; Inwood *v.* Steamboat Fleetwood, 19 Mo. 529, 531; and also in Eyser *v.* Weissgercer, 2 Iowa, 463, 482, where some judicious observations will be found in the opinion of the court given by Wright, J.

[3] *Post*, § 2407.

[4] See Schneer *v.* Lemp, 17 Mo. 142, 145, where the opinion contains animadversions upon the conduct of a trial judge who seems to have taken this course. An erroneous instruction given for one side is not cured by a *more accurate* one given for the other side. Illinois Central R. Co. *v.* Maffit, 67 Ill. 431.

[5] Morrison *v.* State, 76 Ind. 335.

[6] Chappell *v.* Allen, 38 Mo. 213.

[7] Clarke *v.* Kitchen, 52 Mo. 316.

given. It was so held where the instruction contained this clause: "And if the defendant struck him with the seal to avoid such injury, and not with a spirit of malice or revenge, he was justifiable,"—the reason being that the jury might thereby fall into the error of supposing that the word "malice" is the legal equivalent of the word "revenge."[1] So, while it has been held a question for the jury to interpret the meaning of words used in a contract relating to *fixtures*, where the contract was aided by evidence of the conduct of the parties,[2] it has been held error to submit to the jury the question without proper explanatory instructions, whether or not certain articles were fixtures.[3] But it is a sound view that jurors must be presumed to have intelligence enough to understand the meaning of *ordinary English words*. They must be presumed, for instance, to know that to "*countenance*" an act is to aid in or abet it, and that one, by mere silence at the time of an act, or by approval of an act after its commission, cannot be held thereby to countenance the same or be liable therefor.[4] Attention may be here renewed to what has, perhaps, been already sufficiently explained,[5] that the court is not required to define to the jury the meaning of words in common and ordinary use and to which the law has attached no specific meaning.[6] Thus, where at the close of the charge given by the court, counsel reminded the judge that he had not defined to the jury the word "*unfaithfulness*," the reviewing court, speaking through Cutting, J., said: "If the judge had defined the word '*unfaithfulness*' he might have been called upon to define the words of his own definition, and so have proceeded *ad finitum*, or until his vocabulary had become exhausted. This is hardly to be expected of the court, and, perhaps, not expedient in all cases; for, *omnis definitio in jure civile periculosa est, parum est enim, ut non subverti possit.*" And it was held that what constitutes unfaithfulness on the part of commissioners appointed under a complaint for the flowage of

[1] Morgan *v.* Durfree, 69 Mo. 469, 480.

[2] Martin *v.* Cope, 28 N. Y. 181; *ante*, § 1081.

[3] Grand Lodge *v.* Knox, 27 Mo. 315.

[4] Cooper *v.* Johnson, 81 Mo. 483.

[5] *Ante*, § 1075, *et seq.*

[6] Berry *v.* Billings, 47 Me. 326.

land, so as to invalidate their report, is a question to be settled by the jury from all the evidence in the case.[1] But where the meaning of *words used in a technical sense*, which is not generally understood, is in issue, and the meaning requires the aid of extrinsic evidence, the question is to be submitted to the jury. Thus, it has been held, in an action for damages for the nonperformance of a contract for the sale of "one hundred and fifty tons of *soft English lead* of Walker, Parker & Walker brand," that it was a question for the jury, whether such a brand was in existence, and further, whether the words "soft English lead" meant in commerce soft lead made in England, no matter from what ores.[2] So, where the action was brought to recover the value of a carding machine, it was held that the court should have submitted to the jury the question whether the words, "*carding machine and fulling mill*," used in the contract between the parties, did not mean the building on the farm in which the business of carding wool and dressing cloth had been carried on; and if so, whether the phrase "*fixtures* belonging to the fulling machine and carding machine" did not mean the carding machine and other machinery that had been used in said building, though detached and stored elsewhere at the date of the contract. It should be added that this was a case where the interpretation of the contract was aided by evidence of the conduct of the parties.[3]

§ 2328. **Should Cover the Whole Case.**—Instructions should cover the whole case,[4] and should not be so framed as to single out isolated portions of the evidence not in themselves decisive, and make the verdict turn upon them.[5] This rule is, of course, subordinate to a principle elsewhere explained,[6] and which must

[1] *Ibid.* Compare Ware *v.* Ware, 8 Me. 42, and Darling *v.* Dodge, 36 Me. 370.

[2] Pollen *v.* Le Roy, 30 N. Y. 550, 563.

[3] Martin *v.* Cope, 28 N. Y. 180.

[4] First Nat. Bank *v.* Currie, 44 Mo. 91.

[5] Chappell *v.* Allen, 38 Mo. 213, 220; Grube *v.* Nichols, 36 Ill. 93; Raysdon *v.* Trumbo, 52 Mo. 35; Ellis *v.* McPike, 50 Mo. 574; Reese *v.* Beck, 24 Ala. 651.

[6] *Post*, § 2341.

never be lost sight of, that mere *incompleteness* in a charge, that is, *partial non-direction*, will not be ground of error, unless the proper complementary instructions are requested and refused. But the error of *singling out isolated facts*, not in themselves decisive of the merits of the controversy, and instructing the jury that if they believe such facts they will find for one party or the other, is not regarded as non-direction, but as misdirection, and an invasion of the province of the jury. It is a frequent and pernicious error, for which judgments are constantly reversed. For this reason, where the judge is asked to give a charge which is so framed as to exclude from the jury any portion of the evidence which might exert an influence on their verdict, it may properly be refused.[1] But while this is so, it is equally well settled that a judgment will not be reversed because a single instruction is technically erroneous, provided the instructions given, all taken together, fairly present the law on both sides of the case to the jury, and present the whole case in a manner that is not calculated to mislead.[2] Moreover, if requests for instructions, which do not cover the whole case, are presented to the judge, he may *modify* them, so as to make them present the law applicable to the facts contended for by both parties, there being, of course, evidence of such facts.[3] Upon a similar principle, it is held that instructions, requested in criminal cases, are properly refused, when they direct the attention of the jury to a partial view of the evidence, and direct an acquittal if they believe the facts stated to be true.[4] On the trial of an indictment for an assault with intent to murder, the law presumes the defendant innocent of the felony, unless the *whole evidence* satisfies the jury that he made the assault with the particular intent alleged in the indictment. In such a case it is error for the court, in charging the jury, to select from the mass of the evidence a portion only of the facts disclosed by it, and to declare

[1] Adams *v.* Roberts, 2 How. (U. S.) 486; Reese *v.* Beck, 24 Ala. 651, 662, Swope *v.* Schafer (Ky.), 4 S. W. Rep. 300; Maxwell *v.* Hannibal &c. R. Co., 85 Mo. 95; Kirk *v.* Wolff Man. Co., 118 Ill. 567; *s. c.* 6 West. Rep. 510.

[2] Henschen *v.* O'Bannon, 56 Mo. 289; *post*, § 2407.

[3] O'Neil *v.* Capelle, 56 Mo 296; *post*, § 2353.

[4] Swigar *v.* People, 109 Ill. 272.

that if such facts are proved, the law presumes that the act was malicious, and that the defendant intended to kill. Such a charge takes away from the defendant the presumption of innocence upon the selected facts only; whereas, according to law, that presumption cannot be taken away except by a conviction of his guilt, produced on the minds of the jury by the whole evidence. Such a charge, it is well said, loses sight of the distinction in a criminal case between a *prima facie* case and the changing of the burden of proof, and actually shifts the burden of proof, by the effect which it imputes to the selected facts.[1] But, where the purpose of an instruction is simply to *define the duty* of the defendant, arising out of certain supposed facts, and it does not purport to contain a complete hypothesis on which the right of recovery is predicated, in an action for damages for negligence, it is not necessary that it should also refer to the true or supposed negligence of the plaintiff.[2] But it is not necessary that the judge should make the impracticable attempt of so framing *each paragraph* of his charge as to make it cover all the elements of the evidence. On the contrary, the rule here explained is subordinate to another rule, hereafter explained,[3] which is, that a series of instructions are *construed as an entirety*, and will be regarded as sufficient, if, when so construed, they cover the whole case.

§ 2329. Instructing on Particular Phases or Theories. — Neither is the judge bound, in charging the jury, to anticipate every possible phase of the case, nor negative every possible exception;[4] nor illustrate a proposition of law in every conceivable way.[5] A court is not required in a criminal case to give instructions, though requested, upon *each separate item* of evidence, nor to direct the jury to the different theories of the State and of the accused, in respect of certain features of the evidence. Thus, the court is not bound to give an instruction, in a trial for mur-

[1] Ogletree *v.* State, 28 Ala. 693, 701.

[2] Chicago &c. R. Co. *v.* Avery, 109 Ill. 314.

[3] *Post*, § 2407.

[4] Hobbs *v.* Eastern R. Co., 66 Me. 572.

[5] Whitcomb *v.* Fairlee, 43 Vt. 671.

der where the evidence is circumstantial, that, if there is a conflict between the State and the defendant as to the hour or period of time at which the killing was done, and the time becomes, in the judgment of the jury, material, the jury should solve the conflict on the side of the defendant, unless satisfied beyond a reasonable doubt that the position of the State is correct. Nor, on such a trial, is the court bound to give an instruction that, if there is any conflict between the State and the defendant as to whether the body of the deceased was, at or near the particular hour, cold or warm, that conflict should be solved on the side of the defendant. Such instructions, it was justly observed, would be much more likely to mislead, than to enlighten the jury. "Besides, when the court has put the whole case to the jury by proper and full instructions, it would be a very tedious and unreasonable practice to require a separate instruction upon each separate item of evidence." [1]

§ **2330. Giving Undue Prominence to Isolated Parts of the Testimony.** — Instructions should not be so drawn as to direct their attention to prominent features in the testimony on one side of the case, while sinking out of view, or passing lightly over, portions of the testimony on the other side, which deserve equal attention. By this course, the judge impresses on the minds of the jury his own bias or view of the case, while seeming not to do so. A judge, who desires to control the verdict of the jury, may adroitly reach the result in this way. It is unnecessary to say that those courts which uphold in a strict measure the independence of juries, regard this as a reprehensible practice, for which, if it appear that the jury were misled by it,[2] the judgment will be reversed.[3] One court has gone so far as to hold that the giving of instructions so drawn is error for which

[1] Koerner *v.* State, 98 Ind. 7, 21; citing Wade *v.* State, 71 Ind. 535; Jones *v.* State, 64 Ind. 473.

[2] Wachstetter *v.* State, 99 Ind. 290, 294; Goodwin *v.* State, 96 Ind. 550, 568; Campbell *v.* People, 109 Ill. 566.

[3] Sawyer *v.* Hannibal &c. R. Co., 37 Mo. 240, 263; Clark *v.* Hammerle, 27 Mo. 55, 70; Anderson *v.* Kincheloe, 30 Mo. 520; Fine *v.* St. Louis Public Schools, 39 Mo. 59, 67; Rose *v.* Spies, 44 Mo. 20; Jones *v.* Jones, 57 Mo. 138; Parker *v.* Donaldson, 6 Watts & S. (Pa.) 132.

a judgment will be reversed, although the unsuccessful party did not request the court to give instructions applicable to the other features of the case.[1] But this view is not in accordance with the prevailing doctrine, as hereafter seen.[2] On better grounds, it has been held that, where the evidence of a single witness is such that, if believed by the jury, it determines the merits of the case, it is not error for the judge to single out the testimony of such witness, and base his instructions upon that alone, without noticing the other evidence. Such a charge, it is said, does not necessarily exclude from the consideration of the jury the other testimony, either expressly, or by implication; but if such a result is apprehended, counsel may guard against it by asking additional instructions.[3] On either view, the giving of an instruction which merely ignores one of the issues in the case, will not necessarily be ground of reversing the judgment, since it may be cured by other instructions given which present the proper issue to the jury.[4]

§ 2331. Making a Principle of Law too Prominent by Repetition. — In the view of one court it is improper for a court to place, by *frequent repetitions*, too prominently before a jury any principle of law involved in the case.[5] It is said that, "especially is such rule important in a criminal case, in order to guard against creating an impression upon the minds of the jury, as to what may be the opinion of the court with regard to the facts to which the principle is applicable."[6]

§ 2332. Instructions Couched in General Terms. — It often happens that a general statement of the rights and obligations of the parties to a transaction assists materially to a clear understanding of the particular obligation claimed to have been vio-

[1] Clarke *v.* Hammerle, *supra*, per Scott, J.; Fitzgerald *v.* Hayward, 50 Mo. 516.

[2] *Post*, § 2341.

[3] Garrett *v* Garrett, 27 Ala. 687; Hart *v.* Bray, 50 Ala. 446.

[4] Merchants' Ins. Co. *v.* Hauck, 83 Mo. 20, 29.

[5] Powell *v.* Messer, 18 Tex. 401.

[6] Irvine *v.* State, 20 Tex App. 12, 41.

lated;[1] and unless it is seen that such an instruction was likely to mislead the jury into the consideration of matters foreign to the case the giving of it will not be held error. Accordingly, in an action for damages against a stage proprietor, it was held no error for the judge to give to the jury an instruction which correctly embodied a general statement of the duties and obligations of stage proprietors. Where the instructions, taken as a whole, contain a correct statement of the law, an objection to a particular instruction, that it is *too general*, will not warrant a reversal in a criminal case.[2]

§ **2333. Long and Numerous Instructions.** — The appellate courts have frequently been called upon to condemn the practice of giving a multiplicity of instructions, announcing in effect the same legal principles,[3] and of giving instructions drawn out at great length with arguments injected into them.[4] In one jurisdiction the practice produced so many reversals, in criminal cases, that the Supreme Court, in condemning it, felt called upon to say: "In many cases it would be wise to give no instructions at all for the State, and in none is it prudent to give many. By this course convictions would be just as numerous,

[1] Sawyer *v.* Sauer, 10 Kan. 466, 470, per Brewer, J.

[2] People *v.* Tomlinson, 63 Cal. 344. Such being undoubtedly the law, the case of Kranz *v.* Thiebens, 15 Bradw. (Ill.) 482, holding that the giving of an instruction in general terms was erroneous because liable to mislead the jury, is a judicial aberration.

[3] Haney *v.* Caldwell, 43 Ark. 184, 193; Sadler *v.* Sadler, 16 Ark. 628; Hanger *v.* Evins, 38 Ark. 334.

[4] Merritt *v.* Merritt, 20 Ill. 65, 80; reaffirmed and applied in a case where an instruction, upon hypothetical facts, occupied more than a page of closely printed paper, in Roe *v.* Taylor, 45 Ill. 485, 491. "Instructions," say the court in these cases, "should be concise, and briefly present the point of law alone on which the party relies." On the trial of an indictment for an assault with intent to murder, in the same State, the court gave *eleven* instructions requested by the defendant, without modification, gave *twelve* others, so requested, after modifying them, and refused *twenty-three*. The Supreme Court said that the rules of law applicable to the case were simple and plain, and that the practice of incumbering the record with so many instructions was a vicious one which ought not to be encouraged. No error was therefore found in refusing the twenty-three instructions. Dunn *v.* People, 109 Ill. 635.

and reversals would be rare."[1] Another court has said. "We do not think that juries can derive any help from attempts, by numerous and complicated requests, to explain what would be very much plainer without them. If a jury cannot understand their duty, when told they must not convict when they have a reasonable doubt of the prisoner's guilt, or of any fact essential to prove it, they can very seldom get any help from such subtleties as require a trained mind to distinguish. Jurors are presumed to have common sense and to understand common English. But they are not presumed to have professional, or any high degree of technical or linguistic training."[2] It has, however, been held error to refuse to give *any instructions* merely because of the number or length of those requested. The reviewing court say: "As to the court's refusing to give the *thirty-three instructions* or requests asked by defendant, on account of their length, we think it only necessary to say that the court is not justified to refuse to pass on such instructions, when handed in at the time prescribed by the rule. The jury can be dismissed for a time, that the court may have an opportunity of considering the requests."[3]

[1] Ingram *v.* State, 62 Miss. 142, 145.

[2] Hamilton *v.* People, 29 Mich. 173.

[3] Andrews *v.* Runyon, 65 Cal. 629, 634.

CHAPTER LXVI.

OF REQUESTS FOR INSTRUCTIONS.

SECTION
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2360. View that Requests must be Handed up before the General Charge.
2361. After the General Charge.
2362. Illustration: Court refusing to listen to Requests for Additional Instructions after General Charge.
2363. Of Additional Instructions after the Jury have Retired.
2364. Further on this Subject.
2365. In Criminal Cases, what.
2366. [Continued.] In Civil Cases.
2367. Necessity of the Presence of Counsel.
2368. Under Statutes Requiring the Instructions to be Delivered before Argument.
2369. Jury taking the Charge to their Room.

§ **2338. Non-direction in Civil Cases.** — It is a rule in the law of procedure, recognized and enforced in all jurisdictions, that, in civil cases, the judge is not bound to give his opinion to the jury upon any matter of law arising upon the evidence, unless requested to do so by one of the parties. Where no such request is preferred, the presumption is that the jurors are acquainted with the rules of the law applicable to the case, and the failure to instruct them cannot be assigned for error.[1]

§ **2339. Non-direction in Criminal Cases.** — It is apprehended that, according to the principles of common law procedure, no conviction in a criminal case will be reversed for mere non-direction, where no instructions were requested by the accused, unless the record discloses that the jurors were mistaken in matter of law.[2] "In criminal cases," said Chief Justice Shaw, "by the form in which the issue is made up, the jury pass upon the whole matter of law and fact. It is the duty of the judge to give such instructions to the jury in matters of law, as, in his judgment, may be best calculated to aid and assist them in forming their verdict. But he is not bound to give instructions upon any particular questions, unless his attention is called to them, and they are particularly requested, in which case, if pertinent, instructions will be given; and, if the judge thinks proper he will reserve the question of their correctness. But the presumption is, after verdict, that all necessary and proper instructions,

[1] Drury *v.* White, 10 Mo. 354; Clarke *v.* Hammerle, 27 Mo. 55, 70; Coates *v.* Sangston, 5 Md. 121; Haupt *v.* Pohlman, 16 Abb. Pr. (N.Y.) 301, 307; *post*, § 2341.

[2] It is apprehended that no case can be found in the English books where a conviction for crime was reversed for non-direction; though this fact might not be decisive upon the question, since convictions in criminal cases are not reviewed on error in that country, except where a writ of error is granted by the *fiat* of the attorney general, and those cases are very rare. The usual review, where it is allowed at all, takes place on a question of law reserved by the trial judge for the consideration of the Court for Crown Cases reserved. In New York, the Supreme Court refused to reverse a conviction for murder where the judge omitted to charge the jury, when to do so would have protracted the trial into Sunday and resulted in a discharge of the jury, — there being no dispute about the law and nothing for the jury to decide but questions of fact and intent, and it being, upon the record, a case of willful murder. People *v.* Gray, 5 Wend. (N. Y.) 289.

in matter of law, for the aid and information of the jury, were given; and it must of necessity be presumed that such instructions were legally correct, where no exceptions have been taken and no points reserved." [1] But, under the influence of *statutes requiring the judge in criminal cases to charge the jury*, the question has several times arisen in American State courts, whether he is bound to do so when not requested on behalf of the prisoner. In Indiana he is not bound, even in a capital case, to give instructions to the jury without such request.[2] In Tennessee, it is his duty, even without request, to charge the jury, definitely and specifically, as to every question of law involved.[3] In Iowa, it is sufficient if he state to the jury the facts alleged in the indictment as constituting the crime charged, and the law applicable to the grounds on which the defense is based.[4] In Missouri, it is his duty, in all criminal cases, whether of felony or misdemeanor, to instruct the jury as to the law arising upon the evidence, and a *failure* or refusal to do so is error.[5] Under this rule, where the judge refuses an instruction because not correctly drawn, it is his duty to give to the jury the appropriate instruction on the same hypothesis.[6] Where the court has allowed *evidentiary matters to be detailed to the jury by counsel in argument*, against the objection of the opposite party, it has been held in one State,[7] and said in another,[8] that the rule that the court is not bound to charge unless requested, has no application, but the court is bound, without special request, to advise the jury that such matters are not to be regarded as evidence.[9]

[1] Com *v.* Kneeland, 20 Pick. 206, 222.

[2] Hodge *v.* State, 85 Ind. 561; Burgett *v.* Burgett, 43 Ind. 78; Jones *v.* Hathaway, 77 Ind. 14; Rollins *v.* State, 62 Ind. 46; Blacketer *v.* House, 67 Ind. 414; Bissot *v.* State, 53 Ind. 408; Fisher *v.* State, 77 Ind. 42; Adams *v.* State, 65 Ind. 565; Powers *v.* State, 87 Ind. 144, 153. In the case last cited it is held that the rule is not changed by § 1823 of the Revised Statutes of 1881.

[3] Laug *v.* State (Tenn.), 1 S. W. Rep. 319.

[4] State *v.* Nadal, 8 Crim. Law Mag. 730.

[5] State *v.* Matthews, 20 Mo. 55; State *v.* Stonum, 62 Mo. 596; State *v.* Palmer, 88 Mo. 568; State *v.* Banks, 73 Mo. 592 (Norton, C. J., dissenting).

[6] State *v.* Jones, 61 Mo. 232.

[7] Yoe *v.* People, 49 Ill. 410, 412.

[8] People *v.* Wheeler, 60 Cal. 581, 589.

[9] Compare People *v.* Taylor, 59 Cal. 640; Harvey *v.* State, 40 Cal. 516. See *ante*, §§ 265, 951, 960, 961.

§ 2340. RULE UNDER TEXAS STATUTE.—In Texas, in cases of felony, the judge must charge the jury, and must "distinctly set forth the law applicable to the case; whether asked or not."[1] "But in criminal actions for misdemeanors the court is not required to charge the jury, except at the request of the counsel on either side; but, when so requested, shall give or refuse such charges, with or without modification, as are asked, in writing."[2] This written charge "shall be certified by the judge and filed among the papers in the case, and shall constitute a part of the record of the cause."[3] The above provision, in respect of cases of felony, is *mandatory*, and, in such cases, the judge is obliged to instruct the jury upon all the *defensive hypotheses* raised by the evidence, whether requested to do so or not.[4] In such cases "a defendant is entitled to a distinct and affirmative, and not merely an implied or negative, presentation of the issues which arise upon his evidence, in order to prevent the jury from ignoring his defense, and to conduct them to a proper verdict if they find his evidence to be true. However improbable his evidence may seem, it is his right to have the jury determine its truth or falsity in the first instance, without being forestalled by the court."[5] - - - - Thus, the failure to give instructions requested, on a hypothesis presented of the defendant's evidence which will reduce the offense to a *lower grade* is error.[6] - - - - So, where the evidence in a murder trial fairly presents the issue whether the killing was done in *self-defense*, or in the defense of another, it is the duty of the court, under the above statute, of its own motion, to explain to the jury the law relating thereto fully and correctly, in all the phases presented by the evidence.[7] In such a case, it has been held error to omit to charge that the defendant, if unlawfully attacked by the deceased, is not bound to retreat, in order to avoid the necessity of killing him.[8] "This," says Willson, J., "is a very material part of the law of

[1] Tex. Code Crim. Proc., art. 677.

[2] Texas Code Crim. Proc., art. 681.

[3] Tex. Code Crim. Proc., art. 680.

[4] Jenkins *v.* State, 1 Tex. App. 346; Fulcher *v.* State, 41 Tex. 233; Sanders *v.* State, 41 Tex. 307.

[5] Reynolds *v.* State, 8 Tex. App. 412; Greta *v.* State, 9 Tex. App. 429; Jackson *v.* State, 15 Tex. App. 84; Kenneda *v.* State, 16 Tex. App. 258; White *v.* State, 18 Tex. App. 57, 63; Bell *v.* State, 21 Tex. App. 270.

[6] Lewis *v.* State, 18 Tex. App. 116.

[7] Ashworth *v.* State, 19 Tex. App. 182, 195; King *v.* State, 13 Tex. App. 277; Edwards *v.* State, 5 Tex. App. 593; Guffee *v.* State, 8 Tex. App. 187; North *v.* State, 12 Tex. App. 111; Sterling *v.* State, 15 Tex. App. 249.

[8] Bell *v.* State, 17 Tex. App. 538, 550; Williams *v.* State, 14 Tex. App. 102, 113; Tex. Pen. Code, art. 573.

self-defense, and is a statutory innovation upon the common law and upon the common view of what constitutes self-defense. The common law required the assailed party to retreat to the wall; and this requirement, while it no longer exists as the law of this State, is still believed by many who are unlearned in the law to be in force. In all cases, therefore, where the issue of self-defense arises from the evidence, the jury should be instructed that the assailed party is not bound to retreat in order to make perfect his right of self-defense. And when the evidence presents the issue of self-defense, the law, and *all* the law applicable to the issue, as made by the evidence, should be given in charge to the jury, whether requested or not."[1] When the court omits to do this it is error, and *if excepted* to at the time of the trial, the conviction will necessarily be set aside. But if the error be not excepted to, but be brought to the attention of the trial court for the first time in a motion for a new trial, it will not be cause for reversal, unless it appear to the appellate court that the defendant's rights have probably been injured thereby.[2] - - - - So, in the case of aggravated assault, a charge which omits the elements of *intent* is, in that State, fundamentally erroneous, if excepted to at the time.[3] - - - - Again, *where* insanity is set up as a defense to a criminal charge, and there is substantial evidence tending to establish it, it will be error and ground of reversal, that the court nowhere in its charge substantially gave the jury a direct, positive and affirmative instruction upon insanity as a defense to crime, and nowhere admonished them, as declared by statute,[4] in that State, that "no act done in a state of insanity can be punished as an offense."[5] - - - - So, in a prosecution for burglary, where the evidence tended to show that the defendant had broken open the blacksmith shop of the prosecuting witness and had taken therefrom a tool to be used in committing a burglary in the adjacent storehouse of another proprietor, because the court did not admonish the jury that, if the defendant obtained the tool not for the purpose of permanently depriving its owner of his property in it,[6] but for the mere

[1] Bell *v.* State, *supra;* Edwards *v.* State, 5 Tex. App. 593, King *v.* State, 13 Tex. App. 277.

[2] Bell *v.* State, 17 Tex. App. 538, 551; Gilly *v.* State, 15 Tex. App. 287, 302; Bishop *v.* State, 43 Tex. 390; Tex. Code Crim. Proc., art. 685.

[3] Crawford *v.* State, 21 Tex. App. 454.

[4] Tex. Penal Code, art. 39.

[5] Smith *v.* State, 19 Tex. App. 96, 111.

[6] That this element is necessary in order to constitute a larceny, see: 1 Whart. Crim. Law, 8th edition, 883; Johnson *v.* State, 36 Tex. 375; Blackburn *v.* State, 44 Tex. 457; Loza *v.* State, 1 Tex. App. 488; State *v.* Sher-

purpose of using it temporarily, he was not guilty, a conviction was reversed.[1] - - - - But the court is not bound, unless requested, to charge the law of *circumstantial evidence*, except in cases in which the inculpatory evidence is wholly circumstantial. [2] - - - - The doubtful policy of mandatory statutes of this kind will readily occur to every mind. The mere *forgetfulness of the judge* to instruct the jury as to the law relating to some defensive hypothesis furnished by the evidence of the accused, or as to the law furnished by the evidence for the State, will work a reversal, although the failure so to instruct the jury may have had no influence whatever on the merits. The doubtful policy of such a principle is found in the numerous reversals which have taken place in Texas, where it is upheld with its greatest strictness, for mere non-direction, in cases where able counsel have sat by and intentionally omitted to call the attention of the judge to the matter in respect of which the instruction should have been given. In a recent case in Indiana, it was well said by Zollers, J. "The position seems to be that if, by oversight, mistake or accident, any point is omitted by the court in its instructions the omission is fatal, whether the attention of the court may have been called to the matter or not; in other words, that the party and his counsel, knowing that the court is omitting to instruct the jury upon some point in the case, may remain quiet, and, without asking for further instructions, procure a reversal of the judgment on account of such omissions. Such a practice would be wrong in theory and mischievous in results."[3] There may be good reason for such a rule, where the prisoner is not assisted by counsel, or where there is reason to believe, on an inspection of the record, that the jury have made a mistake in matter of law; but in other cases its results must be mischievous rather than salutory.

§ 2341. Specific Instructions must be Asked for. — It is, then, a general rule of procedure, subject, in this country, to a few statutory innovations, that, mere *non-direction*, partial or total, is not ground of new trial, unless specific instructions, good

mer, 55 Mo. 83; Hart *v.* State, 57 Ind. 102; State *v.* Hawkins, 8 Porter (Ala.), 461; Phelps *v.* People, 55 Ill. 334; State *v.* Scott, 64 N. C. 586; Fields *v.* State, 6 Cold. (Tenn.) 52. In Rex *v.* Crump, 1 Carr. & P. 658, it was held that if a person stealing other property take a horse, not with intent to steal it, but only to get off more conveniently with the other property, such taking of the horse is not a felony.

[1] Wilson *v.* State, 18 Tex. App. 270.

[2] Jack *v.* State, 20 Tex. App. 656; House *v.* State, 19 Tex. App. 227, 229.

[3] Powers *v.* State, 87 Ind. 144, 153.

in point of law and appropriate to the evidence, were requested and refused. A party cannot, by merely excepting to a charge, make it the foundation for an assignment of error, that it is indefinite or incomplete.[1] The rule rests upon the soundest foun-

[1] Rozar *v.* Burns, 13 Ga. 34; Hatch *v.* Spearin, 11 Me. 354; Hall *v.* Weir, 1 Allen (Mass.), 261; Burns *v.* Sutherland, 7 Pa. St. 103; Taft *v.* Wildman, 15 Ohio, 123; Farquhar *v.* Dallas, 20 Texas, 200; Seigle *v.* Louderbaugh, 5 Pa. St. 490; Crail *v.* Crail, 6 Pa. St. 480; Davis *v.* Elliott, 15 Gray (Mass.), 90; State *v.* O'Neal, 7 Ired. L. (N. C.) 251; Ward *v.* Herrin, 4 Jones L. (N. C.) 23; Chamberlain *v.* Porter, 9 Minn. 260; Zabriskie *v.* Smith, 13 N. Y. 322; Parsons *v.* Brown, 15 Barb. (N. Y.) 590; Jones *v.* State, 20 Ohio, 34: Cato *v.* State, 9 Fla. 163; Carter *v.* Bennett, 4 Fla. 284; Bynum *v.* Bynum, 11 Ired. L. (N. C.) 632; Coates *v.* Sangston, 5 Md. 121: Bain *v.* Doran, 54 Pa. St. 124; Dewees *v.* Hudgeons, 1 Texas, 192; Linn *v.* Wright, 18 Texas, 317; Moore *v.* Ross, 11 N. H. 547; Castle *v.* Bullard, 23 How. (U. S.) 172, 189; Kent *v.* Tyson, 20 N. H. 121; Fisher *v.* Filbert, 6 Pa. St. 61; State *v.* Straw, 33 Me. 554; Averett *v.* Brady, 20 Ga. 523; Tomlinson *v.* Wallace, 16 Wis. 224, 235; Boykin *v.* Perry, 4 Jones L. (N. C.) 325; State *v.* Scott, 2 Dev. & Batt. (N. C.) 35; McNiell *v.* Massey, 3 Hawks (N. C.), 91; State *v.* Morris, 3 Hawks (N. C.), 388; Express Co. *v.* Kountze, 8 Wall. (U. S.) 342, 353; Pennock *v.* Dialogue, 2 Pet. (U. S.) 1 (affirming *s. c.* 4 Wash. C. C. (U. S.) 538); Seabury *v.* Field, 1 McAll. (U. S.) 60; United States *v.* Fourteen Packages, Gilp. (U. S.) 235; Eiland *v.* State, 52 Ala. 322; Koehler *v.* Wilson, 40 Iowa, 183; Miller *v.* Bryan, 3 Iowa, 58; Ault *v.* Sloan, 4 Iowa, 508; Madsden *v.* Phœnix Fire Ins. Co., 1 S. C. 24; Herbert *v.* Huie, 1 Ala. 18; State *v.* Scott, 12 La. Ann. 386; Fisher *v.* Larick, 7 Serg. & R. (Pa.) 991; Stokes *v.* Burrell, 3 Grant Cas. (Pa.) 241; Kauffman *v.* Griesemer, 26 Pa. St. 467; State *v.* Phinney, 42 Me. 384, 390; Dows *v.* Rush, 28 Barb. (N. Y.) 157; Swallow *v.* State, 22 Ala. 20; Ross *v.* Ross, 21 Ala. 322; Aitkin *v.* Young, 12 Pa. St. 15; Earle *v.* Thomas, 14 Texas, 583, 593; Street *v.* Lynch, 38 Ga. 631; Behymer *v.* State, 95 Ind. 140; Powers *v.* State, 87 Ind. 144; Ireland *v.* Emmerson, 93 Ind. 1, 6; Jones *v.* Hathaway, 77 Ind. 14; Taggart *v.* McKinney, 85 Ind. 392, 396; Wilson *v.* Trafalgar &c. Co., 93 Ind. 287, 291; Dyer *v.* Dyer, 87 Ind. 13; Bissot *v.* State, 53 Ind. 408; Hodge *v.* State, 85 Ind. 561; Fitzgerald *v.* Goff, 99 Ind. 28, 40; Sioux City &c. R. Co. *v.* Finlayson, 16 Neb. 578; Burlington &c. R. Co. *v.* Schluntz, 14 Neb. 421, 425; Sioux City &c. R. Co. *v.* Brown, 13 Neb. 317; Ott *v.* Oyer, 106 Pa. St. 7; Horlor *v.* Carpenter, 27 L. J. (C. P.) 1; Morgan *v.* Couchman, 14 C. B. 100; *s. c.* 23 L. J. (C. P.) 36; Martin *v.* Great Northern R. Co., 16 C. B. 179; *s. c.* 1 Jur. (N. S.) 613; 24 L. J. (C. P.) 209; Tenney *v.* Butler, 32 Me. 269; Stowell *v.* Goodenow, 31 Me. 538. The English rule seems to be that non-direction, where specific direction is not requested, is no ground of new trial, unless it produce a verdict against the evidence. Ford *v.* Lacey, 30 L. J. (Exch.) 351; *s. c.* 7 Jur. (N. S.) 684; Great Western R. Co. *v.* Braid, 1 Moore, P. C. Cas. (N. S.) 101; *s. c.* 9 Jur. (N. S.) 339; 11 Week. Rep. 444; 8 L. T. (N. S.) 31.

dation. The facts of the case come to the mind of the judge as matters of first impression, and it will often be extremely difficult for him, in the short time allowed for a trial before a jury, and in the midst of such a trial, to prepare a series of instructions applicable to all the hypotheses presented by the evidence. On the other hand, counsel are presumed to have studied their case beforehand; to come to the court with a fair understanding of the facts which will probably be proved, and with a full knowledge of the law applicable to those facts. It is, therefore, their duty to give attention to the charge of the judge, and if, in their opinion, it omits to give direction as to the law applicable to any essential feature of the evidence, to call his attention to the omission and to request appropriate suppletory instructions; and where they fail thus to call his attention to something which he may fairly be supposed to have omitted from inadvertence, they ought not to be allowed to complain of the omission in an appellate court. A rule which would allow them to do so would be extremely inconvenient. It would multiply new trials and reversals, and often on grounds which have no connection whatever with the merits.

§ 2342. THE SAME RULE WHERE THE JUDGE ANSWERS POINTS, AS IN PENNSYLVANIA. — Where counsel put a point to the judge under the practice in Pennsylvania, and he answers it, and his answer contains erroneous statements of fact, it is the duty of the counsel to call the attention of the court to the error, or he cannot make it the ground of exception in the Supreme Court.[1] Where a party has submitted no points, nor asked for any instructions, he will not be heard to complain that the judge did not fully instruct the jury.[2] So, an omission to instruct the jury upon all the lines of defense assumed in a trial, is not sufficient cause to reverse the judgment, unless the opinion of the judge were specifically called for.[3]

§ 2343. MISSISSIPPI: RULE THAT THE JUDGE IS NOT AUTHORIZED TO INSTRUCT THE JURY EXCEPT UPON REQUEST. — From the rule which ob-

[1] Levers *v.* Van Buskirk, 4 Pa. St. 309.

[2] Wertz *v.* May, 21 Pa. St. 274.

[3] Fisher *v.* Filbert, 6 Pa. St. 61, 69. To the same effect in substance, see Wood *v.* Figard, 28 Pa. St. 403.

liges the judge in criminal cases to charge the jury upon every essential feature of the evidence, at the peril of having to try the cause over again,[1] the pendulum swings back to a statutory rule enacted in Mississippi,[2] which, as judicially interpreted, is, that the judge is not authorized to instruct the jury except upon request,[3] and then *only* upon contested questions of law applicable to the issues, and that if, on his own motion, and without being requested distinctly in writing he charges the jury, it will be error for which a conviction will be reversed, although the matter of the instruction be strictly legal and applicable to the issue.[4]

§ 2344. Illinois: Judge may give Instructions of his own Motion. — The statute of Illinois,[5] requiring instructions to be in writing, prescribing the manner in which they shall be given or refused, and prohibiting the judge from qualifying, modifying or explaining them, does not prohibit him from giving such instructions, as to the law of the case, as he thinks proper, without request, provided they are given in writing.[6]

§ 2345. Summing up the Evidence. — In England, in the Federal courts, and in the courts of some of the States, it is the custom for the judge to take notes, and, after counsel have completed their argument, to sum up the evidence to the jury. "When the evidence," says Blackstone, "is gone through on both sides, the judge, in the presence of the parties, the counsel and all others, sums up the whole to the jury; omitting the superfluous circumstances, observing wherein the main question and principal issue lies, stating what evidence has been given to support it, with such remarks as he thinks necessary for their direction, and giving them his opinion in matters of law arising upon that evidence."[7] This practice is distinctly continued under some American constitutions and statutes,[8] which provide

[1] *Ante*, § 2340.

[2] Miss. Code 1871, § 643; 1880, § 1714.

[3] Edwards *v.* State, 47 Miss. 581, 589.

[4] Williams *v.* State, 32 Miss. 389, 397. It is difficult to see how criminal justice can be administered with safety to the rights of society where such juridical nonsense prevails.

[5] Ill. Act Feb. 25th, 1847, p. 63, §§ 1, 2, 3.

[6] Brown *v.* People, 9 Ill. 439.

[7] 3 Bla. Com. 375.

[8] *Ante*, § 2280.

that the judge may "state the testimony," but by others it is distinctly prohibited.[1] On the other hand, under the common law system of jury trial, the judge is not bound to render this assistance to the jury, even upon request; whether he will do so or not is a matter resting in his *discretion*, which discretion, it has been justly observed, he will not exercise by refusing this aid to the jury, in cases where it is really required.[2] On the other hand, if he sums up the evidence, *he must fairly present all its material elements to the jury.* He must array before them all the material elements on both sides. He must not single out isolated parts of the testimony, and instruct the jury as to the law arising on the facts which such testimony tends to prove,[3] and he must be careful not to give undue prominence to certain portions of it;[4] especially he ought not to review only those facts which have a tendency to establish one side of the case.[5] "To sum up means, *ex vi termini*, to present *all* the proof to the consideration of the jury; and unless this is done, it had better be omitted altogether."[6] It is obviously wrong for him to single out an isolated fact, and express himself strongly upon it. It is well calculated to distort its importance in the estimation of the jury, and to concentrate their attention too intensely upon it, to the undervaluing of the rest of the evidence.[7] But these statements must be taken in subordination to another rule, which is, that the mere omission to direct the attention of the jury to some material portion of the testimony, will not, where the whole summing up is not grossly negligent or partial, be ground of error, unless counsel direct the attention of the judge to the omitted portion, and request him to make his summing up more full.[8]

[1] Miss. Code 1871, § 643; *ante*, § 2280. The statute of Georgia, already considered, has been construed as not having this effect. Shiels *v.* Stark, 14 Ga. 429. Compare Green *v.* State, 43 Ga. 368. In Virginia, the practice does not obtain — "a course," says Judge Tucker, "which would probably be deemed, with us, an invasion of the jury trial." Tucker Comm. 299.

[2] State *v.* Morris, 3 Hawks (N. C.), 390.

[3] *Ante*, § 2330.

[4] *Ante*, § 2331.

[5] Parker *v.* Donaldson, 6 Watts & S. (Pa.) 132.

[6] Lumpkin, J., in Johnson *v.* Kinsey, 7 Ga. 428, 431.

[7] *Ibid.*

[8] McNeill *v.* Massey, 3 Hawks (N. C.), 91, 100.

This is analogous to the proposition that mere *non-direction* on matters of law is not ground of error, unless specific instructions are requested.[1]

§ **2346. Distinction between Non-direction and Misdirection.** — In general, then, while misdirection is error, non-direction is not. But it will be often difficult in practice to distinguish between misdirection and non-direction. It has been reasoned that, if there is a mere tendency in the charge to mislead the jury the defendant must ask additional explanatory instructions, in order to avail himself of its defectiveness in a court of error; but where it *necessarily* and actually misleads the jury, it is a fatal error.[2] But where the charge is couched in such *general terms* as leave it doubtful whether the jury understand its application to the evidence,[3] or though right in the abstract, may require modification by reason of something peculiar to the situation of the parties, which has escaped the attention of the judge; [4] or where evidence, competent and material when received, becomes by a turn in the case, incompetent and immaterial; and no request is made to instruct the jury to disregard it; [5] or where, in a controversy touching the title to land, the judge charges the jury that the question depends mainly upon *notice*, without explaining to them what amounts to notice; [6] or where, in an action for malicious prosecution, the judge submits to the jury the question whether there was or was not *probable cause* upon a general instruction, merely telling them what probable cause is; [7] or where, on the trial of an indictment for an *assault with intent to murder*, the court directs the jury as to the form of their verdict in case of conviction, but omits to inform them that they may bring in a verdict for a *lower grade* of the offense; [8] in these, and in many like cases, there is no ground of error, unless the appropriate

[1] *Ante*, § 2341.

[2] Kenan *v.* Holloway, 16 Ala. 53.

[3] Bast *v.* Alford, 20 Tex. 226. To the same effect, see Casky *v.* Haviland, 13 Ala. 314; Ivey *v.* Owens, 28 Ala. 642; Warner *v.* Dunnavan, 23 Ill. 380; Sharp *v.* Burns, 35 Ala. 653.

[4] State *v.* Phinney, 42 Me. 384, 390.

[5] Aitkin *v.* Young, 12 Pa. St. 15.

[6] Street *v.* Lynch, 38 Ga. 631.

[7] Humphries *v.* Parker, 52 Me. 502, 505; *ante*, §§ 1613, 1614.

[8] Dunn *v.* People, 109 Ill. 635.

complementary instruction was requested and refused. Within the meaning of this rule, it is not a ground of new trial that the instructions were *indefinite* on some particular element of the case, provided more definite instructions were not requested and refused;[1] though, as elsewhere seen, some courts have gone so far as to reverse judgments because instructions were not sufficiently pointed and definite.[2]

§ 2347. Right to Appropriate Instructions on Request. — The trial court is bound to give instructions, properly drawn, correct in point of law and applicable to the evidence, in all cases when requested by a party, except (1) when the matter of the instruction requested is sufficiently covered by instructions already or thereafter given;[3] (2) when the request for the instruction comes too late;[4] or (3) when the state of the evidence is such that there is no case to be submitted to the jury.[5] With these exceptions, the refusal of appropriate instructions upon request is the subject of exception and review upon error, or appeal in the nature of a writ of error.[6] But, where the jury are to find the facts simply in the form of a *special verdict*, without reference to their legal bearings, it is not a case which calls for general instructions as to the law, and it is not error to refuse such instructions; since they would be nugatory and misleading, as the jury in such a case are not charged with the office of applying the law to the facts.[7]

[1] Emerson *v.* Hogg. 2 Blatchf. (U. S.) 1, 18; Smith *v.* Carrington, 4 Cranch (U. S.), 62; Carver *v.* Jackson, 4 Pet. (U. S.) 1; Norman *v.* Wells, 17 Wend. (N. Y.) 136; Stafford *v.* Bacon, 1 Hill (N. Y.), 532, 537.

[2] *Ante*, § 2325.

[3] *Post*, § 2352.

[4] Chapman *v.* McCormick, 86 N. Y. 479, 482.

[5] People *v.* Gray, 5 Wend. (N. Y.) 289; *ante*, § 2245.

[6] Chapman *v.* McCormick, 86 N. Y. 479, 482; Zabriskie *v.* Smith, 13 N. Y. 322; Foster *v.* People, 50 N. Y. 598, 601; Pennock *v.* Dialogue, 2 Pet. (U. S.) 15; Sailer *v.* Barnousky, 60 Wis. 169; Campbell *v.* Campbell, 54 Wis. 90, 98; Kendrick *v.* Cisco, 77 Tenn. (13 Lea) 248, 251; State *v.* Partlow, 90 Mo. 608; *s. c.* 4 S.W. Rep. 14; Souther *v.* State, 18 Tex. App. 352.

[7] Indianapolis &c. R. Co. *v.* Bush, 101 Ind. 583, 587. In Wisconsin it is ruled that, where a special verdict is demanded, the trial court may, in its discretion, limit its instructions to such matters as are necessarily involved in the questions submitted; and the instructions as to such mat-

§ 2348. Illustrations. — Thus, in an action for *malicious prosecution*, either party, upon request, is entitled to a direct and specific instruction from the presiding judge as to whether the alleged facts set up in the defense, if proved, do or do not show a want of probable cause,[1] in pursuance of a rule elsewhere explained,[2] that probable cause is a question of law for the court. Accordingly it has been held error to refuse to instruct the jury as follows: "If the defendants instituted suit against plaintiffs in good faith, without malice, and with no other motive than to recover a debt which they honestly believed was due by plaintiffs, then plaintiffs cannot recover." [3] On the other hand, it has been held error to instruct the jury that, "if the defendants did not sue out the attachment with malice, or from a disposition to vex and harass the plaintiff, but honestly believed that they had reasonable and probable cause to sue out the attachment, then the plaintiff was not entitled to recover;" [4] the principle being, as held in Massachusetts, that "no action lies for one whose property has been attached, and who has suffered much damage in consequence of a civil suit, which was abated, unless the prosecution of such suit were malicious." [5] In Texas, where, as elsewhere seen,[6] peculiar rules exist on the subject of instructions in criminal cases, it has been held, in a prosecution for murder, where the issue under the evidence, was, whether or not the facts tended to show that the deceased and the defendant's wife were "taken in the act of adultery," within the meaning of a statute [7] which makes a killing under such circumstances justifiable, the jury should be correctly instructed as to the meaning of the expression "taken in the act of adultery;" a failure so to instruct them was held fatal, although the charge was not excepted to, the defendant's counsel having tendered special instructions which supplied the omissions in the general charge in this respect.[8]

§ **2349. When Properly Refused.** — To entitle the instruction to be given it must be *wholly correct in point of law*.[9]

ters should be given in connection with the instructions, and not as general instructions in the case. Burns *v.* North Chicago Rolling Mills Co., 60 Wis. 541.

[1] Humphries *v.* Parker, 52 Me. 502, 505; Pullen *v.* Glidden, 68 Me. 559, 567.

[2] *Ante*, §§ 1613, 1630.

[3] Gonzales *v.* Gobliner, 68 Cal. 151.

[4] Benson *v.* McCoy, 36 Ala. 716.

[5] Lindsay *v.* Larned, 17 Mass. 190.

[6] *Ante*, § 2340.

[7] Tex. Penal Code, art. 567.

[8] Price *v.* State, 18 Tex. App. 474.

[9] Grand Trunk R. Co. *v.* Latham, 63 Me. 177; Snow *v.* Penobscot River Ice Co., 77 Me. 55.

Where a series of instructions is asked for in the aggregate, and there is any single proposition in the series which is objectionable, the court may, for that reason, refuse to give the whole, and the refusal will be no ground of error.[1] Such a refusal will generally be upheld in respect of requests which are lacking in *definiteness and precision*.[2] "When instructions are asked, they should be precise and certain to a particular intent, that the point intended to be raised may be distinctly seen by the court, and that error, if one be made, may be distinctly assigned."[3] If instructions which he is asked to give cannot properly be given *without being modified*, he may, for that reason, refuse to give them.[4] If, therefore, the request embraces several distinct propositions, one of which is wrong, the judge may, for this reason, reject the whole.[5] This is especially so where the request is long. A judge cannot be called upon to dissect a *long request*, presented, perhaps for the first time, when submitting a case to the jury, and select the sound from the unsound, giving the former to the jury, and rejecting the latter. He may properly refuse to give such requests altogether.[6] It is error for the court to refuse to give instructions which, imperfect in themselves, *require to be qualified by the instructions given for the opposite party*. It is obviously asking too much of the intelligence of a jury, to expect them to take instructions given for one party, and piece them out with instructions given for the opposite party, and make out of the patchwork a consistent and

[1] Indianapolis &c. R. Co. *v.* Horst, 93 U. S. 291, 295; Harvey *v.* Tyler, 2 Wall. (U. S.) 328, 338.

[2] *Ante*, § 2325.

[3] United States *v.* Bank of Metropolis, 15 Pet. (U. S.) 377, 406, per Mr. Justice Wayne. To the same effect are Gas Co. *v.* Wheeling, 8 W. Va. 323; McKinney *v.* Snyder, 78 Pa. St. 497; Hocum *v.* Weitherick, 22 Minn. 152; Van Vechten, *v.* Griffiths, 4 Abb. App. (N. Y.) 487. See also Pendleton Street R. Co. *v.* Stallman, 22 Ohio St. 1; Cook *v.* Duvall, 9 Gill (Md.), 460.

[4] Bevan *v.* Hayden, 13 Iowa, 122, 127; Grimes *v.* Martin, 10 Iowa, 347; Carpenter *v.* Stillwell, 11 N. Y. 61, 79; Lucas *v.* Brooks, 18 Wall. (U. S.) 436; Hodges *v.* Cooper, 43 N. Y. 216; Goodwin *v.* State, 96 Ind. 550, 566, and cases cited; Ricketts *v.* Harvey, 106 Ind. 564; Lawrence *v.* State, 20 Tex. App. 536, 542; Garlick *v.* Bowers, 66 Cal. 122.

[5] Fuller *v.* Coates, 18 Ohio St. 343, 352.

[6] Bryant *v.* Crosby, 40 Me. 9, 19.

intelligent whole. On the contrary, the rule is, that each party, in submitting instructions to the court, shall see that they are proper in themselves. This is particularly so where the instructions given for the opposite party are numerous and complicated.[1] And, generally, it is proper to refuse requests which are so drawn that, in the state of the evidence, they would be more likely to mislead than to instruct the jury.[2]

§ 2350. Modifying Instructions Requested. — Unless there is a statute such as those elsewhere considered, requiring the judge in all cases to give or refuse instructions in the terms in which they are presented to him,[3] it is his right and duty, if they do not conform to his view of the law, to modify them so that they shall state the law correctly, as he understands it, and to give them to the jury as thus modified.[4] "It is very clear," says Mr. Justice Story, "that the court are not bound to give instructions in the terms required by either party; but it is sufficient if so much thereof are given as are applicable to the evidence before the jury, and the merits of the case, as presented by the parties."[5] In a case at circuit, the same learned justice declared the rule in the following manner: "The court is never bound to give an instruction to a jury upon a point of law, even when pertinent and relevant to the facts of the case, precisely in the form and manner in which it is put by counsel; for that may sometimes have a tendency to mislead the jury, and withdraw their attention from the merits of the case. All that is the duty of the court is, to give such instructions to the jury in point of law, as clearly arise upon the evidence, and are proper for the consideration of the jury, upon the issue before them, in such terms and in such a manner as shall comport with the real merits

[1] Gregory *v.* Ford, 5 B. Mon. (Ky.) 473.

[2] Baxter *v.* The People, 8 Ill. 380; Dwyer *v.* Bassett, 63 Tex. 275.

[3] *Post*, §§ 2384, 2397.

[4] Castle *v.* Bullard, 23 How. (U. S.) 172, 190; Pleak *v.* Chambers, 7 B. Mon. (Ky.) 565, 569; Dodge *v.* Rogers, 9 Minn. 223; Horton *v.* Williams, 21 Minn. 187, 192; Chicago &c. R. Co. *v.* Avery, 109 Ill. 314. So by statute in Texas: Tex. Code Crim. Proc., art. 679.

[5] Clymer *v.* Dawkings, 3 How. (U. S.) 674, 688.

and justice of the case, and enable the jury to give a proper verdict in point of law. Having done this, the court has discharged its entire duty, and is not bound to respond to instructions asked which are of a more general form, or of an abstract nature, or are not necessary for a just decision of the cause."[1] But the judge ought not, after having given an instruction in the terms of the request, to weaken its force by language of his own, the effect of which must be to leave the jury in doubt whether it was given or refused.[2] The foregoing rules will not apply in cases where the statute requires the judge to charge the jury on all the essential features of the case, of his own motion and without request. Such a statute, as elsewhere seen,[3] exists in Texas, in cases of felony; and in that jurisdiction it has been held that, in a prosecution for *larceny*, it is the duty of the court to charge upon the *standard of value*, which is the market value of the article, if it have such value, and, if not, the amount it would cost to replace it; and where there is a request for an instruction upon the subject of value in such a prosecution, which, though not properly embodying the law, yet serves to *call the attention of the trial court to its omission* to charge the jury upon this element of the case, its failure so to charge them will be error.[4]

§ 2351. Judge may Instruct wholly in his own Language.— So, in the absence of statutes providing otherwise, the judge is at liberty to disregard the requests for instructions which have been made, and to instruct the jury wholly in his own language;[5] and if he has thus fully instructed them upon all the elements of the case, he is not bound to give additional instructions.[6] A party has no just ground of complaint where, although his instructions have been refused, the court embraced them in its charge, so far

[1] Pitts *v.* Whitman, 2 Story C. C. (U. S.) 609, 620.

[2] Horton *v.* Williams, 21 Minn. 187.

[3] *Ante*, § 2340.

[4] Martinez *v.* State, 16 Tex. App. 122. This principle was recognized in Saddler *v.* State, 20 Tex. App. 195, where an instruction upon the subject of value was held to be correct.

[5] State *v.* Ott, 49 Mo. 326; Harman *v.* Shotwell, 49 Mo. 423. It is now so provided by statute in Missouri. 1 R. S. 1879, § 3655.

[6] *Infra*, next section.

as they stated correct propositions of law.[1] But it has been said that, in framing his instructions, it is the duty of the judge to use, when possible, the precise words contained in the requests furnished by counsel.[2]

§ 2352. Refusing Requests Covered by Instructions Given.— It is not error for the judge to refuse requests for instructions upon propositions which have elsewhere been sufficiently covered, either in his general charge or in other special instructions given; and it is a principle upon which appellate courts uniformly act, that the judgment will not be reversed for the refusal of instructions, if the court can see that the case was placed fully, fairly and properly before the jury by the instructions which were given, although the requests refused may have been correctly drawn, in point of law and in their applications to the evidence.[3]

[1] Bixby *v.* Carskaddon, 70 Ia. 726; *s. c.* 29 N. W. Rep. 626.

[2] Cook *v.* Brown (Mich.), 29 N. W. Rep. 46.

[3] State *v.* Floyd, 15 Mo. 349; Phillips *v.* Smoot, 15 Mo. 598; State *v.* Miller, 67 Mo. 604; White *v.* Graves, 68 Mo. 219; Rickey *v.* Zeppenfeldt, 64 Mo. 277; Rogers *v.* McCune, 19 Mo. 557; Kitchen *v.* Cape Girardeau &c. R. Co., 59 Mo. 514; State *v.* Harris, 59 Mo. 550; Potter *v.* McPherson, 61 Mo. 240; Miller *v.* Tillman, 61 Mo. 316; Powell *v.* Camp, 60 Mo. 569; Carroll *v.* Paul, 19 Mo. 102; Kelly *v.* Jackson, 6 Pet. (U. S.) 622, 628; Mason *v.* Poulson, 43 Md. 162; Laber *v.* Cooper, 7 Wall. (U. S.) 565; Indianapolis &c. R. Co. *v.* Horst, 93 U. S. 291, 295; Jones *v.* Jones, 71 Ill. 562; Crisman *v.* McDonald, 28 Ark. 9; Miller *v.* Drake, 62 Mo. 544, 548; Bay *v.* Sullivan, 30 Mo. 191; Gonsolis *v.* Gearhart, 31 Mo. 585; Martin *v.* Smylee, 55 Mo. 577; Meyers *v.* Chicago &c. R. Co., 59 Mo. 223; Bradley *v.* West, 60 Mo. 59; Wilson *v.* Kansas City &c. R. Co., 60 Mo. 184; Clymer *v.* Dawkins, 3 How. (U. S.) 674, 688; Owens *v.* Hannibal &c. R. Co., 58 Mo. 386; Railway Co. *v.* Whitton, 13 Wall. (U. S.) 270; Scott *v.* Lloyd, Pet. 9 (U. S.) 418, 460; Leache *v.* State, 22 Tex. App. 279; *s. c.* 3 S. W. Rep. 539; People *v.* Gray, 66 Cal. 271; Bullard *v.* Stone, 67 Cal. 477; Conner *v.* State, 17 Tex. App. 1; Moore *v.* State, 20 Tex. App. 233; People *v.* Turner, 65 Cal. 540; Harvey *v.* State, 40 Ind. 516; Graham *v.* Nowlin, 54 Ind. 389; Wachstetter *v.* State, 99 Ind. 290, 294; People *v.* McDowell, 64 Cal. 467; State ex rel. *v.* St. Louis Brokerage Co., 85 Mo. 411; Holdridge *v.* Cubbedge, 71 Ga. 254; Harris *v.* Lee, 80 Mo. 420. See also Palmer *v.* Railroad Co., 76 Mo. 217; Anthony *v.* Bartholow, 69 Mo. 186; State *v.* King, 44 Mo. 238; Pond *v.* Wyman, 15 Mo. 175; Browne *v.* Fire Ins. Co., 68 Mo. 133; Merchants' Ins. Co. *v.* Hauck, 83 Mo. 21; Wilson *v.* Nations, 5 Yerg. (Tenn.) 211; Thompson *v.* Duff, 119 Ill. 226; Schwinger *v.* Raymond (N. Y.), 11 N.

Nay, where the judge has sufficiently instructed the jury, he should, as a rule of practice, refuse additional instructions; for as elsewhere seen,[1] a multiplicity of instructions, although correct in themselves, tends to confuse and embarrass the jury. It may be that the instruction requested presents the law in a more pointed manner than those which the court has given;[2] but it is sufficient that the jury were properly instructed *in substance*. Counsel cannot, by presenting special requests, *dictate the frame of language* in which instructions shall be given.[3] But "when several forms of expression are equally accurate, it is within the *discretion* of the trial court to choose that form which it deems best adapted to make the rule of law intelligible to common minds."[4] The rule also rests upon the conception "that courts will presume jurors to be men of average intelligence, and capable of understanding and bearing in mind a proposition of law once fully and clearly stated, without its repetition in subsequent instructions."[5]

East. Rep. 952; affirming *s. c.* 35 Hun (N. Y.), 666; State *v.* Partlow, 90 Mo. 608, *s. c.* 4 S. W. Rep. 14; Stephenson *v.* State, 110 Ind. 358; *s. c.* 11 N. East. Rep. 361; Conradt *v.* Clauve, 93 Ind. 476; Indiana Manufg. Co. *v.* Millican, 87 Ind. 87; Barnett *v.* State, 100 Ind. 171; Freeze *v.* De Puy, 57 Ind. 188; Starrett *v.* Burkhalter, 86 Ind. 439; Coryell *v.* Stone, 62 Ind. 307; City of Indianapolis *v.* Murphy, 91 Ind. 382; Bowen *v.* Pollard, 71 Ind. 177; National Benefit Assn. *v.* Grauman, 107 Ind. 288; *s. c.* 7 N. E. Rep. 233; McDermott *v.* State, 89 Ind. 187, 196; Everson *v.* Seller, 105 Ind. 266; *s. c.* 4 N. E. Rep. 854; Koerner *v.* State, 98 Ind. 7, 21; Wade *v.* State, 71 Ind. 535; Fitzgerald *v.* Jerolaman, 10 Ind. 338. It was so held where a "congeries" of instructions, twenty-eight in all, were handed up and the court refused them all. Law *v.* Cross, 1 Black (U. S.), 533. Moreover, the repetition of instructions on particular points is a censurable practice, because as elsewhere seen (*ante*, § 2331), it may tend to give undue prominence to particular features of the evidence. Union Mutual Life Ins. Co. *v.* Buchanan, 100 Ind. 63, 80; citing Goodwin *v.* State, 96 Ind. 550.

[1] *Ante*, § 2333.

[2] Parker *v.* State, 18 Tex. App. 72, 91.

[3] People *v.* Strong, 30 Cal. 151; Clough *v.* State, 7 Neb. 323, 343; Curry *v.* State, 5 Neb. 412. To the same effect, see State *v.* Volmer, 6 Kan. 371; State *v.* Schlagel, 19 Ia. 169.

[4] Com. *v.* Costley, 118 Mass. 1, 25; citing Kelly *v.* Jackson, 6 Pet. (U. S.) 622; Morris *v.* Bowman, 12 Gray (Mass.), 467; Blake *v.* Sawnin, 10 Allen (Mass.), 340; State *v.* Reed, 62 Me. 129.

[5] Union Mutual Life Ins. Co. *v.* Buchanan, 100 Ind. 63, 74; Goodwin *v.* State, 96 Ind. 550; Browning *v.* Hight, 78 Ind. 257; McDonel *v.* State, 90 Ind. 320, 327.

§ 2353. Revoking or Modifying Instructions already Given. As elsewhere seen,[1] it is not generally ground of reversing a judgment that erroneous evidence was admitted, if it was afterwards distinctly withdrawn from the jury by an instruction directing them to disregard it. Upon a similar principle, it has been held that, where an erroneous instruction is given, and the judge, on discovering the error, withdraws it from the jury and gives them the correct instruction in its place, no ground is afforded for reversing the judgment; and this, it seems, may be properly done, at any time before the jury return their verdict.[2] The court has power, at any time during the trial, to modify instructions already given, or give or revoke them entirely, if, upon reflection, he concludes that they are erroneous.[3] Where erroneous instructions are given for one party, the error is not cured by giving for the other party instructions explanatory or contradictory of those first given. The erroneous instruction should be expressly withdrawn from the jury.[4] The reason of this is plain. If the judge, instead of withdrawing the erroneous expression, attempts to explain it away or correct it by another instruction, it results that he gives contradictory or inconsistent instructions to the jury, which, as already seen,[5] is ground of reversing the judgment, since it cannot be known whether the jury followed the correct or erroneous instruction; and it is a most reprehensible practice, for, where it is pursued, whichever party succeeds, the judgment must be reversed if the other party appeals. In respect of the *time* of giving additional corrective instructions, it has been ruled that it is not a ground for a new trial that the judge, after having summed up the cause, instructed the jury, on motion of counsel, upon a point arising out of the facts in the case but not previously suggested, — such course of proceeding being within his discretion. But if the losing party might have produced material evidence on the point in

[1] *Post*, next section; *ante*, § 723.

[2] Booker *v.* State, 76 Ala. 22, 24.

[3] Sittig *v.* Birkestack, 38 Md. 158; Jones *v.* Van Patten, 3 Ind. 107; Hall *v.* State, 8 Ind. 439, 444.

[4] Jones *v.* Talbot, 4 Mo. 279, 285.

[5] *Ante*, § 2326.

case, if it had been earlier presented, he has a remedy by petition for a new trial.[1]

§ 2354. Withdrawing Evidence erroneously admitted. — The prevailing rule is that, where evidence is erroneously admitted, or admitted on a promise to connect it with the other evidence, or to make it relevant by subsequence evidence, which promise is not fulfilled, the error may be cured by withdrawing it by an instruction which admonishes the jury in distinct terms not to regard it in considering their verdict.[2] In respect of the stage of the trial at which such an instruction may be given, it has been held, but upon grounds which are believed to be untenable, that where testimony is offered to go to the jury without objection, and no offer is made to withdraw it from their consideration, it is too late after the argument is closed, to call upon the judge to charge the jury that it was illegally admitted.[3] No reason is perceived why, in order to avoid the necessity for a new trial, such a corrective instruction may not be given, under the principles already stated,[4] at any time before the jury return their verdict. It has been ruled that where there are *two defendants*, if a question and answer, put to a witness, are *competent as to one of the defendants*, they cannot be struck out because they may be incompetent as to the other. In such case the answer must stand, and should be limited to the one defendant by a proper instruction. And in such case, if the party wishes the answer so limited he should ask for such an instruction." [5]

§ 2355. Error of excluding Testimony not cured by an Instruction. — Where the court has erroneously excluded testimony from the jury, of course the error is not cured by giving

[1] Sawyer *v.* Merrill, 6 Pick. (Mass.) 478.

[2] *Ante*, § 723; Davis *v.* Peveler, 65 Mo. 189; Zehner *v.* Kepler, 16 Ind. 290; Indianapolis &c. R. Co. *v.* Bush, 101 Ind. 583, 589; Links *v.* State, 13 Lea (Tenn.), 701.

[3] Harrison *v.* Young, 9 Ga. 359, 366.

[4] *Ante*, §§ 351, 723.

[5] Long *v.* State, 95 Ind. 481, 488; citing Elliott *v.* Russell, 92 Ind. 526.

an instruction based upon the hypothesis which the testimony would have made if admitted.[1]

§ 2356. **Declarations of Law in Chancery Cases.** — In chancery proceedings, as is well known, the judge or chancellor tries the case without a jury, though he may, in his discretion, call in a jury to aid him in the determination of a particular issue of fact. He is not, however, bound by the verdict of the jury in such a case; it is advisory to him, but not conclusive upon him.[2] An appeal, as is also well known, from a final decree in a suit in chancery, carries the entire record to the appellate court, and the case is there re-examined *de novo* on the bill, the answers and the proofs. It is this circumstance which makes the duties of the judges of appellate courts in chancery proceedings so onerous, and their opinions so prolix. In cases at law where a trial by jury is waived, the judge is generally required by statutes regulating the procedure in such cases, to make declarations of law similar to instructions to a jury, so that exceptions may be reserved to his rulings, in the same way as though the case were tried by a jury. But in a chancery proceeding, for the reasons indicated, he is not bound to make such declarations;[3] and if he makes them, they will be disregarded by the Supreme Court.[4] Questions which are thus submitted to juries in chancery cases for the purpose of informing the conscience of the chancellor are, it is understood, questions of fact purely. It has been said, with apparent propriety, that a judge sitting in a case in equity ought not to submit to a jury a mixed question of law and fact, such as the question whether a debt has been paid.[5] It also follows from the foregoing, that, where a jury, impanneled to try an issue in an equity case, fail to agree, the court is not bound to call another jury, but may decide the case on the evidence it has already heard before the jury which has disagreed.[6]

[1] State *v.* Mallon, 75 Mo. 355.

[2] Keithley *v.* Keithley, 85 Mo. 217; Snell *v.* Harrison, 83 Mo. 651.

[3] Freeman *v.* Wilkerson, 50 Mo. 554; Moore *v.* Wingate, 53 Mo. 398.

[4] Gill *v.* Clark, 54 Mo. 415; Durfee *v.* Moran, 57 Mo. 37.

[5] Adams *v.* Helm, 55 Mo. 468.

[6] Keithley *v.* Keithley, 85 Mo. 217.

§ 2357. Requests when Granted, how Presented to the Jury. — This subject will be more fully considered in the next chapter in connection with the subject of written instructions.[1] Except where the subject is regulated by statutes, such as will be there considered, there does not seem to be any prescribed way in which the judge is to announce to the jury that he gives them in charge a particular proposition of law. Of course, the formal and proper way is for him to state or read distinctly, accordingly as the charge is oral or written, what he desires them to understand as the law of the case. Where the counsel read from a decision of the Supreme Court of Massachusetts, in his argument to the jury, and the judge, taking the book, said to the jury: "Gentlemen, without stopping to weary you by repeating the decision of the Supreme Court of Massachusetts, which has just been read by the counsel for the plaintiff, I charge that decision to be the law," this was held sufficient.[2] But where counsel from his seat made a request for an instruction to the court, and the judge simply said, "Well, I charge it," this was considered in effect no charge, although it was not ruled that the judge was bound to deliver it to them in writing.[3] When, however, the judge replied to such an instruction, "That is the law," the same court, in an opinion by the same judge, with more sense, took a different view.[4] In a still later case, the same court laid down the rule thus: "As a matter of practice, when the counsel for either party reads written requests to charge in the presence and hearing of the jury, the court should either give or refuse to give such requests in charge. If the request is a legal and pertinent charge which ought to be given to the jury, then the court should give it in the language of the request, by reading the same to the jury, and not hold up the paper containing the requests to charge, after the same had been read and handed to the court, and say, 'Gentlemen, I give you all these in charge, as requested.'"[5] The judge, after assenting

[1] *Post*, § 2374, *et seq.*

[2] Dillon *v.* McRae, 40 Ga. 107. Compare Talmage *v.* Davenport, 31 N. J. L. 561.

[3] Colquitt *v.* Thomas, 8 Ga. 258, 270.

[4] Long *v.* State, 12 Ga. 293, 329.

[5] Leaptrot *v.* Robertson, 44 Ga. 46, 50.

to the correctness of a request, ought not to weaken its force by a sarcastic remark.[1] It has been held no error for the judge to read to the jury a decision of the Supreme Court in the case on trial, if he does this merely for the purpose of charging them as to what principles of law govern the case, and if he fairly apply in his charge those principles to the facts of the case, as it stands before them on trial.[2] By statute in Texas it is provided: "When charges are asked the judge shall read to the jury only such as he gives."[3] An objection, made for the first time on appeal (and, on principle, on a motion for new trial) that, owing to the noise in the court-room, the jury *did not hear the instructions*, is not available unless it be made to appear that the counsel called the attention of the court to the fact at the time, and the court disregarded it.[4] Where the judge refuses requests for instructions which have been read in the hearing of the jury, on the ground that he has already so charged, he ought, it has been held, to state the grounds of his refusal, so that the jury can hear it, in order that they may not be misled into the supposition that he refused the requests on the ground that they ought not to be given.[5] But this rule can have no application where the practice is to hand up the requests to the judge in writing and for him to indorse thereon "given" or "refused," returning those which are refused; for here the jury have no knowledge of what is contained in those which are refused.[6]

§ 2358. **Rule that Requests for Instructions should be Presented before Argument Commenced.** — In several jurisdictions the rule prevails that requests for instructions must be presented to the judge before the commencement of the argument of the cause to the jury, and that, if not so presented, it is not error to disallow them, though the judge may allow them in his discretion.[7] It is an objectionable practice to allow counsel to

[1] Horton *v.* Williams, 21 Minn. 187, 192.

[2] Riggins *v.* Brown, 12 Ga. 271, 276. See Talmage *v.* Davenport, 31 N. J. L. 561.

[3] Texas Code Crim. Proc., art. 683.

[4] People *v.* Price, 67 Cal. 350.

[5] People *v.* Hurley, 8 Cal. 390.

[6] Clough *v.* State, 7 Neb. 320, 344.

[7] Ela *v.* Cockshott, 119 Mass. 416; McMahon *v.* O'Connor, 137 Mass. 216; Ind. Rev. Stat. 1881, §§ 533, 534; Ol-

send up these points *after the argument is closed*; for, often, the court has no time to examine them. The handing in of such requests should not be deferred beyond the opening of the argument on either side. That is the time when, in appellate courts, briefs are generally required to be handed to the judges; and, as Judge Redfield once observed, "these written requests are more in the nature of a brief than anything else; and, as they are intended as briefs for the court, it is but reasonable the court should have time to become familiar with them, before they are called upon to speak from them."[1] For the same reason, the Vermont court ruled, in an earlier case, that it is not in time to request a charge *upon a new point*, after the counsel have closed their arguments to the jury and submitted the case.[2] In Indiana, it is not error for the court to refuse to submit interrogatories to the jury *after the argument has commenced*. At such a stage of the proceedings the court may, but is not bound to submit them.[3] In Missouri, the proper time to instruct the jury is after the evidence is concluded, and before the argument is commenced.[4] But it has been held not error, to give an instruction after the argument had closed, where the instruction was of such a nature as to work no harm.[5] In Illinois, the established practice is said to be to require all requests for instructions to be submitted to the court at or before the commencement of the closing argument; though, where such requests were presented during the closing argument, a reversal was refused, on the ground that they were not embodied in the bill of exceptions, and the court could not see whether the giving of them would have been proper.[6]

§ 2359. View that Refusal of Request after Argument Commenced may be Error. — A statute of Nebraska provides

lam *v.* Shaw, 27 Ind. 388; Malady *v.* McEnary, 30 Ind. 273; Hege *v.* Newson, 96 Ind. 426, 429; United States *v.* Gibert, 2 Sumn. (U. S.) 22 (capital trial before Mr. Justice Story).

[1] Vaughn *v.* Porter, 16 Vt. 266, 269.

[2] Stanton *v.* Bannister, 2 Vt. 464.

[3] Glasgow *v.* Hobbs, 52 Ind. 239; Buskirk's Ind. Prac. 213, and cases cited.

[4] 2 Wagn. Stats., p. 1046, § 47; 1 Rev. Stat. 1879, § 3655.

[5] Cluskey *v.* St. Louis, 50 Mo. 89.

[6] Prindeville *v.* The People, 42 Ill. 221.

as follows: "When the evidence is concluded, either party may request instructions to the jury on points of law, which shall be given or refused by court; * * * the parties may then submit or argue the case to the jury. * * * The court may again charge the jury after the argument is concluded." [1] Construing this statute, the court hold, that when instructions are asked for by either party before the jury retire, which are unobjectionable, pertaining to the issue, and necessary for the jury to consider in making up their verdict, they should be given by the court, notwithstanding the rule requiring *all* instructions to be submitted before the commencement of the argument. "In the hurry of a trial," says Maxwell, J., "the most careful lawyer may overlook some question on which it is proper the jury should be instructed. * * * The object of the law is to administer justice; and rules of court for conducting trials should not be so construed as to prevent a fair submission of a case to the jury." [2] In a case in Wisconsin, after the general charge of the court, counsel for the unsuccessful party proposed in anstruction, which he was entitled to have given, unless for the reason that it was proposed out of time. The court declined so to instruct, not because the instruction was not good in law, but because it was not proposed in time,—the court saying: "I am not going to give any additional instructions. It is a rule which has been publicly announced a good many times, that I don't feel bound to consider instructions that are asked for after the argument has been commenced." The Supreme Court held that the refusal to give the instruction was error. Lyon, J., in giving the opinion of the court, said: "We think there may be circumstances in some cases which would render that rule a little too rigid. The course of argument by the opposing counsel, or the unexpected failure of the court to charge in a particular way, or to charge at all, upon some branch of the case, might make it absolutely necessary for the safety of his client that counsel ask additional instructions, either at the close of the ar-

[1] Neb. Comp. Stats. 1887, Code Civ. Proc., § 283, p. 774.

[2] Billings *v.* McCoy, 5 Neb. 187, 191.

gument or of the charge, upon points which, earlier in the case, might not have seemed important, or which the court may have omitted to notice. The rule should be sufficiently elastic to allow additional instructions to be asked for in such cases after argument and charge. This seems to be in the interest of justice, and can work harm to no one."[1]

§ 2360. **View that Requests must be Handed up Before the General Charge.** — In some courts the practice is for counsel to send up written points, or requests, to be embodied in the general charge of the court. Such a rule exists in South Carolina, but it is not of that imperative character that the circuit judge cannot, in his discretion, dispense with it.[2]

§ 2361. **After the General Charge.**— In New York, according to recent decisions, it is error for the court to refuse to listen to additional requests for instructions after giving its general charge, and before the jury retire.[3] The reason, briefly stated, is, that the general charge may assume such a form as to render special instructions necessary, which would not otherwise be required. In support of this view, it was said by Brady, J.: "While it is quite apparent that in many instances the charge itself may present an unforeseen view and create an unforeseen necessity which may demand from counsel, in the careful conduct of their case, and in the protection of their clients' rights, the preparation of other requests, a necessity which may arise from the manner in which the previous requests had been disposed of, or treated by the justice presiding at the trial, by his refusal to acquiesce in some and his treatment of others, and the expression of original views of the facts, circumstances and law of the case. Yet it is impossible for counsel to anticipate what disposition of their requests will be made, or what views may be ex-

[1] Carey *v.* Chicago &c. R. Co., 61 Wis. 71, 76.

[2] State *v.* Prater, 26 S. C. 198; *s. c.* 2 S. E. Rep. 108.

[3] Chapman *v.* McCormick, 86 N. Y. 479; Pfeffele *v.* Second Ave. R. Co., 34 Hun (N. Y.), 497; (Davis, P. J., dissenting). See also State *v.* Catlin, 3 Vt. 530, 534.

pressed with regard to them or of the case itself. In any, and indeed in all, of these emergencies, the necessity for further requests may exist; and it is not only a right but the duty of counsel to make such requests in the discharge of his professional obligations, not only to his client but to the court, as the emergency demands. It is not to be denied that requests to charge very often assist in the administration of justice, either by preventing the enforcement of a rule not applicable to the case, or by preventing the omission of one which is controlling." [1]

§ 2362. Illustration: Court refusing to listen to Requests for additional Instructions after General Charge. — At the close of the testimony in a civil case, counsel had summed up to the jury, and the judge had given his general charge. The jury "having risen from their seats, and about to retire in charge of an officer to deliberate on their verdict," the defendant's counsel said: "Wait one minute, please." The court replied: "No; I will not add to my charge at all;" and, addressing the jury, the judge said: "Go on, gentlemen." The dialogue then proceeded thus: Defendant's counsel. "I want to ask the court to make some charge to the jury." The court. "No; I have said all I ought to say. You take an exception?" Defendant's counsel. "Yes; but I want to ask the court to charge the jury in certain respects. I claim that to be my right, your Honor." The court. "I refuse, and you take an exception." It was held that, in this ruling, the trial court erred. Danforth, J., giving the opinion of the Court of Appeals, said: "It is the duty of counsel so to conduct the client's cause that the jury may have the facts before them, under such instructions as to the law as are material to the case; and as, under our system of judicature, those instructions can be given only by the court, it would seem to be the client's absolute right to have his counsel heard concerning them. In no other way can the suitor have the benefit of the machinery of the courts; of the law as claimed by him, if the response is favorable; of an exception for review, if it is refused. The right may be forfeited by the omission of counsel to speak in time, for the client is bound by his conduct, and, as to that, the court has a large discretion. Here it was not exercised. The jury were before the court, in their proper places. Its ear was withheld from the counsel, not because he did not speak in season, but because, anticipat-

[1] Pfeffele *v.* Second Ave. R. Co., 34 Hun (N. Y.), 497, 499.

ing the object of counsel, the court decided to deny him. It may be that no suggestion would have changed that mind; but had it been heard, the defendant would have had either the benefit of an exception to that decision, or a ruling of the court in accordance with his views. To one or the other he was entitled, and it was beyond the power of the court to deprive him of it." [1]

§ **2363. Of Additional Instructions after the Jury have Retired.** — We have seen that it is the right, and sometimes the duty of the judge, to instruct the jury on questions of law, although not requested to do so, except where the practice is not enjoined by statute.[2] We have also seen that the judge may rightfully modify or revoke instructions which he has given to the jury, which on further reflection, he concludes to be erroneous.[3] It necessarily results from this, that the judge may, of his own motion, recall the jury and give them further instructions, whenever he considers it necessary to do so. The limitation of this privilege is that he can only do it in open court and in the presence of the parties or their counsel, or, at least, after affording them a reasonable opportunity to be present, and, in cases of felony, in the presence of the prisoner. With these limitations, it is, on the one hand, his privilege to recall the jury and give them additional instructions, until, in his opinion, he has fully possessed their minds of the law of the case; on the other hand, he is absolutely prohibited, as much so as a private person is, from holding any secret communication with them.[4]

§ **2364. Further of this Subject.** — After the jury have retired to consider of their verdict, the judge will, as a general

[1] Chapman *v.* McCormick, 86 N. Y. 479, 481. Folger and Miller, JJ., dissented, and on grounds which seem unanswerable, one of which was that an orderly course of procedure requires such requests to be handed up prior to the time when the jury are ready to retire in charge of an officer; but a more conclusive one is that the record did not show that any portion of the charge as made was excepted to, nor what additional charge was desired, or that it would have affected the disposition of the case in any manner.

[2] *Ante*, § 2338, *et seq.*

[3] *Ante*, § 2353.

[4] Breedlove *v.* Bundy, 96 Ind. 319; People *v.* Perry, 65 Cal. 568; Alexander *v.* Gardiner, 14 R. I. 15.

rule, refuse to give them any additional instructions at the instance of either party; though he will, if the jury ask for further instructions on matters of law, give them.[1] In Georgia, it is his duty to do so; but he is not bound to re-charge them upon the whole law of the case.[2] It has been held that, if the jury send a written request for further instructions when the court is not in session, the court may, after notice to the counsel, reply in writing, if it deem it safe and proper to do so.[3] "We think," said Shaw, C. J., "it not unfrequently happens in practice, that something occurs to the judge after the jury has retired, as, in his opinion, requiring correction or modification; or that something which, on reflection, he deems material, has been omitted; and in such case, we believe, it has been the practice for the judge to send for the jury, for the purpose of making the necessary explanations or additions. This being done in open court, in the presence of the counsel, and as part of the instructions to the jury in matters of law open to exception, we think it is entirely within the province of the court, and cannot be deemed irregular."[4]

§ **2365. In Criminal Cases, what.** — Where the jury, in a criminal case, return into court in presence of the parties, and say that they cannot agree, it is competent for the court, of its own motion, to give them any additional instruction, proper in itself, which may be necessary to meet the difficulty in their minds;[5] and where this was done, it was held no error, although the counsel on both sides, instead of asking for further instructions, insisted that the jury should be locked up till they agreed.[6] But if the jury return into court in a criminal case, and report that they cannot agree, but do not ask for further instructions, for the court to repeat to them certain disjointed portions of the

[1] Turner *v.* Foxall, 2 Cranch C. C. (U. S.) 324, Forrest *v.* Hanson, 1 Cranch C. C. (U. S.) 63; United States *v.* White, 5 Cranch C. C. (U. S.) 116; Rogers *v.* Moulthrop, 13 Wend. (N. Y.) 274.

[2] O'Shields *v.* State, 55 Ga. 697.

[3] Norris *v.* Cook, 1 Curt. C. C. (U. S.) 464.

[4] Com. *v.* Snelling, 15 Pick. (Mass.) 321, 333.

[5] State *v.* Pitts, 11 Iowa, 343.

[6] Hogg *v.* State, 7 Ind. 551. See the Indiana Stat. 1881, § 539.

charge already given them is error: since this may well leave them to suppose that such portions of the charge are the controlling features of the case.[1]

§ 2366. [Continued.] **In Civil Cases.**— In Massachusetts, additional instructions, given to the jury after the cause has been committed to them and they have retired, are subject to exceptions for error, just the same as those given before the jury retired:[2] and this, I suppose, to be necessarily the rule everywhere. As to the manner of giving additional instructions, it is said that, "whether those instructions be given in answer to the questions of the jury, or of the judge's own motion, it is proper in most cases that the transaction be confined to communications passing between them. A fresh discussion of the law or the evidence on the part of counsel in the presence of the jury, cannot be had, unless allowed by the judge in his discretion. Nor is the judge required to give additional instructions, by way of explanation or modification of those already given, at the request of either party. In such matters, much must be left to the discretion of the judge, who can best see at the time what may prejudice, and what advance an intelligent and honest decision of the questions at issue."[3] If the jury ask for further instructions, after having retired for deliberation, it is within the discretion of the judge to give them additional instructions upon a point not covered by their request, or to entertain a request for such an instruction.[4] In Georgia, there is a case where a request for an instruction was declined, because the "request was made after the court had commenced its charge." The jury retired, and, being unable at once to agree, returned into court for further instructions, when the court was again requested to give the instruction which had been refused, and again refused to give it. This was held error.[5]

[1] Swaggerty *v.* Caton, 1 Heisk. (Tenn.) 199.

[2] Nelson *v.* Dodge, 116 Mass. 367; Lund *v.* Tyngsboro, 11 Cush. (Mass.) 563.

[3] Nelson *v.* Dodge, 116 Mass. 367, 370.

[4] Kellogg *v.* French, 15 Gray (Mass.), 354.

[5] Yeldell *v.* Shinholster, 15 Ga. 189. The court say that "it would be better in all cases, if such requests to charge could be submitted in writing by counsel before the court proceeds to charge

§ 2367. **Necessity of the Presence of Counsel.**— It has been held in one case, that the presence of counsel is not absolutely necessary in a civil case, to warrant the judge in giving the jury, at their request, additional instructions, provided the instructions are given in open court,[1] though in California, where the practice is regulated by statute, the rule is different.[2] The giving of additional instructions in the absence of the parties and their counsel, and during a recess of the court, has been held error.[3] Under the New York Code of Civil Procedure, the trial of a cause is not concluded until the jury is discharged from its consideration.[4] It has been said that the power of the court to recall and re-instruct the jury has never been judicially doubted in that State. "Counsel, by purposely or inadvertently withdrawing from the court, cannot take away the power, or suspend the right to exercise it, until they can be found and brought in, if willing to come. It is the duty of counsel engaged in the trial of a case, to remain in or be represented at the court, during its sessions, until the jury having the case in charge is discharged.[5] The failure of counsel to perform their duty does not deprive the court of its power to discharge its duty. The court is not required to send out its officers to invite counsel to attend to their duties and hear additional instructions which the court proposes to give to the jury. Undoubtedly, in most cases courts will endeavor, as a matter of courtesy, to secure the attendance of counsel before re-instructing the jury; but it is not an error if it is not done."[6]

the jury; but, in the pressure of business, this is frequently impracticable without considerable delay; and in such event it is proper, after the charge is closed, that the attention of the court should be called to the point omitted."

[1] Chapman *v.* Chicago &c. R. Co., 26 Wis. 295.

[2] Redman *v.* Gulnac, 5 Cal. 148. So, in a criminal case: People *v.* Trim, 27 Cal. 276.

[3] Campbell *v.* Beckett, 8 Ohio St. 210.

[4] N. Y. Code Civ. Proc., § 992.

[5] Citing Dauntley *v.* Hyde, 6 Jur. 133.

[6] The above statement of the law is from the opinion of the Supreme Court of New York, Fourth Department, in General Term, by Follett, J., in Cornish *v.* Graff, 36 Hun (N. Y.), 160, 162. The learned judge cited: Wiggins *v.* Downer, 67 How. Pr. (N. Y.) 65; Cook *v.* Green, 1 Halst. (N. J.) 109; Chapman *v.* Chicago &c. R. Co., 26 Wis. 295; *s. c.* 7 Am. Rep. 81;

§ 2368. Under Statutes Requiring the Instructions to be Delivered before Argument. — Under statutes like that of Missouri,[1] there is possibly more reason for prohibiting the judge from recalling the jury and giving them additional instructions after they have retired, than under the usual system; and on this theory it has been held that it is error to do this, unless it appear that the party complaining could not have been prejudiced thereby, or that it was necessary to rectify some omission or oversight.[2] It is not perceived, however, that the peculiarity of the statutory provision furnishes any reason for a different rule from that which obtains in other jurisdictions; since under no system is argument to the jury permitted after they have retired

and distinguishes Burke *v.* Webb, 2 N. Y. Weekly Digest, 579. The court also distinguish Bunn *v.* Croul, 10 Johns. (N. Y.) 239; Taylor *v.* Betsford, 13 Johns. (N. Y.) 487; Moody *v.* Pomeroy, 4 Denio (N. Y.), 115, as cases which arose in justice courts where the justice entered the jury room and instructed them in the absence of counsel. It also distinguished People *v.* Cassiano, 30 Hun (N. Y.), 388, as a case arising under § 427 of the New York Code of Civil Procedure, which provides that notice of the court's intention to give additional instructions to the jury must be given to the district attorney and to the defendant's counsel. It also distinguished Redman *v.* Gulnac, 5 Cal. 148, as a case arising under a statute (Cal. Code Civ. Proc., §§ 10, 614) providing that in civil cases, further instructions "must be given in the presence of, or after notice to, the parties or counsel." It also distinguished People *v.* Trim, 37 Cal. 274, as having been decided under a statute providing for further instructions in criminal cases after notice, given to the defendant and his counsel. Cal. Crim. Prac. Act, § 408. The court pointed out that the California statute, having been found inconvenient, has been changed so as to provide that in criminal cases additional instructions "must be given in the presence of, or after notice to the district attorney, and the defendant or his counsel, or after they have been called." Penal Code Cal., § 1138. The court was also obliged to distinguish two Ohio cases (Campbell *v.* Beckett, 8 Oh. St., 211, and Kirk *v.* State, 14 Oh. 511), as having been decided under a statute, providing that additional instructions shall only be given in the presence of or after notice to the parties or their counsel. Oh. Code Proc., § 270. It was conceded, however, that the power to re-instruct a jury in the absence of counsel may, like other powers, be abused, in which case the wrong can be corrected by a motion for new trial. Cornish *v.* Graff, 36 Hun (N. Y.), 160. See Watertown Bank & Loan Co. *v.* Mix, 51 N. Y. 558.

[1] 2 Wagn. Mo. Stat., p. 1046, § 47; Rev. Stat. Mo. 1879, § 3655.

[2] Burns *v.* Wilson, 1 Mo. App. 179.

for deliberation. The Supreme Court of that State has said that "there may be instances when it will become the imperative duty of a court to rectify some omission or cure some oversight, by giving to the jury an additional instruction after their retirement:" [1] and in another case it has said that "the court may, after argument closed, at the instance of a party, withdraw from the jury by an instruction a matter of evidence;" but the court stated that in the particular case the withdrawal "could have done the plaintiff no harm — if it had any effect at all, it was in his favor." [2]

§ **2369. Jury Taking the Charge to their Room.** — There is a difference of practice in different jurisdictions upon this question. One recent case presents the untenable conception that it is not the proper practice to allow the jury to take the written instructions or any other papers used in the case to the jury room, against the consent of the parties, or either of them, except it may be the items of an account.[3] In another jurisdiction *it is not error* to allow the jurors to take the written instructions with them on retiring to consider of their verdict.[4] In still another jurisdiction it is provided by statute that "the jury may take with them in their retirement, the charges given by the court after the same have been filed, but they shall not be permitted to take with them any charge or portion of a charge that has been asked of the court and which the court has refused to give." [5]

[1] Dowzelot *v.* Rawlings, 58 Mo. 75.

[2] Cluskey *v.* St. Louis, 50 Mo. 89.

[3] Hewitt *v.* Flint &c. R. Co. (Mich.), 11 W. Rep. 148. Suppose that, instead of being tried by a jury, a case is referred to a referee. Suppose that the party move the court to give, and the court gives, to a *referee*, certain written directions as to the mode of conducting the inquiry. Suppose that the court then reads these directions to the referee and refuses to allow him to take them with him for subsequent reference and consultation. What would be thought of such a ruling?

[4] Wood *v.* Aldrich, 25 Wis. 695.

[5] Tex. Code Crim. Proc., art. 684.

CHAPTER LXVII.

OF WRITTEN INSTRUCTIONS.

SECTION
2374. At Common Law Discretionary to Charge Orally or in Writing.
2375. Statutes Requiring Instructions to be Given in Writing.
2376. Giving Instructions and afterwards Writing them out.
2377. Oral Qualifications of Written Instructions.
2378. Right to Written Instructions may be Waived.
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2380. What is "A Charge" or "An Instruction," within the Meaning of such Statutes.
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2387. Right of Counsel to Propose Special Instructions in Answer to a Juror's Question.
2388. Loss of the Written Instructions.
2389. Clerical Errors in Written Instructions.

§ 2374. At Common Law Discretionary to Charge Orally or in Writing. — Where there is no statute creating a contrary rule, whether the judge will deliver his instructions orally or in writing, is a matter which rests in his sound *discretion*, which discretion is not subject to appellate control. In important cases the judge generally will, especially if so requested by counsel, reduce his instructions to writing, in order to avoid hasty action, and to enable the unsuccessful party to secure a fair bill of exceptions; as well as to enable the jury to peruse the instructions on their retirement, where it is the practice to allow them to take them out.[1]

[1] See the observations on this subject in Smith *v.* Crichton, 33 Md. 103, 108.

§ 2375. Statutes Requiring Instructions to be Given in Writing. — Statutes exist in several of the States requiring the judge to deliver his instructions to the jury in writing. These statutes are *mandatory;* and where they exist, the giving of an oral instruction is error, for which a judgment will be reversed.[1] They mean that the whole charge must be in writing, and that it should be delivered to the jury literally as it is written.[2] Where the judge, notwithstanding he had been requested to give his instructions in writing, said verbally to the jury: "Gentlemen of the Jury: If the State has failed to make out a case against this defendant beyond a reasonable doubt, or if the defendant by his evidence has raised a reasonable doubt, then your verdict will be as follows" [reading from a verdict for defendant], — this was held a flagrant violation of the statute, and the conviction was reversed.[3] In short, all the cases agree that

[1] Dixon *v.* State, 13 Fla. 636; Toledo &c. R. Co. *v.* Daniels, 21 Ind. 256; Townsend *v.* Chapin, 8 Blackf. (Ind.) 328; Miller *v.* Hampton, 37 Ala. 342; Doggett *v.* Jordan, 2 Fla. 541, 551; Riley *v.* Watson, 18 Ind. 291; People *v.* Beeler, 6 Cal. 246; People *v.* Ah Fong, 12 Cal. 345; Gile *v.* People, 1 Colo. 60; Ray *v.* Wooters, 19 Ill. 82; Illinois &c. R. Co. *v.* Hammer, 85 Ill. 526; State *v.* Potter, 15 Kan. 302; Swartwout *v.* Michigan &c. R. Co., 24 Mich. 389; Horton *v.* Williams, 21 Minn. 187; State *v.* Jones, 61 Mo. 232. By the terms of the Indiana statute, "when the argument is concluded the court shall give general instructions to the jury, which shall be in writing and numbered and signed by the judge, if required by either party." This statute has always been regarded as mandatory, and the uniform holding under it has been that, when properly requested, the trial court is bound to put all of its instructions in writing. Bradway *v.* Waddell, 95 Ind. 170; Townsend *v.* Doe, 8 Blackf. 328; McClay *v.* State, 1 Ind. 385; Kenworthy *v.* Williams, 5 Ind. 375; Lung *v.* Deal, 16 Ind. 349; Rising Sun &c. Co. *v.* Conway, 7 Ind. 187; Laselle *v.* Wells, 17 Ind. 33; Widner *v.* State, 28 Ind. 394; Riley *v.* Watson, 18 Ind. 291; Feriter *v.* State, 33 Ind. 283; Meredith *v.* Crawford, 34 Ind. 399; Gray *v.* Stivers, 38 Ind. 197; Hardin *v.* Helton, 50 Ind. 319; Bosworth *v.* Barker, 65 Ind. 595; Provines *v.* Heaston, 67 Ind. 482; Shafer *v.* Stinson, 76 Ind. 374; Davis *v.* Foster, 68 Ind. 238; Bottorff *v.* Shelton, 79 Ind. 98; Smurr *v.* State, 88 Ind. 504. So held of the Utah Code of Criminal Procedure (§ 257, clause 7; §§ 289, 315), which requires the judge, except where the parties otherwise consent, to give his charge in writing, and make it part of the record, dispensing with exceptions thereto. Hopt *v.* People, 104 U. S. 631, 635.

[2] Rising Sun Co. *v.* Conway, 7 Ind. 187; Bradway *v.* Waddell, 95 Ind. 170, 173.

[3] Stephenson *v.* State, 110 Ind. 358, 375; *s. c.* 11 N. East. Rep. 360.

statutes of this kind, in criminal cases, where the accused is not presumed to waive any of his legal rights, must be strictly complied with.[1]

§ 2376. Giving Instructions and afterwards Writing them out. — The judge must, both in civil and criminal cases, deliver his charge to the jury *as it has been written*, and not write it out afterwards, as he delivered it.[2]

§ 2377. Oral Qualifications of Written Instructions. — Under such a statute, it is not allowable for the judge to give the chief instructions in writing, and then to add *orally* supplementary instructions asked for by the parties.[3] Nor may he give written instructions to the jury, and then explain or modify them orally. In like manner,[4] under a statute requiring the judge to charge the jury in writing, "if required by either party," it is error, where counsel have properly signified their desire that the charge should be in writing, for the judge to give a verbal charge,[5] or to give a written charge accompanied with verbal explanations or modifications.[6] The charge, and every modification of it, must be in writing, if required;[7] and if the verbal explanations are numerous, such an error is not cured by a request, made by the court to the jury, to consider such instructions withdrawn.[8] It is, however, the right of the court to decline to notice any request which wants addition or modification to render it proper.[9] The court has gone so far as to hold that it is error to amend an instruction by the oral sub-

[1] Widner *v.* State, 28 Ind. 394; Strattan *v.* Paul, 10 Iowa, 139.

[2] Dixon *v.* State, 13 Fla. 636; Toledo &c. R. Co. *v.* Daniels, 21 Ind. 256; Rising Sun Co. *v.* Conway, 7 Ind. 187; Laselle *v.* Wells, 17 Ind. 33; Widner *v.* State, 28 Ind. 394.

[3] Strattan *v.* Paul, 10 Iowa, 139.

[4] Head *v.* Langworthy, 15 Iowa, 235; Parris *v.* State, 2 G. Greene (Ia.), 449.

[5] Toledo &c. R. Co. *v.* Daniels, 21 Ind. 256; Rising Sun Co. *v.* Conway, 7 Ind. 187; Riley *v.* Watson, 18 Ind. 291; Widner *v.* State, 28 Ind. 394.

[6] Townsend *v.* Chapin, 8 Blackf. (Ind.) 328; Meredith *v.* Crawford, 34 Ind. 399; Kenworthy *v.* Williams, 5 Ind. 375; Laselle *v.* Wells, 17 Ind. 33; Tenbrook *v.* Brown, 17 Ind. 410.

[7] See the cases last cited, and City Bank *v.* Kent, 57 Ga. 285.

[8] Laselle *v.* Wells, 17 Ind. 33.

[9] City Bank *v.* Kent, 56 Ga. 285; *ante*, § 2349.

stitution of a material word, — as the word "fairly" in the place of the word "strictly."[1] For the same reason, it is error to read *to the jury*, after a request for written instructions, *from the statute book*, or from any other book. The reason is that the matter thus read is not, in accordance with the terms of the statute, written out and filed by the court.[2] In like manner, where, after a request for written instructions, the court instructed the jury upon the subject of *nominal damages*, it was held error for which the judgment must be reversed.[3]

§ 2378. **Right to Written Instructions may be Waived.** — But the right to have the jury instructed in writing is not so high a right that it cannot be waived by the parties. It is not that the court has no jurisdiction to instruct them orally, in that sense in which it is held that consent cannot confer jurisdiction. It is a right which may be waived; and where in a *civil case*, a party sits by with a knowledge that the statute is not being complied with, and fails to object to the act of the judge in charging them orally, he will not afterwards be heard to complain of the same, at least in a court of error.[4] But if the court below, in such a case, sees fit to grant him a new trial, that is a matter which will not be interfered with by the higher court.[5] So, in Texas, in a prosecution for a *misdemeanor*, it has been held that it is no ground of error that the judge charge the jury verbally, unless an exception is taken to it at the time; for, in the absence of such an exception, it would be presumed that he charged the jury properly.[6] In Georgia, in all cases of *felony*, a charge may be required in writing at the instance of either party; and when so written out and read to the jury it becomes *an office paper*, is to be filed with the clerk, and is to be accessible to all persons interested therein. But if a written charge is not required, it is no ground of error that it is not written out or filed.[7]

[1] Provines *v.* Heaston, 67 Ind. 482.

[2] Bottdorff *v.* Shelton, 79 Ind. 98; Smurr *v.* State, 88 Ind. 504.

[3] Bradway *v.* Waddell, 95 Ind. 170.

[4] Head *v.* Langworthy, 15 Iowa, 235.

[5] *Ibid.* This was an appeal from a motion *granting* a new trial.

[6] Vanwey *v.* State, 41 Texas, 639.

[7] Jones *v.* State, 65 Ga. 507.

§ 2379. Oral Instructions Given in Favor of the Party Complaining. — Appellate courts do not reverse judgments for errors which work in favor of the party who complains of them. There is no reason why this principle should not apply to the error of giving oral instructions in violation of a statute which requires instructions to be given in writing, as well as to any other error. On this subject it has been justly said: "If oral instructions should be given, and it could not be ascertained what they were, * * * it would be a cause for reversing the judgment. But if they are preserved in the bill of exceptions, and it appears that they were favorable to the party complaining, or did not at all affect his rights as a suitor, it would be difficult to find a ground on which to place such a construction of the statute as would overturn the judgment. The instructions may have been given without the solicitation of the party obtaining the verdict, and even against his consent; and yet to deprive him of his ascertained rights, and to subject him to payment of costs, merely because the judge has willfully violated a statute in a way that did not at all conduce to the attainment of his verdict, would seem to be the greatest injustice. The statute gave the right of excepting to the party aggrieved; and unless he was aggrieved by the instructions, he had no right to except." [1]

§ 2380. What is "A Charge" or "an Instruction" within the Meaning of such Statutes. — This is often a question of much nicety and difficulty; and a judge, in the haste of a trial, is often embarrassed by being called upon to decide whether he may give the jury a particular admonition by word of mouth, or whether he must delay the trial to reduce it to writing. It has been held that directions which are deemed instructions, within the meaning of such a statute, are *statements of rules of* law governing the matters in issue or the amount of the recovery. All these, it is said, must, when a proper request is made, be given to the jury in writing. But the statute does not apply to *directions to* the jury to *reject evidence* which has been improvidently

[1] Hogell *v.* Lindell, 10 Mo. 483, 487.

admitted, or to directions as to *the form of the verdict*, or the like.[1] Where evidence is permitted to be heard, the relevancy of which depends upon another fact to be proved, it is not error for the judge to instruct the jury orally that they are to disregard such evidence unless such other fact be proved;[2] — such a direction not being an instruction within the meaning of a statute requiring the judge to instruct the jury in writing.[3] It has been so held of an oral statement by the judge to the jury, directing them to *answer certain interrogatories*.[4] It is, however, inferred from the preceding sections, that the word "charge" in such a statute, refers not only to the instructions in chief, but to those asked by either party after the principal instructions have been given; and so it has been held.[5] If it were otherwise, the court might give instructions in writing, and afterwards give verbal exceptions or modifications of them, which, we have seen, cannot be done.[6] It has been held in a criminal case, with obvious propriety, that, where the jury return into court and ask for special instructions, such instructions must, in order to conform to the requirements of such a statute, be in writing.[7] But where, in a civil case, after the jury had been charged, a juror asked a question as to the matter in controversy, to which the court gave a negative answer, without reducing it to writing, this was held no error, because it was not a "charge" within the meaning of a statute requiring judges to reduce their charges to juries to writing.[8]

§ 2381. Whether Requests made Verbally or in Writing.— It is *presumed* that, unless there is a statute or rule of court requiring otherwise, a request by counsel for the court to charge in a particular way may be made verbally, though it is no doubt always the preferable practice to require that such requests be reduced to writing. A statute of Alabama, which we have consid-

[1] Bradway *v.* Waddell, 95 Ind. 170, 175; Stanley *v.* Sutherland, 54 Ind. 339; McCallister *v.* Mount, 73 Ind. 559; Lawler *v.* McPheeters, 73 Ind. 577; Trentman *v.* Wiley, 85 Ind. 33

[2] *Ante*, § 717.

[3] Stanley *v.* Sutherland, 54 Ind. 341.

[4] Trentman *v.* Wiley, *supra*.

[5] Strattan *v.* Paul, 10 Iowa, 139.

[6] *Ante*, § 2377.

[7] Dixon *v.* State, 13 Fla. 636, 648.

[8] Millard *v.* Lyons, 25 Wis. 516.

ered in another connection,[1] requires such requests to be made in writing. If, therefore, they are made verbally, and the judge fails to notice them, it will be no error. But, conforming to the general presumption that whatever has been done has been rightly done, if the record in the Supreme Court fails to show whether a request to charge was made in writing, or orally, it will be presumed that it was made in writing as required by the statute; and the court will look to its merits to see whether it was rightly refused.[2]

§ 2382. **Written Instructions, how Delivered to the Jury.** — There is a variety of practice under this head, and, where the statute or governing rule of court is not explicit, there is here, as elsewhere in the law of procedure, considerable room for the exercise of the court's discretion. Under a rule of court requiring the judge to reduce to writing instructions given of his own motion, it was held that he might, in his discretion, dictate such an instruction to counsel, the latter reducing it to writing.[3] A criminal statute of California provides that, "if the charge be not given in writing, it must be *taken down by the phonographic reporter*."[4] Where the record shows that the charge was given to the jury orally, and is silent upon the question whether it was so taken down, the court will *presume* that it was so taken down, on the principle of the presumption of right-acting, and that it is for the defendant to show error.[5] By statute in Alabama, the judge is required, when instructions are requested in writing and refused, to write upon such instructions the word "refused" and to *sign his name thereto*.[6] Where the judge omits to do this, in order to make the irregularity available on appeal, it must appear that his attention was called to the omission, and that an exception was saved to his failure to correct it.[7] By the Code of Criminal Procedure of Texas, "after the argument of any

[1] *Post*, § 2382; *ante*, § 2343.

[2] Myatts *v.* Bell, 41 Ala. 222.

[3] Dixon *v.* State, 13 Fla. 636, 648.

[4] Cal. Penal Code, § 1093.

[5] People *v.* Ferris, 56 Cal. 442; People *v.* Bourke, 66 Cal. 455.

[6] Code of Ala. 1886, § 2756.

[7] Tyree *v.* Parham, 66 Ala. 424; Jenkins *v.* State, 82 Ala. 25; *s. c.* 2 South. Rep. 150.

criminal cause has been concluded, the judge shall deliver to the jury a written charge, in which he shall distinctly set forth the law applicable to the case; but he shall not express any opinion as to the weight of the evidence, nor shall he sum up the testimony. This charge shall be given in all cases of felony, whether asked or not."[1] "The general charge given by the court, as well as those given or refused at the request of either party, shall be certified by the judge and filed among the papers in the cause, and shall constitute a part of the record in the cause."[2] The statute of California, requiring the judge to mark requests for instructions which are submitted to him, "given" or "refused," does not apply to instructions given by the court *of its own motion*, and these need not be marked.[3]

§ 2383. **Reading Passages from Law Books.** — There is some difficulty about the question whether, under a statute requiring instructions to be given in writing, the judge can read to the jury an extract from the statute or other book of the law. In Texas it is held, in misdemeanor cases, that, although the statute requires the judge to give or refuse written instructions which are tendered, without modification, and from giving an oral charge without the consent of the parties, yet this does not prevent him from informing the jury orally as to the law of the case, since he can nevertheless read from the statutes such portions as are necessary to that end.[4] The contrary interpretation is placed upon the statute of Utah, which requires the instructions to be in writing and entered of record, and which dispenses with formal exceptions thereto. There, the judge is not allowed to read to the jury from books of the law, without reducing to writing the passage which he reads and making it a part of the record, in like manner as the other instructions. "If," said Mr. Justice Gray, "the book was not given to the jury when they retired for deliberation they did not have with them the whole of the instructions of the judge, as the statute contemplated.

[1] Tex. Code Crim. Proc., art. 677.
[2] *Ibid.*, art. 680.
[3] People *v.* Samsels, 66 Cal. 99.
[4] Hobbs *v.* State, 7 Tex. App. 117 (overruling on this point Carr *v.* State, 41 Tex. 543, 546).

If they were permitted to take the book with them without the defendant's consent, that would of itself be ground of exception." [1]

§ 2384. Interpretation of Statutes which Require the Judge to Give or Refuse the Instructions Asked without Qualification. —As already stated,[2] these statutes are *mandatory*, and accord to parties a right which is placed beyond judicial control or denial. It has accordingly been held that the judge cannot refuse such a charge when requested, on the ground that he has already laid down to the jury substantially the same proposition.[3] He can, however, under one view of such a statute, give subsequent *explanatory instructions*, which are necessary to prevent a misunderstanding or misapplication of those given at the request of a party; [4] or, where such a request, unless explained, would mislead the jury, he may for that reason refuse it,[5] on a principle already explained.[6] Later cases in the same court take the view that the judge cannot add any qualifications to written requests, but must give or refuse them as asked,[7] reconciling this with their former view, on the ground that their earlier decisions asserted a power to *explain*, not to *qualify* the written charge thus offered and given.[8] The sensible construction put

[1] Hopt *v.* People, 104 U. S. 631, 635. To the point that allowing the jury to take the book with them without the defendant's consent would be the ground of exception, the learned justice cited Merrill *v.* Nary, 10 Allen (Mass.), 416. See, as to books and papers in the jury room, *post*, § 2586, *et seq.*

[2] *Ante*, § 2375.

[3] Carson *v.* The State, 50 Ala. 134; Polly *v.* McCall, 37 Ala. 20.

[4] Morris *v.* State, 25 Ala. 57; Bell *v.* Troy, 35 Ala. 184, 208.

[5] Miller *v.* Garrett, 35 Ala. 96. See also, Godbold *v.* Blair, 27 Ala. 592; Partridge *v.* Forsythe, 29 Ala. 200.

[6] *Ante*, § 2349.

[7] Edgar *v.* State, 43 Ala. 45, 52; Knight *v.* Clements, 45 Ala. 89; Eiland *v.* State, 52 Ala. 322, 328.

[8] See and compare the following cases: Eiland *v.* State, 52 Ala. 322, 328; Edgar *v.* State, 43 Ala. 45; Rives *v.* McLosky, 5 Stew. & P. (Ala.) 330 (prior to the statute); Maynard *v.* Johnson, 4 Ala. 116 (prior to the statute); Ivey *v.* Phifer, 11 Ala. 535 (prior to the statute); Clealand *v.* Walker, *Id.* 1059 (prior to the statute); Hinton *v.* Nelms, 13 Ala. 222 (prior to the statute); Cole *v.* Spann, *Id.* 537 (prior to the statute); Phillips *v.* Beene, 16 Ala. 720 (prior to the statute); Long *v.* Rodgers, 19 Ala. 321 (prior to the statute, but change of rule); Ewing *v.* Sanford, 21 Ala. 157

upon the Wisconsin statute [1] is, that a subsequent modification of an instruction requested, though contrary to the letter of the statute, is not ground of reversing a judgment, provided it states the law correctly, since the error is immaterial. It is only where the statute is violated to the injury of the party complaining, that the judgment will be reversed.[2] Nor is a charge which in substance is nothing more than a mere direction to the jury to find for the plaintiff, within this statute, and hence need not be reduced to writing.[3]

§ 2385. **Presumptions on Appeal or Error.**—Where it is not shown by the record, on appeal or error, that the instructions were not requested in writing, as required by the statute, it will be presumed, in conformity with a well settled rule of appellate procedure, that they were so requested; [4] and so where the record does not show that the instructions were not given in writing, as required by the statute, it will be presumed that they were so given.[5]

§ 2386. **At what Stage of Trial Requests for Written Instructions Preferred.** — This subject is elsewhere considered in another relation.[6] Under the Wisconsin statute, it is held that a rule of court requiring such a request to be made before the commencement of the trial is unreasonable, but that it is sufficient if made after the evidence is all in.[7]

(prior to the statute); Morris *v.* State, 25 Ala. 57 (subsequent to the statute, but authorizing subsequent explanatory charges); Dupree *v.* State, 33 Ala. 380 (explanatory charges not error); Bell *v.* Troy, 35 Ala. 185 (privilege and duty to give explanatory charges); Scott *v.* State, 37 Ala. 117; Turbeville *v.* State, 40 Ala. 715 (explanatory charge given and no error). In Eiland *v.* State, 52 Ala. 322, 328, these decisions are reviewed by Brickell, J., with the result stated in the text.

[1] R. S. Wis. 1878, § 2853.

[2] Mason *v.* Whitbeck Co., 35 Wis. 164; Eldred *v.* Oconto Co., 33 Wis. 133; Andrea *v.* Thatcher, 24 Wis. 471.

[3] Grant *v.* Connecticut Mutual Life Ins. Co., 29 Wis. 125.

[4] Milner *v.* Wilson, 45 Ala. 478, 481.

[5] Meshke *v.* Van Doren, 16 Wis. 319.

[6] *Ante*, §§ 2358, 2362.

[7] Patterson *v.* Ball, 19 Wis. 243, 246. Although the proposition is reasoned at some length, the propriety of the conclusion is doubtful.

§ 2387. **Right of Counsel to Propose Special Instructions in Answer to a Juror's Question.** — It has been ruled in a case of murder, that, where the jury, after having retired for deliberation, return into court, in order to enable a juror to propound a question to the court touching the law of the case, the court must allow counsel an opportunity to propose to the judge special instructions touching the question asked, under a statute providing that, upon the presentment to the judge of instructions in writing, on points of law or exceptions taken at the trial, it shall be the duty of the judge to declare in writing his rulings thereon as presented, and pronounce the same to the jury as given or refused.[1]

§ 2388. **Loss of the Written Instructions.** — Where the instructions are required by law to be in writing, the loss of the written instructions, before the decision of the motion for a new trial, affords no ground for a new trial, any more than would the loss of the summons, the declaration, the plea, the depositions, or the minutes of the evidence. It would be merely ground for granting leave to restore any of them, except the minutes of the evidence. The court said: "If appellant desired to embody the instructions in the record for this court, he should have taken the necessary steps to have them restored. It was not the duty of the court to do so, but of counsel on either side to proceed for the purpose; nor will we, the instructions being lost, presume that any error was committed in giving or refusing them. On the contrary, we will presume, as in other cases, that the court decided correctly."[2]

§ 2389. CLERICAL ERRORS IN WRITTEN INSTRUCTIONS. — Judgments are some times reversed because of absurd clerical errors in drawing written instructions, where it is very doubtful whether the jury could have been misled by the error and whether it did not correct itself. An instance of this kind is found in a case in Texas, which was the trial of an indictment for adultery. The trial court charged the jury: "If you believe that Ed. Sanders and Adeline Blacklock, the defendants in this

[1] Dixon *v.* State, 13 Fla. 636, 648.

[2] Addems *v.* Suver, 89 Ill. 482.

case, in the county of Rusk and State of Texas, at any time within two years before the filing of the indictment in this case, did then and there, as charged in the indictment in this case, live together and have carnal intercourse with each other, or did then and there have habitual carnal intercourse with each other, without living together, the said Adeline Blacklock being then and there lawfully married with another man, other than said Ed. Sanders, — you will find them each guilty of adultery; *otherwise you will.*" It is evident that the defect of this charge consisted in the clerical error of omitting the word "not" after the last word, "will." Although such an error apparently corrects itself, and, it should seem, is an error of a kind which may be regarded as corrected by other portions of the charge, the Texas Court of Appeals held that it was ground for reversing a conviction. White, P. J., said: "It may be that subsequent portions of the charge, when it is considered as a whole, tended to correct this error to some extent; but we cannot say that it did not control the jury to the prejudice of the appellant."[1]

[1] Sanders *v.* State, 17 Tex. App. 222.

CHAPTER LXVIII.

OF THE APPELLATE REVIEW OF INSTRUCTIONS.

SECTION
2394. Necessity of Objecting.
2395. Necessity of Excepting.
2396. Distinction between Exceptions for Misdirection and for Non-direction.
2397. Exceptions must be Taken Separately and not *En Masse*.
2398. Grounds of Exception must be Specifically Pointed Out.
2399. Statutory Rule in Indiana.
2400. Statutory Rule in Texas in Cases of Felony.
2401. Misdirection no Ground for a New Trial.
2402. Nor Because of Error in Instructions, unless Prejudicial.
2403. Nor where Substantial Justice has been done.
2404. Nor because a Wrong Reason was Given for a Right Direction.
2405. Nor because they were in Point of Fact Misunderstood by the Jury.
2406. Theory that the Evidence will not be Looked into to see whether the Verdict was Right.
2407. How Instructions Construed in Courts of Error.
2408. [Continued.] Construed According to the Evidence.

§ 2394. Necessity of Objecting. — Under a settled rule of procedure, if the court delivers to the jury an instruction which a party conceives to be erroneous and prejudicial to him, he must, if he would save the question for review in an appellate court, call the attention of the trial court, at the time, to the supposed error, by an explicit objection. If he fails to do this, the error is deemed waived, and he cannot, — unless there is a practice that all objections are deemed saved, as there is in some jurisdictions, — renew it in his motion for new trial, nor make it the subject of appellate review on a bill of exceptions.[1] The reason is, that the court is entitled to an opportunity to correct any error

[1] Winchell *v.* Hicks, 18 N. Y. 558; Dows *v.* Rush, 28 Barb. 157; Clark *v.* New York, 24 How. Pr. (N. Y.) 333; Jencks *v.* Smith, 1 N. Y. 90; Timbrook *v.* State, 18 Tex. App. 1, 6; Burke *v.* State, 15 Tex. App. 156. The Texas cases are subordinate to a rule in that State more fully explained hereafter. *Post*, § 2400.

inadvertently committed in the progress of a trial; and a party ought not to be permitted to put the other party to the expense of an appeal, to correct an omission which he might have prevented by objecting at the proper time. If, for instance, the judge errs in assuming matters to be uncontroverted which a party intended to controvert, his attention should be called to the error before the jury retire, in order that he may make the proper correction.[1] And *where a party is present* in court, in proper person, and sees an irregularity about to be committed, it has been said to be his duty to object, although his *counsel may be absent*.[2] And this on the soundest principle; for there cannot be one rule for a case where a party is represented by counsel, and another rule for a case where he is not.

§ **2395. Necessity of Excepting.** — If the objection spoken of in the preceding paragraph is overruled, and if the party would stand on his objection, and renew the same in his motion for new trial, or save it for review in an appellate tribunal, he must, at the time, notify the court that he excepts to its ruling, and request the judge to note his exception. This is the proper and strict practice, applicable alike in civil and in criminal cases.[3] By a principle of the common law, the record is deemed to be in the breast of the judge until the close of the term, and until that time the trial court has the power to rectify its own error, upon discovering it, by setting aside the judgment and granting a new trial, although the error was not excepted to at the time; but, on appeal from an order refusing a new trial, the appellate court can, as a general rule, consider no objection which is not based upon some exception taken at the trial.[4] So, the ruling of the judge on those preliminary questions of fact, which he is required to decide without the aid of the jury,[5] is conclusive, unless the question is saved for revision in a higher

[1] State *v.* Fenlason, 78 Me. 495; *s. c.* 3 N. Eng. Rep. 273, 275.

[2] Alexander *v.* Gardiner, 14 R. I. 15, 18.

[3] Krack *v.* Wolf, 39 Ind. 88; Murray *v.* State, 26 Ind. 141; Bills *v.* Ottumwa, 35 Ia. 107.

[4] Schwinger *v.* Raymond, 105 N. Y. 648; *s. c.* 11 N. East. Rep. 952.

[5] *Ante*, § 318, *et seq.*

court, by a report of the facts, or by a bill of exceptions, according to the practice which obtains in the particular jurisdiction.[1] The objection spoken of in the preceding section very frequently takes, at the outset, the form of an exception, the party or his counsel notifying the court that he excepts to the opinion and direction of the court, or to some distinct portion of it which he specifies, stating also distinctly his ground of exception.

§ 2396. Distinction between Exceptions for Misdirection and for Non-direction. — As elsewhere fully explained [2] a party cannot make an exception to a charge or instruction available on appeal or error, on the ground that it was not sufficiently full or explicit, unless he requested the proper complementary instruction, and his request was refused, and he excepted to the ruling of the court at the time.[3] Thus, in New York, the authorities are to the effect that, where the defendant, at the close of the evidence, makes an unavailing motion for a nonsuit, which is followed by a direction from the court to find a verdict for the plaintiff, and no request is made by the defendant to submit any question of fact to the jury, the defendant will be held to have admitted that no questions of law were involved.[4] So, if a party requests certain specific questions to be submitted to the jury, for which there is no valid ground, he is deemed to have waived the submission of other questions.[5] If he desire to raise any

[1] Gorton *v.* Hadsell, 9 Cush. (Mass.) 508; Dole *v.* Thurlow, 12 Metc. (Mass.) 157; Odiorne *v.* Bacon, 6 Cush. (Mass.) 185; Bartlett *v.* Smith, 11 Mees. & W. 483; Doe *v.* Davies, 10 Q. B. 314, 323; Cleave *v.* Jones, 7 Exch. 421.

[2] *Ante*, § 2341.

[3] It was formerly a disputed question whether an exception would lie to the *refusal* of instructions, or whether it was not limited to the errors in the instructions which were *given*, but it came to be well settled that, where the charge has not complied with the prayers for instructions, they are to be considered as refused, and exceptions will lie to the refusals of the court to give instructions when requested, in like manner as to instructions given. Emerson *v.* Hogg, 2 Blatchf. (U. S.) 1, 7; Douglass *v.* McAllister, 3 Cranch (U. S.), 298; Smith *v.* Carrington, 4 Cranch (U. S.), 62; Pennock *v.* Dialogue, 2 Pet. (U. S.) 1; Pitts *v.* Whitman, 2 Story (U. S.), 609; Clymer *v.* Dawkins, 3 How. (U. S.) 674.

[4] Todd *v.* Todd, 3 Hun (N. Y.), 298; Barnes *v.* Perine, 12 N. Y. 18; Winchell *v.* Hicks, 18 N. Y. 558; O'Neill *v.* James, 43 N. Y. 84.

[5] Dounce *v.* Dow, 64 N. Y. 411.

other question and submit it to the jury, he is bound to specify it, in order to make available an exception to the failure to give it.[1] But in the case of *misdirection* the rule is different. Here it is not necessary that he should submit to the judge the proper direction.[2]

§ 2397. Exceptions must be Taken Separately and not En Masse. — A general exception to the charge brings before the court only its propriety as a whole; and if, as a whole, it is not a misdirection, not calculated to mislead the jury, the judgment will not be reversed. If, as elsewhere more fully pointed out,[3] it is merely subject to the criticism that on certain points it did not instruct the jury with sufficient fullness, it will afford no ground for reversing the judgment; for the party in such a case should save his objections by asking for more specific instructions.[4] And it is well settled that, if a series of propositions be embodied in instructions, and the instructions be excepted to in a mass, if any one of the propositions be correct, the exception must be overruled.[5] In the Federal courts such exceptions can not be taken, except in violation of the 38th rule established by the Supreme Court of the United States in 1832, which directs that thereafter "the judges of the Circuit and District Courts do not allow any bill of exceptions, which shall contain the charge of the court at large, to the jury, in trials at common law, upon any general exception to the whole of such charge, but that the party excepting be required to state distinctly the several matters in law in such charge, to which he excepts, and that such matters of law, and those only, be inserted in the bill of excep-

[1] Winchell *v.* Hicks, 18 N. Y. 558; Mallory *v.* Tioga R. Co., 5 Abb. Pr. (N. S.) (N. Y.) 420; Seymour *v.* Cowing, 1 Keyes (N. Y.), 532; Jencks *v.* Smith, 1 N. Y. 92.

[2] Allis *v.* Leonard, 58 N. Y. 288.

[3] *Ante*, § 2328.

[4] Tomlinson *v.* Wallace, 16 Wis. 224, 234; Camden &c. R. Co. *v.* Belknap, 21 Wend. (N. Y.) 354.

[5] Johnston *v.* Jones, 1 Black (U. S.), 209; Rogers *v.* The Marshal, 1 Wall. (U. S.) 645, 654; Harvey *v.* Tyler, 2 Wall. (U. S.) 328; Hunt *v.* Maybee, 7 N. Y. 273; Decker *v.* Mathews, 12 N. Y. 313; Bedwell *v.* Bedwell, 77 Ala. 587; Stovall *v.* Fowler, 72 Ala. 77; Elliott *v.* Stocks, 67 Ala. 336; Cohen *v.* State, 50 Ala. 108.

tions, and allowed by the court." In some jurisdictions the rule is more broadly stated, that where several distinct charges or instructions are given, a general exception to all of them, as, for instance, an exception in the following words, "to all of which charges the defendants then and there excepted," — is not sufficient to present for review *any question* arising upon the sufficiency or insufficiency of the instructions.[1]

§ 2398. Grounds of Exception must be Specifically Pointed out. — It is, moreover, a general rule that an exception to a charge must specifically point out the portions which are deemed objectionable, and that a general exception to the whole charge will be of no avail.[2] Accordingly, the following exception has been held sufficient: "To which charge of the court as given, and each and every part thereof, the defendant then and there excepted."[3]

§ 2399. STATUTORY RULE IN INDIANA. — In Indiana a peculiar mode of saving exceptions to instructions exists, under a statute providing as follows: "Where either party asks special instructions to be given to the jury, the court shall either give each instruction as requested, or positively refuse to do so; or give the instructions with a modification, in such manner that it shall distinctly appear what instructions were given, in whole or in part, and in like manner those refused; so that

[1] Ferson *v.* Wilcox, 19 Minn, 449; State *v.* Staley, 14 Minn. 105; Baldwin *v.* Blanchard, 15 Minn. 489; Judson *v.* Reardon, 16 Minn. 431. From the case of Eyser *v.* Weissgerber, 2 Ia. 463, 486, it would seem to be the practice in that State to review the instructions where they are excepted to as a whole. In Illinois where a case is tried by the court without a jury, and no propositions of law are submitted to the court, and no motion for a new trial made, it will be sufficient if an exception is taken to the final decision. Hemmer *v.* Wolfer (Ill.), 11 N. East. Rep. 885. See also Metcalf *v.* Fouts, 27 Ill. 110; Mahoney *v.* Davis, 44 Ill. 288; Jones *v.* Buffum, 50 Ill. 277.

[2] McAllister *v.* Engle, 52 Mich. 56, 60; Danielson *v.* Dyckman, 26 Mich. 169; Mandigo *v.* Mandigo, 26 Mich. 349; McKay *v.* Evans, 48 Mich. 597, 603; Altman *v.* Wheeler, 18 Mich. 240; Baylis *v.* Stout, 49 Mich. 215; Clapp *v.* Minneapolis &c. R. Co., 36 Minn. 6; *s. c.* 29 N. W. Rep. 340; Adams *v.* State, 25 Oh. St. 584; Adams *v.* State, 29 Oh. St. 412; Curry *v.* Porter, 125 Mass. 94; McMahon *v.* O'Connor, 137 Mass. 216.

[3] McAllister *v.* Engle, 52 Mich. 56.

either party may except to the instructions as asked for, or as modified, or to the modification. All instructions given by the court must be signed by the judge, and filed, together with those asked for by the parties, as a part of the record. The instructions shall not be entered at large on the final record, unless either party may wish to remove the cause to a superior court."[1] "A party excepting to the giving of instructions, or the refusal thereof, shall not be required to file a formal bill of exceptions; but it shall be sufficient to write on the margin or at the close of each instruction, 'refused and excepted to,' or 'given and excepted to,' which memorandum shall be signed by the judge and dated" [originally, "signed by the party or his attorney"].[2] Construing this statute as it originally stood, it was held that, in order that an instruction which had been given or refused should constitute part of the record, it must be authenticated either by the signature of the judge, or be embodied in a bill of exceptions.[3] But this decision was overruled,[4] and the statute was later held to mean that exceptions to instructions, given or refused, might be taken in either of two ways: (1) By the party or his attorney writing at the end of each instruction "given (or refused) and excepted to," and signing it; or (2) by a general bill of exceptions.[5] When the words "given (or refused) and excepted to" were written after the instruction, and signed by the judge instead of the attorney, the exception was not properly reserved.[6] It is no ground of exception under this statute, that the judge did not number the instructions which he gave to the jury, unless it appear that he was requested by counsel to instruct the jury in writing. If he instructed them in writing of his own motion, he was not bound to number them.[7] The necessity of saving exceptions, in the manner pointed out by this statute, or by a bill of exceptions, is illustrated in a case where, after the argument of a cause had closed, the court said to the jury: "I have no instructions to give you. Defendant's counsel have requested me to instruct you in writing, which I am not prepared to do, having had no time to write them. If counsel require me to put my instructions in writing, without giving

[1] Ind. Code, 1881, § 535; 2 Gav. & H. St., § 324, pt. 6.

[2] *Ibid*, § 533, pt. 6.

[3] Cross *v.* Pearson, 17 Ind. 612.

[4] Jeffersonville &c. R. Co. *v.* Cox, 37 Ind. 352.

[5] *Ibid.*; Newby *v.* Warren, 24 Ind. 161.

[6] Newby *v.* Warren, *supra;* Ledley *v.* State, 4 Ind. 580. That instructions will not be considered by the Supreme Court, unless signed by the party or his attorney, see State *v.* Robourn, 14 Ind. 300; Bush *v.* Durham, 15 Ind. 252; Maghee *v.* Baker, 15 Ind. 254; Sutherland *v.* Harkins, 56 Ind. 343.

[7] Sutherland *v.* Harkins, 56 Ind. 343, 352.

me time to prepare them, they must do without them. You will therefore retire in charge of your bailiff, and do what is right between the parties." After being out about five hours, the jury returned into court, and stated that they thought there was no prospect of their agreeing. The court then charged them to come to some conclusion, giving some reasons why they should do so. They again retired, and in about two hours, returned a verdict for the defendant. The Supreme Court held: 1. That it could not be said that the court below had failed to instruct the jury; 2. That as the only error assigned was the overruling of a motion for a new trial, as no exceptions had been taken to the failure or refusal of the court to instruct the jury, and as the evidence was not in the record, the court could not say that any other, or different instructions were necessary.[1]

§ 2400. Statutory Rule in Texas in Cases of Felony. — Under the Code of Criminal Procedure of Texas, as construed by the Court of Appeals of that State, that court will, *in cases of felony*, reverse the judgment of the District Court for what is termed *fundamental error* in the matter of instructions, whether consisting of misdirection or non-direction, although no exception was saved at the time. That court has announced the true rule to be this: "If there was a material misdirection of law as applicable to the case, or a failure to give in charge to the jury the law which was required by the evidence in the case, and such error, or omission was calculated, under all the circumstances of the case, to prejudice the rights of the defendant, the Court of Appeals should, for either cause, reverse the judgment, whether an exception has been saved or not, or whether a special request supplying any deficiency in the charge has been made or not.[2] In that State, as already seen,[3] the failure of the court to charge the law in respect of any defensive hypothesis, or in respect of certain other matters, is deemed fundamental error within the meaning of this rule. But in cases of felony, outside of the class of questions that fall within the category of fundamental errors, the rule seems to be that the failure of the court to charge the jury upon a question involved in the trial, should be objected to, or the accused should seek to supply the omission by requesting a special charge, otherwise a conviction will not be reversed because of such

[1] Krack *v.* Wolf, 39 Ind. 88.

[2] Elam *v.* State, 16 Tex. App. 34; qualifying, it seems, Bishop *v.* State, 43 Tex. 390. See also Crist *v.* State, 21 Tex. App. 361. See also Lewis *v.* State, 18 Tex. App. 401, 408; Mendiola *v.* State, 18 Tex. App. 462.

[3] *Ante*, § 2340.

omission, unless prejudice to the accused is made to appear. It was so held where the accused did not object to the charge because of the omission, nor ask the proper charge, nor claim a new trial in the court below because of the defect in the charge, but raised the question for the first time on appeal.[1] But, in cases of *misdemeanor* in that State the rule is different. Here, exceptions must be reserved to the charge of the court if the charge is objected to; otherwise it will not be revised on appeal.[2] The defendant must except to the charge of the court at the time, *and* must ask any additional instructions which he may desire, and unless he does so in the trial court, the charge will not be revised unless it is radically wrong.[3] The meaning is, that exceptions to a charge in such cases are futile, unless the defendant requests the court to give other instructions in lieu of those which the court has given.[4] More fully stated, the rule is, that the court is not required to charge the jury at all, except at the request of the parties; but when so requested, the court shall give or refuse such instructions as are asked, with or without modification, in writing, unless the parties consent that they shall be given verbally.[5] And if it appears by the record that the court has departed from either of these rules, the judgment of the court will, in compliance with the statute, be reversed, provided that it appears from the record that the defendant excepted to the action of the court at the time of the trial;[6] and where no charge appears in the record, the appellate court will either presume that no charge was given, or else that a verbal charge was given by consent of the parties; and if the latter, that it was correct.[7] The provision of the Texas Code of

[1] Fonville *v.* State, 17 Tex. App. 369; Thomas *v.* State, 17 Tex. App. 437; Bell *v.* State, 17 Tex. App. 538; Vaughn *v.* State, 17 Tex. App. 562.

[2] Day *v.* State, 21 Tex. App. 213.

[3] Loyd *v.* State, 19 Tex. App. 321; Mooring *v.* State, 42 Tex. 85; Goode *v.* State, 2 Tex. App. 520; Browning *v.* State, 1 Tex. App. 96; Jackson *v.* State, 25 Tex. (Supp.) 229; Foster *v.* State, 1 Tex. App. 363; Porter *v.* State, 1 Tex. App. 474; Robinson *v.* State, 24 Tex. 152, 154; Helbrion *v.* State, 2 Tex. App. 537; Campbell *v.* State, 3 Tex. App. 33; Forrest *v.* State, 3 Tex. App. 232; Hobbs *v.* State, 7 Tex. App. 117 (where the proper practice is set forth at length). Compare Chevarrio *v.* State, 17 Tex. App. 390; Haynes *v.* State, 2 Tex. App. 84; Mark *v.* State, 10 Tex. App. 334; Sanders *v.* State, 17 Tex. App. 222.

[4] Foster *v.* State, 1 Tex. App. 363.

[5] Tex. Code Crim. Proc., arts. 681, 682.

[6] *Ibid.*, art 685; Jordan *v.* State, 5 Tex. App. 422; Killman *v.* State, 2 Tex. App. 222; Goode *v.* State, 2 Tex. App. 520; Carr *v.* State, 5 Tex. App. 153.

[7] Bowden *v.* State, 2 Tex. App. 56; Newton *v.* State, 3 Tex. App. 245; Carr *v.* State, 5 Tex. App. 153.

Criminal Procedure,[1] that "in criminal actions for misdemeanor the court is not required to charge the jury, except at the request of counsel on either side," etc., contemplates that such a request must be presented to the court *in writing*, and where it is presented orally, the court is not bound to give it or to give any written charge in lieu of it.[2] Moreover, it is a rule in that State, contrary, as above seen,[3] to that which generally obtains elsewhere, that the exception to the charge need not specifically point out the ground of objection, — the conception being that the announcement of such an objection would require more time for scanning the charge than is compatible with the haste of a trial. "All that is required is, that general exception be taken at the time, with a request for time to prepare a bill containing the specific objections, to be prepared before the verdict is returned, in order that the court may have an opportunity to correct the charge, if so desired.[4] Moreover, it is not necessary, under the Texas statute,[5] that the defendant in a criminal trial, desiring to except to the charge of the court, or to the action of the court in refusing a charge, should do so at the very time the charge is given or refused. It is reasoned that to require him to do this, would be placing before him the alternative of passively and silently submitting to what he conceives to be an error, or to take the risk of creating against himself prejudice in the minds of the jury, by expressing a dissatisfaction with the law as given them in charge by the court. And it is held that the proper and usual practice is to allow the defendant to take his bills of exceptions to the charge of the court and to the refusal of charges, after the jury have retired from the box.[6] Moreover, the absurd rule of procedure exists in that State, in criminal cases, that it is not within the discretion of the appellate court to consider the effect upon the jury of an erroneous charge of the court, if the same

[1] Tex. Code Crim. Proc., art. 681.

[2] Hobbs *v.* State, 7 Tex. App. 117.

[3] *Ante*, § 2340.

[4] Phillips *v.* State, 19 Tex. App. 158, 165.

[5] Tex. Code Crim. Proc. art. 686.

McCall *v.* State, 14 Tex. App. 353, 362; Phillips *v.* State, 19 Tex App. 158, 165. It is also said in the same State, that, in civil practice, charges given by the court are not, as in criminal cases, required to be excepted to specially, but are regarded as excepted to without the necessity of taking any bill of exceptions thereto. 19 Tex. App. 165, per White, P. J. This is in conformity with § 1318 of the Revised Statutes of that State, which provides that "such charge shall be filed by the clerk, and shall constitute a part of the record of the cause, and shall be regarded as excepted to, and subject to revision for errors therein, without the necessity of taking any bill of exceptions thereto."

was promptly excepted to at the time when it was given. In such a case the conviction must be set aside, however immaterial the error may have been.[1] Where, however, a charge is not excepted to at the trial, but the same is objected to for the first time on the motion for a new trial, or in Court of Appeals, then the question is, whether or not the charge was calculated to injure the rights of defendant, and unless such is made to appear, this court will not revise the error.[2] As above and elsewhere seen,[3] under this system the mere failure of the judge to charge "the law applicable to the case," as provided in section 677 of the Code of Criminal Procedure that State, is ground of reversing a conviction in cases of felony, whether the court was asked so to charge or not, and whether any exception was saved or not, — thus making the mere oversight of the judge, where counsel, perhaps with a fraudulent purpose, sit still and decline to exercise their proper office of aiding the court, in forgetting or omitting to charge the law on some essential element of the case, the ground of reversing a conviction. Under this system, the trial judge becomes a sort of *insurer* that the law shall be correctly charged in every criminal case, and where he fails in the performance of this duty, he finds himself subjected to an *ex parte* trial in a reviewing court. It is difficult to see how, under such a system, criminal justice can be administered with safety to the rights of society.

§ 2401. Misdirection no Ground for a New Trial unless the jury were Misled. —Courts of error do not sit to decide moot questions, but to redress real grievances. It is, therefore, a rule of nearly all the courts, that no judgment will be reversed on account of the giving of erroneous instructions, unless it appear probable that the jury were misled by them.[4] Expres-

[1] Clanton *v.* State, 20 Tex. App. 616; Bravo *v.* State, *Id.* 188; Cook *v.* State, 22 Tex. App. 511; *s. c.* 3 S. W. Rep. 749, 752.

[2] Cook *v.* State, 22 Tex. App. 511; *s. c.* 3 S. W. Rep. 749; Hill *v.* State, 22 Tex. App. 579; *s. c.* 3 S. W. Rep. 764. See also Bishop *v.* State, 43 Tex. 390; Mace *v.* State, 9 Tex. App. 119; Henry *v.* State, *Id.* 359; Gardner *v.* State, 11 Tex. App. 265; Elam *v.* State, 16 Tex. App. 34; Mendiola *v.* State, 18 Tex. App. 463; Lewis *v.* State, *Id.* 401.

[3] *Ante*, § 2340.

[4] Smith *v.* Carr, 16 Conn. 450; Benham *v.* Carey, 11 Wend. (N. Y.) 83; Doe *v.* Paine, 4 Hawks (N. C.), 64; Hoitt *v.* Holcomb, 32 N. H. 186; Ochel-tree *v.* Carl, 23 Iowa, 394; Stewart *v.* State, 1 Ohio St. 66; Caw *v.* People, 3 Neb. 357, 369; Cummings *v.* Chandler, 26 Me. 452; Horner *v.* Wood, 16 Barb. (N. Y.) 386; United States *v.* Wright, 1 McLean (U. S.), 509; Fisher *v.* Forrester, 33 Pa. St. 501; Hart *v.* Girard, 56 Pa. St. 23; Mercer

sions of this rule could be multiplied almost without limit. Thus, it is said that instructions faulty, or technically erroneous, will not work a reversal of the judgment, if the jury were not misled, or if, as a whole, the case was fairly presented to them,[1] and especially if their verdict is obviously correct.[2] So, although an instruction given to the jury contained matter technically erroneous, yet, if the objectionable part was merely superfluous, and not calculated to mislead, the judgment will not be reversed because of the giving of it.[3]

§ 2402. Nor because of Error in Instructions unless Prejudicial. — Of course, it can never be said that the jury were misled by the giving of erroneous instructions, where they have reached the correct result by their verdict. Accordingly, it is the practice of most of the courts, before passing upon exceptions to instructions, to look into the evidence and see if the verdict was right, and, if it is found to be so, the court will look no further. The rule of these courts is, that a good verdict cures all errors in the intermediate steps by which it was reached.[4] In England, it is no ground for a new trial that the

Academy *v.* Rusk, 8 W. Va. 373, 382; Spence *v.* Onstott, 3 Texas, 147; Planter's Bank *v.* Richardson, 15 Ga. 277; Washington &c. Ins. Co. *v.* Merchants' &c. Ins. Co., 5 Ohio St. 450; State *v.* Donovan, 10 Nev. 36; Chicago *v.* Hesing, 83 Ill. 204; Clarke *v.* Dutcher, 9 Cowen (N. Y.), 674.

[1] Philadelphia &c. R. Co. *v.* Larkin, 47 Md. 156; Burton *v.* Merrick, 21 Ark. 357; Carrington *v.* Pacific Mail S. S. Co., 1 Cal. 475; Smith *v.* Carr, 16 Conn. 450; Adams *v.* Nantucket, 11 Allen (Mass.), 203; Jackman *v.* Bowker, 4 Metc. (Mass.) 235; Mead *v.* Boxborough, 11 Cush. (Mass.) 362.

[2] Davis *v.* Brown, 67 Mo. 313.

[3] Bowling *v.* Krug, 55 Mo. 446.

[4] Wilkinson *v.* Payne, 4 T. R. 468; Deerly *v.* Duchess of Mazarine, 1 Salk. 116, and 2 Salk. 646; *s. c.* 1 Ld. Raym. 147; Woodbury *v.* Larned, 5 Minn. 339; Brantley *v.* Carter, 26 Miss. 282; Magee *v.* Harrington, 13 Smed. & M. (Miss.) 403; Ettling *v.* Bank of U. S., 11 Wheat. (U. S.) 59; Hanna *v.* Renfro, 32 Miss. 126; Morton *v.* Lawson, 1 B. Mon. (Ky.) 46; Hanks *v.* Neal, 44 Miss. 213; Head *v.* State, 44 Miss. 732; Wesley *v.* State, 37 Miss. 327, 350; Evans *v.* State, 44 Miss. 762; Reynolds *v.* Magness, 2 Ired. L. (N. C.) 26; Howard *v.* Miner, 20 Me. 325; French *v.* Stanley, 21 Me. 512; Thomas *v.* Tanner, 6 T. B. Mon. (Ky.) 61; Emanuel *v.* Cocke, 6 Dana (Ky.), 214; McCall *v.* Seever, 5 Ind. 187; Bischof *v.* Coffelt, 6 Ind. 23; Holdane *v.* Butterworth, 5 Bosw. (N. Y.) 2; Wilkinson *v.* Griswold, 12

judge misdirected the jury, unless it is shown that the jury were thereby induced to form a wrong conclusion.[1] If the revising court sees that *justice has been done* between the parties, they will not set aside the verdict, nor enter into a discussion of the questions of law.[2] Thus, if the jury are *misdirected as to damages*, but do not follow the misdirection, it will be no ground for a new trial;[3] and the same rule obtains in the American courts,[4]— as where the court erroneously instructs the jury that they may give exemplary damages, but they nevertheless give only compensatory damages.[5] So, where the judge disallows a

Smed. & M. (Miss.) 669; Copeland *v.* Wadleigh, 7 Me. 141; Springer *v.* Bowdoinham, 7 Me. 442; Mercer Academy *v.* Rusk, 8 W. Va. 373; Copeland *v.* Copeland, 28 Me. 525, 543; Beall *v.* Mann, 5 Ga. 456, 472; Potts *v.* House, 6 Ga. 325, 364 (before the Act of 1850, *ante*, § 2280; Arrington *v.* Cherry, 10 Ga. 434; Myrick *v.* Hicks, 15 Ga. 155; O'Shields *v.* State, 55 Ga. 697 (where the charge was correct as a whole); Phillips *v.* Ocmulgee Mills, 55 Ga. 633 (where the charge was right as a whole); Vanuxen *v.* Rose, 7 Ind. 222; Cameron *v.* Watson, 40 Miss. 191, 209; Fore *v.* Williams, 35 Miss. 533. "This court," said Weston, J., "upon exceptions, are to do what to law and *justice* may appertain." Copeland *v.* Wadleigh, 7 Me. 141, 145; State *v.* Ruhlman 111 Ind. 17; *s. c.* 11 N. E. Rep. 793; Loew *v.* State, 60 Wis. 559, 564; Hathaway *v.* Crosby, 17 Me. 448 (construing the statute); Ingram *v.* South Carolina Ins. Co., 3 Brev. (S. C.) 522 (jury misdirected, but verdict for defendants affirmed, because of evidence of fraud in procuring policy of insurance); Ward *v.* Gibbs, 37 Miss. 560. In one jurisdiction the view is found, not supported by any conceivable principle of juridical sense, that judgments will be reversed where the jury have declined to follow the instructions, whether they were right or wrong, — the reviewing court refusing to look further than to see that the jury disregarded the instructions of the trial court. The rule has been equally applied where trial courts set aside the verdict for this reason and overrule a motion for judgment thereon, from which latter ruling an appeal was prosecuted, and in cases where the court refused a new trial for this reason. Savery *v.* Busick, 11 Ia. 487; Farley *v.* Budd, 14 Ia. 289; Taylor *v.* Cook, 14 Ia. 501; Musser *v.* Maynard, 59 Ia. 11; Griffith *v.* Parton, 59 Ia. 31.

[1] Duke of Newcastle *v.* Broxtowe, 4 Barn. & Ad. 273; *s. c.* 1 Nev. & M. 598.

[2] Edmondson *v.* Machell, 2 T. R. 4; Wickes *v.* Clutterbuck, 2 Bing. 483; *s. c.* 10 Moore, 63; Clarke *v.* Arden, 16 C. B. 227; *s. c.* 1 Jur. (N. S.) 710; 24 L. J. (C. P.) 162.

[3] Twigg *v.* Potts, 1 Cromp. Mees. & R. 89.

[4] Potter *v.* Hopkins, 25 Wend. (N. Y.) 417. *Aliter* if the jury conformed their verdict to it, to the prejudice of the defendant. West *v.* Anderson, 9 Conn. 107.

[5] Welborn *v.* Spears, 32 Miss. 138.

claim, to *recoup damages*, this will be no ground for a new trial, if it appear that the amount claimed was allowed in *another form*.[1] So, where the court mistakes the law *on a collateral point*, as to which a bill of exceptions would not lie, the judge will not grant a new trial as of right, but will, in his discretion, do so, if he thinks justice has not been done.[2] So, it is error, as we have seen, for the judge to *submit questions of law to the jury;*[3] yet, if he erroneously submit such a question to them, and they decide it rightly, their verdict will not be disturbed.[4] On the other hand, for the judge to assume to decide a question of fact which should have been submitted to the jury, is error;[5] yet if he undertake to decide such a question, and decides it correctly, a new trial will not be granted.[6] The same rule obtains where the charge of the judge was erroneous, and yet, the jury, *disregarding it*, by their verdict reached the right result.[7] Nor will erroneous instructions, applicable to *one count* only, require a verdict to be set aside, if there is evidence applicable to *another count*, sufficient to sustain the verdict.[8]

§ 2403. Nor where Substantial Justice has been Done. — We waste time in multiplying forms of expression, beyond saying that the courts which entertain this conception refuse to reverse judgments because of errors in giving or refusing instructions, where they can see from the whole record that substantial justice has been done, and that another trial *ought* to produce the

[1] Brush *v.* Keeler, 34 Conn. 499.

[2] Black *v.* Jones, 6 Exch. 213; *s. c.* 2 L. J. Exch. 152; Henman *v.* Lester, 12 C. B. (N. S.) 776; *s. c.* 9 Jur. (N. S.) 601.

[3] *Ante*, § 1017; Shaw *v.* Wallace, 2 Stew. & P. (Ala.) 193.

[4] Copeland *v.* Wadleigh, 7 Me. 141, 145; Springer *v.* Bowdoinham, 7 Me. 442, 446; Millikin *v.* Tufts, 31 Me. 497; Emerson *v.* Coggswell, 16 Me. 77; Hathaway *v.* Crosby, 17 Me. 448; Howard *v.* Brown, 21 Me. 385; Smith *v.* Shepard, 1 Dev. L. (N. C.) 461; Marshall *v.* Fisher, 1 Jones L. (N. C.) 111; Stokes *v.* Arey, 8 Jones L. (N. C.) 66; Lee *v.* Mound Station, 118 Ill. 306; *ante*, § 1020.

[5] *Ante*, § 2280.

[6] Green *v.* Dingley, 24 Me. 131.

[7] Tilman *v.* Stringer, 26 Ga. 171, 177; Matter of Pratte, 12 Mo. 194; Hannum *v.* Belchertown, 19 Pick. (Mass.) 311, 313.

[8] Dalton *v.* Bethlehem, 20 N. H. 506.

same result;[1] or will inevitably produce the same result;[2] or where the reviewing court cannot perceive that a new trial, under correct instructions, would result in a different verdict;[3] or where the error was *not injurious* to the party complaining;[4] or where the instructions which were given were *more favorable* to him than those which he requested;[5] or where the verdict is so plainly in accordance with the evidence that it follows as a mere *conclusion of law* thereon;[5] or where the instruction complained

[1] Alsop *v.* Magill, 4 Day (Conn.), 42; Branch *v.* Doane, 17 Conn. 403; Arrington *v.* Cherry, 10 Ga. 429, 434; Johnson *v.* Blackman, 11 Conn. 342, 358; Wood *v.* Wylds, 11 Ark. 754; Prescott *v.* Johnson, 8 Fla. 391; Greenup *v.* Stoker, 8 Ill. 202; Terhune *v.* Dever, 36 Ga. 648; Ducket *v.* Crider, 11 B. Mon. (Ky.) 195; Harris *v.* Doe, 4 Blackf. (Ind.) 370; Depeyster *v.* Columbian Ins. Co., 2 Caines (N. Y.), 85; Bolan *v.* Peeples, 1 Brev. (S. C.) 109; Seare *v.* Prentice, 8 East, 348; Graham *v.* Bradley, 5 Humph. (Tenn.) 476; Princeton Turnp. Co. *v.* Gulick, 16 N. J. L. 161; Mirick *v.* Hemphill, Hempst. (U. S.) 179.

[2] Hewitt *v.* Jones, 72 Ill. 218; citing McConnell *v.* Kibbe, 33 Ill. 175; Root *v.* Curtis, 38 Ill. 192; Boynton *v.* Holmes, 38 Ill. 59; Potter *v.* Potter, 41 Ill. 80; Watson *v.* Woolverton, 41 Ill. 241; Clark *v.* Pageter, 45 Ill. 185; Pahlman *v.* King, 49 Ill. 266; Rankin *v.* Taylor, 49 Ill. 451; Booth *v.* Hynes, 54 Ill. 363; Steudle *v.* Rentchler, 64 Ill. 161; Phœnix Ins. Co. *v.* La Pointe, 118 Ill. 384, 390; Chicago &c. R. Co. *v.* Dooling, 95 Ill. 202; Hubner *v.* Feige, 90 Ill. 208; Chicago &c. R. Co. *v.* Rung, 104 Ill. 641; Brown *v.* Bowen, 30 N. Y. 520; Morton *v.* Lawson, 1 B. Mon. (Ky.) 46; Graham *v.* Bradley, 5 Humph. (Tenn.) 476; Sheldon *v.* South School District, 24 Conn. 88; Foster *v.* Chicago &c. R. Co., 84 Ill. 164.

[3] Noyes *v.* Shepherd, 30 Me. 173.

[4] Dever *v.* Aikin, 40 Ga. 423; Freeman *v.* Rankins, 21 Me. 446; Morford *v.* Woodworth, 7 Ind. 83; Gardner *v.* Clark, 17 Barb. (N. Y.) 538; Hobbs *v.* Outlaw, 6 Jones L. (N. C.) 174; Fagan *v.* Williamson, 8 Jones L. (N. C.) 433; Hook *v.* Craghead, 35 Mo. 380; Mansfield *v.* Wheeler, 23 Wend. (N. Y.) 79; Price *v.* Evans, 4 B. Mon. (Ky.) 388; Holly *v.* Brown, 14 Conn. 256; McKay *v.* Leonard, 17 Iowa, 569; Justices *v.* Griffin &c. Co., 15 Ga. 39; Cross *v.* Hall, 4 Md. 426; Coit *v.* Waples, 1 Minn. 134; Graham *v.* Houston, 4 Dev. L. (N. C.) 236; State *v.* Frank, 5 Jones L. (N. C.) 384; Welborn *v.* Spears, 32 Miss. 138; Finney *v.* Allen, 7 Mo. 416; Vaulx *v.* Campbell, 8 Mo. 224; Sinard *v.* Patterson, 3 Blackf. (Ind.) 353; Ricketts *v.* Harvey, 106 Ind. 564; Jones *v.* Angell, 95 Ind. 376, 381. Citing Morford *v.* Woodworth, 7 Ind. 83; Hall *v.* State, 8 Ind. 439; Hayden *v.* Souger, 56 Ind. 42; *s. c.* 26 Am. Rep. 1; Simpkins *v.* Smith, 94 Ind. 470; Horner *v.* Wood, 16 Barb. (N. Y.) 386; Freeman *v.* Rankins, 21 Me. 446; Lewis *v.* State, 33 Ga. 132; McCall *v.* Seevers, 5 Ind. 187; Winans *v.* Sierra Lumber Co., 66 Cal. 61; Clark *v.* Child, 66 Cal. 87.

[5] Thornton *v.* Lane, 11 Ga. 459, 533; Salmons *v.* Roundtree, 24 Ala. 458.

[6] Musselman *v.* Pratt, 44 Ind. 126.

of was given at the *party's own request;*[1] or where the instruction complained of was in effect a *repetition* of an instruction previously given at the request of the complaining party;[2] or where the misdirection related to a *matter not material* to the result,[3] — as where the instruction, correct in itself, had no application to the evidence either way;[4] or where it is based on hypothetical facts which are negatived by the verdict,[5] as where the instruction as to the measure of damages is erroneous, and the jury find for the defendant.[6] So, where the practice exists of submitting special interrogatories to juries, it will often appear from the answer of the jury to such interrogatories that instructions, which were in themselves erroneous, did not in fact influence their findings. In such a case, the giving of erroneous instructions is no ground for reversing the judgment,[7] at least, where the instructions could not have prejudiced the minds of the jurors in making the special findings.[8] Nor will a judgment be reversed because of the giving of an instruction which was obnoxious to *verbal criticism* merely, — otherwise few judgments could stand,[9] — the true view being that *appellate courts will not presume to prescribe style or manner to the trial courts*, any more than the trial courts will presume to prescribe style or manner to the appellate courts.[10] The doctrine of *error without prejudice* is not admitted to the same extent in criminal as in civil cases; yet it applies in many instances in respect of instructions in criminal cases.[11] Thus, an erroneous instruction as to the law of

[1] Flowers *v.* Helm, 29 Mo. 324; Foote *v.* Silsby, 1 Blatchf. (U. S.) 445 (aff'd. 14 How. (U. S.) 218); Harrison *v.* Spring Valley Hydraulic Gold Co., 65 Cal. 376.

[2] Phillips *v.* Wisconsin State Agricultural Society, 60 Wis. 401.

[3] Glover *v.* Holbrook, 5 Allen (Mass.), 155; Sinard *v.* Patterson, 3 Blackf. (Ind.) 353.

[4] *Ante*, § 2321.

[5] Patterson *v.* McClanahan, 13 Mo. 507.

[6] Marcly *v.* Shults, 29 N. Y. 346, 356.

[7] Porter *v.* Wâltz, 108 Ind. 40; *s. c.* 6 W. Rep. 239, 241. See also Woolery *v.* Louisville &c. R. Co., 107 Ind. 381; *s. c.* 5 West. Rep. 667; Cleveland &c. R. Co. *v.* Newell, 104 Ind. 264; Luke *v.* Johnnycake, 9 Kan. 511, 519; Evans *v.* Commercial Mut. Ins. Co., 6 R. I. 47, 56.

[8] Holdane *v.* Butterworth, 5 Bosw. (N. Y.) 1.

[9] Galpin *v.* Wilson, 40 Iowa, 90.

[10] State *v.* Rollins, 77 Me. 380, 384.

[11] People *v.* Wiley, 3 Hill (N. Y.), 194, 214; People *v.* Lohman, 2 Barb. (N. Y.) 216; Epps *v.* State, 102 Ind. 539; Graeter *v.* State, 105 Ind. 272, 274.

justifiable homicide is no ground of reversal, where the evidence does not present a case of justifiable homicide.[1] So, in a trial for *murder*, an erroneous instruction to the effect that a certain act would constitute murder in the *second degree*, whereas it might amount to *manslaughter* only, is immaterial, if the defendant is convicted of murder in the first degree.[2]

§ **2404. Nor because a Wrong Reason was Given for a Right Direction.** — As a judge at *nisi prius* is not bound to give reasons for the decisions he renders, it is scarcely necessary to say that where the judge directs the jury rightly, the fact that he gives *wrong reasons* for his direction will furnish no ground for a new trial,[3] unless it appear that the jury were misled by them, or that injustice has been done by them, or, at least, that the verdict may in some way have been affected by them.[4]

§ **2405. Nor because they were, in point of Fact, Misunderstood by the Jury.** — Neither will a new trial be granted because there is reason to believe that the jury misunderstood the instructions, unless the party complaining has used due diligence to correct the mistake. A failure to ask for more specific instructions, or to move that the jury be directed to revise their verdict, or to take other measures for relief on the coming in of the verdict, is deemed such negligence as will prevent the granting of a new trial, unless the omission is accounted for on the ground of accident, mistake or misfortune.[5] When, therefore, the jury have been correctly instructed, and have returned a verdict, an inquiry will not be made as a ground for a new trial, whether they did not misunderstand the instructions. They are presumed to have understood them; and if they did not, the fault lies with the counsel complaining, in not asking for more explicit instructions at the time the jury were charged.[6] A further

[1] Shorter *v.* People, 2 N. Y. 193.
[2] People *v.* O'Neal, 67 Cal. 378.
[3] Ellis *v.* Jameson, 17 Me. 235.
[4] Carpenter *v.* Pierce, 13 N. H. 403, 408.
[5] Thayer *v.* Stevens, 44 N. H. 484.
[6] Lathrop *v.* Sharon, 12 Pick. (Mass.) 172; *ante*, § 2341.

remedy for cases where it is obvious to the presiding judge that the jury must have misunderstood or misapplied the law as stated from the bench, may be found in an application to the court for a new trial, on the ground that the verdict is against the evidence under the instructions given to the jury.[1] But the rule that the testimony of jurors will not be heard to impeach their verdict is of force in this connection; and all attempts to introduce the testimony of jurors, after the verdict has been returned and recorded, to show that they misunderstood the charge of the judge, have been unsuccessful.[2] But in Georgia, it is said that where the question is one of fact only, and there is room for apprehension that the jury, on account of ambiguity in the charge, may have been misled in considering and weighing the testimony, it is safer to send the case back for a new trial; [3] a rule which is not supported by the weight of authority. The better rule is said by Redfield, C. J., to be that where it is merely conjectural whether a misapprehension occurred in the minds of the jury, and especially where the matter is of slight importance upon the issue submitted, the court will not direct a new trial, merely because the jury may have apprehended the judge in an indifferent manner. A mere formal error should be clearly established, before a court of errors can be justly expected to reverse the judgment upon that ground. A new trial ought not to be granted in such a case, unless it appear that the court was requested to give the jury specific instructions upon the very point.[4]

§ 2406. Theory that the Evidence will not be Looked into to See whether the Verdict was Right. — Opposed to much of the foregoing is a theory of appellate procedure, entirely correct and proper within reasonable limits, that a misdirection, like any other error committed at the trial of a cause, is *presumed* to have been prejudicial. There is, in the first place, a general

[1] Raymond *v.* Nye, 5 Metc. (Mass.) 151.

[2] *Ibid.;* Hannum *v.* Belchertown, 19 Pick. (Mass.) 311; Dorr *v.* Fenno, 12 Pick. (Mass.) 521; Johnson *v.* State, 27 Texas, 759, 769; Mirick *v.* Hemphill, Hempst. (U. S.) 179; *post,* § 2618.

[3] Fain *v.* Cornett, 25 Ga. 184.

[4] Sherman *v.* Champlain Transp. Co., 31 Vt. 162, 176.

presumption in favor of the rightfulness of whatever has been done in the lower court; and, as a necessary part of this presumption, there is, at the outset of the examination of every case in an appellate court, a presumption that the verdict was right. But when the appellate court sees that the jury were misdirected in a given particular, this general presumption gives way, and the contrary presumption obtains, that a verdict based upon an erroneous direction as to the law is itself erroneous, and the judgment thereon equally so. Unless, then, there is that in the record which clearly rebuts this presumption, the judgment must be reversed for the misdirection. All appellate courts act upon this rule, but they differ greatly in respect of the extent to which they will look into the evidence preserved in the bill of exceptions, for the purpose of seeing whether the verdict is in accordance with the merits. Many of them refuse to look into the evidence to see whether the verdict was right,[1] any further than to see that there is *some* evidence, even though it be no more than a *scintilla*, to sustain it.[2] Under this system, the whole effort of the courts of error is to see that the intermediate steps, by which the verdict was reached, were free from legal error. They do not inquire whether the jury were *actually* misled by the instructions given, but they limit their investigations to the inquiry whether the instructions were "*calculated*" to mislead them.[3] As already seen, one court goes still further, and, under certain circumstances, where error appears, reverses convictions in criminal cases without any inquiry as to the effect which the error may have had upon the result.[4] The sound view is believed to be that, where the jury were misdirected, and there is

[1] Yonge *v.* Pacific Mail S. S. Co., 1 Cal. 353; Chandler *v.* Fulton, 10 Texas, 2; Boyden *v.* Moore, 5 Mass. 365, 372; Dudley *v.* Sumner, 5 Mass. 438; Lane *v.* Crombie, 12 Pick. (Mass.) 177; James *v.* Langdon, 7 B. Mon. 193, 196; Field *v.* Deatley, 10 B. Mon. 4.

[2] *Ante*, § 2246.

[3] Benham *v.* Cary, 11 Wend. 83; Hastings *v.* Bangor House Proprietors, 18 Me. 436; Potts *v.* House, 6 Ga. 325, 364; Tufts *v.* Seabury, 11 Pick. (Mass.) 142. Other illustrations of this view will be found in the following cases: Yonge *v.* Pacific Mail S. S. Co., 1 Cal. 353; Chandler *v.* Fulton, 10 Tex. 2, 21; Hubby *v.* Stokes, 22 Tex. 217; Boyden *v.* Moore, 5 Mass. 365, 371; Dudley *v.* Sumner, 5 Mass. 438, 487; Lane *v.* Crombie, 12 Pick. (Mass.) 177.

[4] *Ante*, § 2400.

not that in the record which shows to a reasonable or *moral*[1] certainty that the verdict was right, or that a new trial must, if rightly conducted, lead to the same result, or that the misdirection did no harm, — a new trial will be granted. So also, when the court cannot see what effect a misdirection upon a material point may have had upon the verdict, they will grant a new trial.[2] So, where there was a misdirection of such a nature as to leave it doubtful whether the jury rested their verdict on an erroneous ground, or on a ground open to contest, — in other words, where, although the evidence may have warranted the verdict found, the chances were equal that it resulted from the misdirection, — a new trial was granted.[3] Neither, in case of a material misdirection, will the judgment be affirmed upon an opinion that the verdict may be right, if the evidence is so far in conflict as to make a question which would properly be left to the jury. The mere fact that the court would, if sitting as a jury, find in the same way upon the evidence as set out in the record, is not sufficient to cure a misdirection.[4] So, where the instruction was such as to leave it uncertain upon what ground the jury found their verdict, it was held that a new trial must be granted, without any inquiry as to whether or not the verdict was right.[5] Nor, in such a case, can justice be done by entering a *remittitur*.[6] Another court has said that a verdict *manifestly* in accordance with the weight of evidence and with the justice of the case, will not usually be disturbed on account of the misdirection of the judge; but where material testimony has been excluded, erroneous instructions given, and the proof mis-stated in summing up the evidence, the verdict will be set aside, and a new trial granted.[7]

[1] Thacher *v.* Jones, 31 Me. 528, 534. To the same effect is Noyes *v.* Shepherd, 30 Me. 17.

[2] Gaines *v.* Buford, 1 Dana (Ky.), 481, 502; Gillespie *v.* Gillespie, 2 Bibb (Ky.), 89, 93; Beaver *v.* Taylor, 1 Wall. (U. S.) 637; Bayless *v.* Davis, 1 Pick. (Mass.) 206.

[3] Wardell *v.* Hughes, 3 Wend. (N. Y.) 418.

[4] James *v.* Langdon, 7 B. Mon. (Ky.) 193, 196; Field *v.* Deatley, 10 B. Mon. (Ky.) 4.

[5] Holmes *v.* Doane, 9 Cush. (Mass.) 135.

[6] Smith *v.* Dukes, 5 Minn. 373.

[7] Potts *v.* House, 6 Ga. 324, 364.

§ 2407. How Instructions Construed in Courts of Error. — The charge is entitled to a *reasonable interpretation.*[1] It is *construed as a whole*, in the same connected way in which it was given, upon the presumption that the jury did not overlook any portion, but gave due weight to it as a whole; and this is so, although it consists of clauses originating with different counsel and applicable to different phases of the evidence.[2] If, when so construed, it presents the law fairly and correctly to the jury, in a manner not calculated to mislead them, it will afford no ground for reversing the judgment, although some of its expressions, if standing alone, might be regarded as erroneous;[3] or because there may be an apparent conflict between isolated sentences;[4] or because its parts may be in some respects slightly repugnant to each other,[5] or because some one of them taken abstractly, may have been erroneous.[6] If, therefore, a single instruction is

[1] Castle *v.* Bullard, 23 How. (U. S.) 172, 189.

[2] Carrington *v.* Pacific Mail S. S. Co., 1 Cal. 475; Clark *v.* McElvy, 11 Cal. 154; Smith *v.* Carr, 16 Conn. 450; Andrews *v.* Graves, 1 Dillon C. C. (U. S.) 108; Nicoles *v.* Calvert, 96 Ind. 316; Louisville, &c. R. Co. *v.* Shanklin, 98 Ind. 573; Story *v.* State, 99 Ind. 413; Walker *v.* State, 102 Ind. 502, 510; United States *v.* Tenney (Ariz.), 8 Crim. Law Mag. 486; Bartling *v.* Behrends, 20 Neb. 211; *s. c.* 29 N. W. Rep. 472; Davis *v.* State, 19 Tex. App. 202; Hart *v.* State, 21 Tex. App. 163, 171; Lewis *v.* State, 18 Tex. App. 401; McCarty *v.* Waterman, 96 Ind. 594, 597; Eggleston *v.* Castle, 42 Ind. 531; Kirland *v.* State, 43 Ind. 146; *s. c.* 13 Am. Rep 386; McCulley *v.* State, 62 Ind. 428.

[3] Logan *v.* State, 17 Tex. App. 50; Stout *v.* State, 96 Ind. 408; Cassaday *v.* Magher, 85 Ind. 228; Norris *v.* Casel, 90 Ind. 143; Cheek *v.* Aurora, 92 Ind. 107; Union Mutual Life Ins. Co. *v.* Buchanan, 100 Ind. 63, 74 (quoting with approval Thomp. Charg. Jur., § 131); Goodwin *v.* State, 96 Ind. 550; McCarty *v.* Waterman, 96 Ind. 594; Lytton *v.* Baird, 95 Ind. 349; Garber *v.* State, 94 Ind. 219; Louisville &c. R. Co. *v.* Harrigan, 94 Ind. 245; Young *v.* Clegg, 93 Ind. 371; Western Union Tel. Co. *v.* Young, 93 Ind. 118; Jones *v.* State, 65 Ga. 506, 510; State *v.* Jones, 64 Ia. 350; White *v.* Beem, 80 Ind. 239; Branstetter *v.* Dorrough, 81 Ind. 527; Eggleston *v.* Castle, 42 Ind. 531; Mitchell *v.* Allison, 29 Ind. 43; Shaw *v.* Saum, 9 Ind. 517; Phillips *v.* Ocmulgee Mills, 55 Ga. 633.

[4] People *v.* Turcott, 65 Cal. 126.

[5] Carrington *v.* Pacific Mail S. S. Co., *supra;* Moore *v.* Sauborin, 42 Mo. 490; Karl *v.* Kansas City &c. R. Co., 55 Mo. 476, 482; Edwards *v.* Cary, 60 Mo. 572; Henschen *v.* O'Bannon, 56 Mo. 289.

[6] Adams *v.* Nantucket, 11 Allen (Mass.), 203; Jackman *v.* Bowker, 4 Metc. (Mass.) 235; Mead *v.* Boxborough, 11 Cush. (Mass) 362.

found which states the law incorrectly, and yet it is qualified by others in such a manner that the jury were probably not misled by it, it will not be ground for reversing the judgment.[1] Thus, where the court commits error in one part of its charge, which error consists merely in laying down abstract propositions of law, or in charging the jury upon hypotheses of fact not embraced in the evidence, it is possible for this to be corrected and cured, by drawing the attention of the jury carefully to the facts in evidence in another portion of the charge.[2] "An instruction," said Elliott, J., "is not to be disposed of by dissection; if good as a whole it will stand. Few rules are better settled than that an instruction is to be taken as an entirety."[3] It is, therefore, a rule that the court is not required, in drawing an instruction, to embrace every hypothesis in a single paragraph; for instance, the elements of negligence in the defendant and contributory negligence in the plaintiff, may be submitted to the jury in separate paragraphs of the charge.[4] While an instruction which purports to state all the elements of an offense necessary to a conviction may be fatally defective if an essential element is omitted, yet where the instruction simply enumerates certain things that the prosecution must prove, without stating that they are of themselves sufficient, and the other requisites are given in another instruction, there is no error.[5] This principle is, however, subordinate to another elsewhere stated[6] that the giving of *contradictory instructions*, material to the evidence, is reversible error; since it cannot, in general, be known whether the jury followed the good or bad one. An erroneous instruction is, therefore, not, in general, cured by a correct one,[7] though an *incomplete* instruction is complemented and cured by another instruction embodying what was omitted in the former. On this subject it has been well said by Haight, J.:

[1] Springdale Cemetery Asso. *v.* Smith, 24 Ill. 480; Toledo &c. R. Co. *v.* Ingraham, 77 Ill. 300; Fort Worth &c. R. Co. *v.* Hogsett, 67 Tex. 685; *s. c.* 4 S. W. Rep. 365.

[2] Steagald *v.* State, 22 Tex. App. 464; *s. c.* 3 S. W. Rep. 771.

[3] Nave *v.* Flack, 90 Ind. 205, 211.

[4] Louisville &c. R. Co. *v.* Kelly, 92 Ind. 371, 375.

[5] Bird *v.* State, 107 Ind. 154; *s. c.* 8 N. East. Rep. 14.

[6] *Ante*, § 2326.

[7] People *v.* Casey, 65 Cal. 260.

"When, upon a criminal trial, the judge in charging the jury lays down erroneous propositions, but upon his attention being called thereto by objections, corrects the misdirections, and lays down the correct rule, no error is presented for review. But to obviate an erroneous instruction upon a material point, the withdrawal must be absolute, and in such explicit terms as to preclude the inference that the jury might have been influenced thereby." [1]

§ **2408**. [**Continued.**] **Construed According to the Evidence.** — Moreover, the words used in them are to be taken *secundum subjectum materiam*. They are to be construed with reference to the evidence on which they are based.[2] Accordingly, it was not error for the court to tell the jury that, in every charge of murder there was included a charge of assault and battery, in a case where the indictment was for murder by cutting with a knife, and not by poison.[3] Nor will it be error for the judge to state the law to the jury in general terms, without stating the exceptions to the rules he thus lays down, where there is no evidence bringing the case within the exceptions.[4] And if the charge, when taken in reference to the evidence, is correct, the judgment will stand, though as a universal proposition it may be erroneous.[5] If the charge, when construed with reference to the evidence, is too favorable to the plaintiff in error, he will not be heard to complain.[6] Finally, there is authority for the view that in criminal cases the instructions will be more closely scrutinized by the reviewing court, where the evidence throws the propriety of the conviction into doubt.[7]

[1] People *v.* Kelley, 35 Hun (N. Y.), 295, 302. The court cite: Greenfield *v.* People, 85 N. Y. 75, 90; Eggler *v.* People, 56 N. Y. 642; Chapman *v.* Erie R. Co., 55 N. Y. 579: and distinguish: Sindram *v.* People, 88 N. Y. 196, 202, and Buel *v.* People, 78 N. Y. 492.

[2] Adams *v.* The State, 22 Ga. 417, 425; Mitchell *v.* Zimmerman, 4 Texas, 75; Berry *v.* Hardman, 12 Ala. 604; McBride *v.* Thompson, 8 Ala. 650; Hooksett *v.* Amoskeag Man. Co., 44 N. H. 105; Sword *v.* Keith, 31 Mich. 248; Blake *v.* Irish, 21 Me. 450; Lyman *v* Redman, 23 Me. 286; Casco Bank *v.* Keene, 53 Me. 103; Smith *v.* Carr, 16 Conn. 450. See also Price *v.* Johnson Co., 15 Mo. 433.

[3] Adams *v.* State, 22 Ga. 417.

[4] State *v.* Downer, 21 Wis. 274.

[5] McBride *v.* Thompson, 8 Ala. 650.

[6] Salmons *v.* Roundtree, 24 Ala. 458; *ante*, § 2403.

[7] State *v.* Irwin, 80 Mo. 249.

CHAPTER LXIX.

CAUTIONARY INSTRUCTIONS AS TO WEIGHING EVIDENCE.

ARTICLE I. — CAUTIONS AS TO THE PROBATIVE VALUE OF VARIOUS KINDS OF EVIDENCE.
ARTICLE II. — AS TO THE PRESUMPTION OF INNOCENCE AND THE DOCTRINE OF REASONABLE DOUBT.
ARTICLE III. — AS TO CIRCUMSTANTIAL EVIDENCE.
ARTICLE IV. — AS TO CERTAIN OTHER PRESUMPTIONS.

ARTICLE I. — CAUTIONS AS TO THE PROBATIVE VALUE OF EVIDENCE IN VARIOUS FORMS.

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2451. Failure of the Accused to Testify.
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2453. Precedents of Instructions on this Subject.
2454. Instructions as to Inference from Failure of Prisoner to Offer Explanation.
2455. As to the Declarations of Co-Conspirators.
2456. As to the Necessity of Enforcing the Criminal Laws.

§ **2413. Preliminary.**—The purpose of this article is to show, by a collection of modern precedents, what cautionary or advisory instructions a judge may properly give to a jury chiefly in criminal cases, touching the credibility of witnesses and the weight or probative value of evidence, in various instances. The writer makes no attempt at a full discussion of each separate topic as a branch of the law of evidence; that would swell each section into an article of itself, so numerous are the adjudications. The experienced judge and practitioner must have discovered, in many cases, that the argumentative deductions of text-writers on the law of evidence, however appropriate in themselves, cannot be repeated to juries in the form of instructions, without leading them to a misunderstanding of their duties, or trenching upon

their exclusive province. The object of this article is to consider, not what ought to be said in such a treatise with reference to the various topics discussed, but what, if anything, a judge may properly say, with reference to them, in charging a jury; and, although the adjudications which the writer has examined and presented are very numerous, yet such is the multitude and variety of precedents on the subject discussed, that the writer confesses to a feeling that his treatment of them is somewhat fragmentary. But all effort must stop somewhere, and, such as it is, this is given to the profession with the hope that it may be useful to them.

§ 2414. Court may Propose General Rules to the Jury to Aid them in Weighing the Evidence. — Within certain limits, the judge may propose to the jury certain rules to aid them in weighing the evidence, and even in determining the credibility of witnesses.[1] He may properly advise them, in a civil case, as to which party has the burden of proof, and such a charge is not, within the meaning of a statute,[2] a charge "on the effect of the evidence."[3] And he may give them cautionary instructions as to the burden of proof in various issues in criminal cases. It has been reasoned, but on grounds which will not be everywhere admitted, that, where the testimony of witnesses is irreconcilable, it is proper that the court should explain to the jury the rules by which the testimony of witnesses is to be weighed.[4]

§ 2415. May Rule out Improper Evidentiary Matters. — Where incompetent evidence, or statements in the nature of evidence, have been rehearsed in the presence of the jury, it is proper and necessary for the judge to admonish the jury to disregard such evidence or such statements. The failure to do so on request will undoubtedly be error, both in civil and criminal cases. The prevailing opinion is that the error of admitting in-

[1] O'Neil *v.* State, 48 Ga. 66; McLean *v.* Clark, 47 Ga. 24; Pœrtner *v.* Pœrtner, 66 Wis. 644; *s. c.* 29 N. W. Rep. 386.

[2] Rev. Code Ala. (1886), § 2754.

[3] Hill *v.* Nichols, 50 Ala. 336.

[4] Farley *v.* Ranck, 3 Watts & S. (Pa.) 554.

competent evidence may be cured by such an instruction,[1] even in a criminal case;[2] but this might not be so where incompetent evidence of a highly prejudicial character has been rehearsed in the presence of the jury. Judges have, with great propriety, given cautionary instructions admonishing juries to exclude from their minds certain circumstances which might appeal to their sympathies, as that the case must be decided by reference to the evidence bearing upon the issues, and that it is of no consequence whether the defendant is married or single.[3] It is the plain duty of the judge, in careful and explicit language, to instruct the jury to disregard any facts which counsel may have stated in opening their respective cases, to prove which they have afterwards introduced no evidence.[4] The judge may properly caution the jury to discriminate between the evidence and any other statements which are not evidence.[5] But he commits no error in refusing to rule out testimony by instructions, which, although inadmissible at the stage of the trial when it was given, became admissible by reason of some subsequent fact arising in the trial.[6] A defendant cannot, however (at least in a civil case), object to the evidence of his opponent, for the first time, by a request for an instruction ruling it out; he must oppose the proper objection when it is offered, or he will not be entitled to renew it in this way.[7]

§ 2416. And Give Instructions Limiting the Effect of Evidence. — Of a similar nature are instructions limiting the effect of certain kinds of evidence. It is sometimes proper, and even necessary, for the court to instruct the jury as to the purpose for which particular evidence has been introduced, admonishing them to confine the application of the evidence to such purpose. For instance, it is a rule in certain criminal prosecutions, ad-

[1] Davis *v.* Peveler, 65 Mo. 189; *ante*, § 723.

[2] Hopt *v.* Utah, 120 U. S. 430; *s. c.* 7 U. S. Sup. Ct. Rep. 614.

[3] People *v.* Young, 65 Cal. 225.

[4] Duncombe *v.* Daniell, 8 Car. & P. 222, 227.

[5] City Bank *v.* Kent, 57 Ga. 285.

[6] Saunders' Appeal, 54 Conn. 108; *s. c.* 6 Atl. Rep. 193.

[7] Harrison *v.* Young, 9 Ga. 359, 366.

mitted guardedly and in exceptional cases, that the commission of other similar crimes or offenses by the accused may be shown, for the purpose of showing that he committed the particular crime charged with a criminal intent. In such a case, it has been well ruled that is the duty of the judge, in charging the jury, to advise them of the purpose for which such evidence of other acts has been introduced, and to admonish them to consider it only in so far as it speaks upon the question of intent.[1] But it has been held that, while it is proper for the court to instruct the jury as to the purpose for which such evidence is admitted, yet the failure of the court to do so is not error, unless the instruction is asked for.[2] So, in a prosecution for rape, it is always admissible to show that the injured female was of an unchaste character, but it is proper for the judge to admonish the jury that such evidence is competent only for the purpose of raising the presumption that she yielded her consent voluntarily, and not in consequence of force.[3]

§ 2417. And Explain the Relative Value of Affirmative and Negative Testimony. — There is a principle of law, if such it can be called, variously formulated by writers on evidence,[4] the meaning of which was well stated in a recent case by Bermudez, J.: "When one witness swears positively that he saw or heard a fact, and another, who was present, merely swears that he did not see or hear it, and the witnesses were equally faith-worthy, general principles would, in ordinary cases, create a preponderance in favor of the affirmative, where the position can be reconciled with the negative without violence and constraint."[5] The propriety of giving the jury a caution upon this subject in any case is extremely doubtful, since it tends to disturb the

[1] Kelley *v.* State, 18 Tex. App. 262, 269; Alexander *v.* State, 21 Tex. App. 407, 410; Holmes *v.* State, 20 Tex. App. 509. As to the ground upon which such evidence is sometimes admitted, see Gilbraith *v.* State, 41 Tex. 567; Ivey *v.* State, 43 Tex. 425; Long *v.* State, 11 Tex. App. 381; Jones *v.* State, 14 Tex. App. 85; House *v.* State, 16 Tex. App. 31.

[2] People *v.* Gray, 66 Cal. 271.

[3] Jenkins *v.* State, 1 Tex. App. 346.

[4] 3 Greenl. Ev., § 375.

[5] State *v.* Chevallier, 36 La. Ann. 81, 84.

operations of their minds in judging of the evidence, and to create impressions that their verdict is not to be returned according to their natural impressions of the truth, derived from the evidence which they have heard, but from the application of artificial rules. It has been held, in a civil case, that it is not error to refuse such a caution, since the whole matter of the credibility of witnesses is for the jury.[1] In a criminal case, where the subject was exceedingly well reasoned and illustrated, it was held proper to refuse such an instruction upon the same ground.[2] On the other hand, a civil case in Illinois is found where an instruction on this subject was approved, which, when analyzed, really meant nothing, because it did not tell the jury that affirmative testimony was more credible than negative testimony, but concluded, after speaking of these two elements of testimony, by telling them that it was their province "to weigh the testimony and give a verdict according to the weight of testimony as it may preponderate on either side."[3] But we find that another court has gone so far, in a civil case, as to approve the following instruction: "The rule of law is that the positive testimony of one credible witness to a fact is entitled to more weight than the testimony of several witnesses, equally credible, who testify negatively, or to collateral circumstances merely persuasive in their character, from which a negative may be inferred."[4] And the same court has ruled that an instruction which tells the jury that, where one man affirms a fact and another positively denies it, the denial is not negative testimony within the meaning of the rule on this subject, states an erroneous proposition of law.[5]

§ 2418. And give General Advice Touching the Credibility of Witnesses. — The judge may properly give to the jury certain general advice touching the credibility of witnesses, so that he

[1] Kelley *v.* Schupp, 60 Wis. 76, 86.

[2] State *v.* Chevallier, 36 La. Ann. 81.

[3] Frizell *v.* Cole, 42 Ill. 363.

[4] Hinton *v.* Cream City R. Co., 65 Wis. 323, 337. Compare Ralph *v.* Chicago &c. Co., 32 Wis. 177; Bohan *v.* Milwaukee &c. R. Co., 61 Wis. 391.

[5] Kelley *v.* Schupp, 60 Wis. 76, 86; Ralph *v.* Chicago &c. R. Co., 32 Wis. 177.

is careful not to trench upon their peculiar province of determining the extent to which the witnesses are to be believed. It is needless to suggest as a premise that, in civil and in criminal actions alike, the credibility of witnesses is exclusively a question for the jury. But the judge may properly tell them, in a criminal case, that it will be their duty to reconcile any conflict which they may find in the testimony, so as to give credit to the whole of it, if they can; but if they cannot, that they may credit the whole or any part of the testimony of any witness, who has testified in the case, accordingly as the testimony of such witness, or his manner of giving it, shall impress their minds as being worthy or unworthy of belief. He may likewise tell them, that they may consider the age, intelligence, interest in the case, or apparent prejudice, if any, and all other circumstances in evidence before them, in determining the credibility of the witnesses.[1] In capital cases in Missouri, it has been held proper to instruct the jury: "In passing upon the credibility of any witness and the weight to be attached to his or her testimony, you should, in connection with all the other facts and circumstances proven, take into account the conduct and appearance of such witness upon the stand, and the interest of such witness in the result of the trial, the motives actuating the witness in testifying, the probability of the statements of such witness, and his or her inclination to speak truthfully or otherwise as to matters within his or her knowledge."[2]

§ 2419. AN INSTRUCTION AS TO PARTIAL VARIANCES BETWEEN THE TESTIMONY OF WITNESSES. — "Partial variances, in the testimony of different witnesses, on minute and collateral points, are of little importance, unless they be of too prominent and striking a nature to be ascribed to mere inadvertence, inattention or defect of memory. It so

[1] Brown *v.* State, 2 Tex. App. 115, 125. See the following civil cases, where models of such instructions, approved by the court, are set out: Lake Erie &c. R. Co. *v.* Parker, 94 Ind. 91, 95; Little *v.* McGuire, 43 Iowa, 450; Wolf *v.* Willitts, 35 Ill. 95.

[2] State *v.* Vansant, 80 Mo. 67, 71. For a model of similar instructions in a criminal case, see Bressler *v.* People, 117 Ill. 422, 441, 443; *s. c.* 8 Crim. L. Mag. 466; State *v.* Bohan, 19 Kan. 34; Solander *v.* People, 2 Colo. 54.

rarely happens that witnesses of the same transaction perfectly and entirely agree on all points connected with it, that an entire and complete coincidence in every particular, so far from strengthening their credit, not unfrequently engenders a suspicion of practice and concert; and that in determining upon the credence to be given to testimony, by the jury, the real question must always be whether the points of variance and of discrepancy be of so strong and decisive a nature as to render it impossible, or at least difficult, to attribute them to ordinary sources of such variance, viz.: inattention or want of memory." [1]

§ 2420. But Must not Trench Upon the Province of the Jury. — But, in doing this, the judge must be careful not to trench upon the exclusive province of the jury in determining the credibility of particular witnesses, or the degree of credit to be given to particular elements of the evidence. He may instruct them as to the *rule*, but not as to the *weight* of the evidence; that is to say, he should not instruct them as to the relative weight of the testimony, or the credibility of the witnesses.[2] He should not undertake to control the freedom of their judgment in dealing with the probabilities of the testimony, by laying down artificial presumptions to control them in arriving at their verdict. Thus, he should not tell them that in passing on the credibility of a witness, they should consider that it is a rule of law — a presumption — that men testify truly and not falsely.[3] It is usual, and entirely proper, both in civil and criminal cases, for the judge to admonish the jury that they are the sole judges of the weight of evidence, and of the credibility of the witnesses.[4] Indeed, such an admonition is extremely important to be given in those jurisdictions where the judge, following the English practice, sums up the evidence, and gives the jury his opinion as to its relative weight and value. Where the judge advances such an opinion upon a matter which lies within their exclusive province, he is bound to tell them that they are at liberty to disregard his conclusions upon questions of fact.

[1] Approved in State *v.* Shelledy, 8 Iowa, 477, 488.

[2] Lampe *v.* Kennedy, 60 Wis. 110.

[3] State *v.* Jones, 77 N. C. 520. Compare State *v.* Smallwood, 75 N. C. 104.

[4] Lampe *v.* Kennedy, 60 Wis. 110, 113.

For instance, on the trial of an indictment for murder, it will be error to charge that dying declarations "are worthy of the same credit as other evidence," there being no rule of law which determines the weight of such declarations in comparison with other evidence.[1] He may, it has been reasoned, properly instruct them that the law presumes, and that they should presume, that a witness speaks in truth, unless there is some reason for thinking otherwise." But it has been well said: "This is not a presumption of law in a technical sense, but of fact, to be drawn from our experience of human veracity. Its force depends upon a number of circumstances, which the jury must consider before acting upon it. It has no artificial force."[2] He ought not to tell them that a particular fact in evidence is a "significant circumstance," bearing upon the credibility of a witness who has testified in the case.[3] One court has gone so far as to hold that he may not tell them that they "are not required to believe a witness, although he makes a plain statement of what is not impossible, and is neither impeached nor contradicted, but may discredit him on account of attendant circumstances," where, in the state of the evidence, the jury would refer this caution to the testimony of a particular witness, and would understand the judge as meaning that there were circumstances which discredited his testimony.[4] Indeed, the danger of trespassing upon the exclusive province of the jury, in giving such instructions, is so great, and the catalogue of what the judge *ought not* to do under this head so extensive, that we may conclude by quoting an observation of the Supreme Court of Alabama: "There are so many considerations affecting the credibility of a witness that it is far better and more promotive of the ends of justice, to leave the jury free in each case to determine, in view of all the circumstances, the witnesses whom they will credit, or the parts of the evidence of any witness which they will credit, and which

[1] Walker *v.* State, 42 Tex. 360, 361.

[2] State *v.* Jones, *supra*, citing 1 Stark. Ev. (10th ed.) 821; 2 Whart. Ev., § 1237.

[3] Ott *v.* Oyer, 106 Pa. St. 6, 17.

[4] Dwyer *v.* Bassett, 63 Tex. 274, 277. The language above quoted was almost the exact words of the syllabus in the case of Cheatham *v.* Riddle, 12 Tex. 112.

they will discredit, than to fetter their judgment by inflexible rules, which may compel them to conclusions they would not otherwise reach." [1]

§ 2421. Nor Direct Attention to the Credibility of Particular Witnesses. — It is a rule, applicable alike in civil and criminal cases, that it is error for the judge, directly or inferentially, to express an opinion to the jury, or in their hearing, as to the credibility of a particular witness, or as to the weight which they should attach to his testimony.[2] He must not single out a particular witness and, mentioning him by name, instruct the jury to take into consideration his interest in the suit as affecting his credibility.[3] Thus, in a case of homicide, the judgment was reversed, because the judge instructed the jury to find the prisoner guilty, if they believed from the evidence that the deceased was guilty under the circumstances detailed by a designated witness.[4] So, where, in a criminal case, the credit of witnesses, who were policemen, was assailed on account of their occupation, and the judge told the jury that in very many of the cases which had been tried at that term of court policemen had been the principal witnesses, and he thought the jury would agree with him in the opinion that in all those cases they had manifested great intelligence, and testified with apparent candor and impartiality, it was held error, and the verdict of guilty was, for that reason, set aside.[5] *A fortiori*, it is not error for the judge, in a criminal case, to refuse to instruct the jury that they are not bound to believe particular witnesses.[6] So, it is error for the court, in instructing the jury upon a particular question, to confine their attention to the testimony of particular witnesses, thus: "If you

[1] Grimes *v.* State, 63 Ala. 166, 169; re-affirmed in Childs *v.* State, 76 Ala. 93, 95.

[2] Crutchfield *v.* Richmond &c. R. Co., 76 N. C. 320.

[3] Phœnix Ins. Co. *v.* La Pointe, 118 Ill. 384, 389. Compare Ammerman *v.* Teeter, 49 Ill. 402.

[4] Rice *v.* State, 3 Tex. App. 451, 455.

[5] Commonwealth *v.* Barry, 9 Allen (Mass.), 276. For illustrations of the same principle in civil cases, see McMinn *v.* Whelan, 27 Cal. 300, 319; Gilliam *v.* Ball, 49 Mo. 249.

[6] Mullins *v.* People, 110 Ill. 42, 44, 47.

are satisfied, by the testimony of Phillips and Ott,'' etc., where other witnesses have given testimony on the same subject.[1]

§ 2422. May Give what Cautions as to the Number of Witnesses. — The judge may properly caution the jury thus: "In summing up the testimony upon any given question, you should not alone count witnesses. It is not always the most satisfactory, neither is it the most certain criterion of the truth." [2] On the other hand, it is error to instruct them, under any circumstances, to decide according to the number of opposing witnesses of equal credibility; for instance, to tell them, in effect, that where all the witnesses are of equal credibility, and the testimony of those on one side conflicts on a particular question with that of those on the other side, the side having the greater number of such witnesses has the greater weight of evidence upon the question.[3] And although, in a criminal trial, the testimony of one witness to a material point may be flatly contradicted by two, so that either the one or the other must have committed perjury, it will be error for the judge to instruct the jury that if they find that the three witnesses were of equal credibility and weight, they might disregard the testimony of the one and accept that of the two.[4] So, it is error to charge that where there is a conflict between two witnesses of equal credibility the fact is not proved; for, while it may be conceded that it rests upon the party who sustains the burden of proof to move the decision of the triers of the facts, in civil cases, by what is termed a preponderance of evidence, and in criminal cases, on the main issue, by evidence beyond a reasonable doubt — yet, the jury being the exclusive judges of the credibility of the witnesses, such an instruction is an invasion of their province. Nor would it be sound as a rule for weighing the probabilities of evidence, if the judge himself were sitting as the trier of the facts; since, in such a case, a very slight circumstance might be sufficient to corroborate the one witness or the other, so as to

[1] Ott *v.* Oyer, 106 Pa. St. 6, 18.

[2] State *v.* Bohan, 19 Kan. 28, 34.

[3] Ely *v.* Tesch, 17 Wis. 202; Bierbach *v.* Goodyear Rubber Co., 54 Wis. 208.

[4] Childs *v.* State, 76 Ala. 93.

produce a rational conviction of the truth or falsity of the *factum probandum*, when, standing alone and disconnected, it might weigh very little, and be totally inadequate for the purpose.[1]

§ 2423. May Instruct as to the Maxim "Falsus in Uno, Falsus in Omnibus." — The judge is at liberty, in the exercise of a sound discretion, both in civil and in criminal cases, to give to the jury a caution touching the credence to be given to the testimony of witnesses who have sworn falsely, in conformity with the maxim, "*Falsus in uno, falsus in omnibus.*" This maxim cannot be said to embody either a presumption or a rule of law. As applied to the testimony of witnesses in jury trials, its meaning is that if any witness has willfully or intentionally sworn falsely to a material fact in controversy on the trial, the jury are at liberty, if they shall think proper, to reject the whole of his testimony.[2] It has been held that when there is but one witness in favor of one side of the case, and his testimony is contradicted by other witnesses, such an instruction is not an abstract one, but the giving of it is proper,[3] and the refusal of it is error.[4] But the better opinion is that the credibility of witnesses being exclusively within the province of the jury, whether the judge will give or refuse such a caution is a matter resting entirely in his discretion, which discretion is not reviewable on appeal.[5] From what will presently follow, it will be perceived that the mere fact that a witness makes a misstatement of fact, and afterwards, before finally leaving the stand, desires to make a correction of it, and to state the fact as he remembers it, which he will always be allowed to do, does not justify the court in

[1] Dorgan *v.* State, 72 Ala. 173; reaffirmed in Childs *v.* State, 76 Ala. 93, 95.

[2] State *v.* Gee, 85 Mo. 647; Minch *v.* People, 8 Colo. 452; Hamilton *v.* People, 29 Mich. 173; State *v.* Dwire, 25 Mo. 553; State *v.* Mix, 15 Mo. 153; People *v.* Sprague, 53 Cal. 491; State *v.* Thompson, 21 W. Va. 746; Brown *v.* Hannibal &c R. Co., 66 Mo. 588, 600; Paulette *v.* Brown, 40 Mo. 52; Kelley *v.* United States Express Co., 45 Mo. 428; Gillett *v.* Wimer, 23 Mo. 77.

[3] Gillett *v.* Wimer, 23 Mo. 77.

[4] State *v.* Mix, 15 Mo. 153; State *v.* Dwire, 25 Mo. 553.

[5] James *v.* Mickey, 26 S. C. 270; *s. c.* 2 S. E. Rep. 130.

giving to the jury this cautionary instruction. The maxim is applicable only to cases where the facts indicate that the false statement has been deliberately made, and is adhered to by the witness.[1] The following limitations must be observed in giving such an instruction: 1. The testimony, concerning which the witness has sworn falsely, must relate to a *material* matter in issue on the trial.[2] It is, therefore, error so to frame such an instruction as to tell the jury that "if a witness has sworn falsely to any matter in the case they may disregard his entire testimony" — omitting the word "material."[3] 2. The false testimony must have been *willful* or *intentional*, or given with a design to conceal or mislead. The mere fact that a witness has made an erroneous statement, through a defect of memory or otherwise, in good faith, does not require the giving of any cautionary instruction from the bench, though it may be the subject of observation to the jury by counsel in argument. It is accordingly error, in formulating a cautionary instruction under this head, to omit the words "knowingly," "willfully," "intentionally," or some equivalent expression. The judge is not at liberty to say: "If you find that the testimony of A. B. was false," etc., "you may disregard all his evidence."[4] 3. The in-

[1] Kay *v.* Noll, 20 Neb. 380; *s. c.* 30 N. W. Rep. 269, 273.

[2] Pierce *v.* State, 53 Ga. 365, 368; Hall *v.* Renfro, 3 Metc. (Ky.) 52; Fishel *v.* Lockard, 52 Ga. 632 (correcting Ivey *v.* State, 23 Ga. 576); Day *v.* Crawford, 13 Ga. 508; McLean *v.* Clark, 47 Ga. 508; Moresi *v.* Swift, 15 Nev. 216.

[3] Moresi *v.* Swift, and other cases *supra*.

[4] Childs *v.* State, 76 Ala. 93, 95; Skipper *v.* State, 59 Ga. 65; Ivey *v.* State, 23 Ga. 576, 581; The Santissima Trinidad, 7 Wheat. (U. S.) 283, 339. An example of the wisdom or folly of attempting to codify the rules of evidence — perhaps of the imperfections of a particular code — is found in California, where it has been held not error to instruct the jury, in a criminal case, as follows: "If any witness has, in your judgment, sworn falsely, in any material respect, he is to be distrusted in all others, and his testimony is not to be accepted or acted upon without great caution." It was objected to this instruction that it omitted the word "willfully," as required by the rule in People *v.* Sprague, 53 Cal. 494. But, as it followed the language of the statute in this respect (Cal. Code Civ. Pro., § 2061), and as the word "falsely" was deemed to be equivalent to the word "willfully," and to exclude the idea of mistake, the court held that it was not error to give it. People *v.* Righetti, 66 Cal. 185.

struction must not be so framed as to *direct* or *require* the jury to disregard the testimony of such a witness, but it should be so framed as to leave the jury at liberty to believe or disbelieve the witness, accordingly as they are impressed with the credibility of his testimony.[1] Therefore, an instruction which tells them that they *ought* to disregard all the testimony of a witness, provided they believe that he has knowingly sworn falsely to any material fact in the case, is erroneous; [2] or, that "if they believe that any witness has sworn falsely and knowingly as to any material fact, they are *bound* to disregard his testimony altogether." [3] 4. It is error to single out a particular witness, and to direct such a cautionary instruction, although couched in proper terms, against his testimony. The reason is, that such a course tends to convey to the minds of the jury the impression that the testimony of the particular witness is disbelieved by the judge, and is to be disregarded — a question which it is their province to determine, and not his.[4] This is especially true where there is nothing in the testimony of the particular witness which requires such a caution.[5]

§ 2424. Whether Error to Advise the Jury that Such Testimony is to be Disbelieved unless Corroborated. — It is, on the clearest principles, error for the judge to advise the jury that the testimony of a witness who has knowingly sworn falsely to a material fact is to be disregarded or disbelieved, unless corroborated by other testimony, or by circumstances. There is no rule which imperatively requires the jury to reject the testimony of such a witness, and such an instruction clearly invades their exclusive province of saying what witnesses they will believe and what they will disbelieve.[6] It is to be regretted that

[1] Jones *v.* People, 2 Col. 351; Mead *v.* McGraw, 19 Ohio St. 55; Senter *v.* Carr, 15 N. H. 351.

[2] Hall *v.* Renfro, 3 Metc. (Ky.) 52.

[3] Letton *v.* Young, 2 Metc. (Ky.) 559, 565.

[4] State *v.* Stout, 31 Mo. 406; State *v.* Cushing, 29 Mo. 215, 217.

[5] State *v.* McDevitt, 69 Iowa, 549; *s. c.* 29 N. W. Rep. 459.

[6] Knowles *v.* People, 15 Mich. 408, 412; Brown *v.* Hannibal &c. R. Co., 66 Mo. 588, 600. In this latter case the Supreme Court of Missouri say: "We hold that it is true, as a legal proposition, that if a witness has willfully sworn falsely as to a material fact, the

any diversity of judicial opinion should have arisen upon so plain a question. We find, however, that the Supreme Court of Georgia has arrived at the conclusion that the true rule, and the one which is proper to be given in charge to the jury when the question arises, is that, if a witness knowingly and willfully swears falsely in a material matter, his testimony should be rejected entirely, unless corroborated by the facts and circumstances of the case, or by other credible evidence; and that court has held that it is error for the trial court to charge the jury that credit may be given to such a witness, without also stating the necessity for such corroboration.[1]

§ 2425. PRECEDENTS OF INSTRUCTIONS UNDER THIS HEAD. — Instructions under this head are commonly framed in the following language, or in words of equivalent import, the judge having first advised the jury that they are the sole judges of the credibility of the witnesses: "If you shall believe that any witness has knowingly sworn falsely to any material fact, you are at liberty to reject all or any portion of such witness' testimony."[2] The following, from a case in West Virginia, is a still better model: "If the jury believe from the evidence that any witness who has testified in this case has knowingly and willfully testified falsely to any material fact in the case, they may disregard the whole testimony of such witness, or they may give such weight to the evidence of such witness as they may think it entitled to. The jury are the exclusive judges of the weight of the testimony."[3] The follow-

jury are at liberty to disregard his entire testimony, notwithstanding he may have been corroborated as to that or any other fact to which he testified."

[1] Pierce *v.* State, 53 Ga. 365, 369. In one case that court said: "The rule is, that if a witness swears willfully and knowingly false in a material particular, his testimony ought to be disregarded entirely, unless it is so corroborated by circumstances, or by other evidence which stands unimpeached as to be irresistible." Skipper *v.* State, 59 Ga. 64. See also Day *v.* Crawford, 13 Ga. 508; Lane *v.* Bailey, 47 Barb. (N. Y.) 395, where the court take the view that the trial judge, in charging the jury with reference to this maxim, should advise them that such a witness may be believed if he is corroborated — implying that he is not to be believed unless he is corroborated. See also, Blanchard *v.* Pratt, 37 Ill. 243; McCrary *v.* Crandall, 1 Iowa, 117, 120.

[2] State *v.* Gee, 85 Mo. 647; Minich *v.* People, 8 Colo. 452; Liddy *v.* St. Louis R. Co., 40 Mo. 511; State *v.* Thomas, 78 Mo. 327, 341.

[3] State *v.* Thompson, 21 W. Va. 746.

ing, selected from an elaborate charge in a celebrated case, is also offered as a good model: "That it does not follow, merely because a witness makes an untrue statement, that his entire testimony is to be disregarded. This must depend upon the motive of the witness. If he intentionally swears falsely as to one matter, the jury may properly reject his whole testimony as unworthy of credit. But if he makes a false statement through mistake or misapprehension, they ought not to disregard his testimony altogether, and they should not consider the circumstances further than as showing inaccuracy of memory or judgment, on the part of the witness." [1]

§ **2426. Credit to be Given to the Testimony of Impeached Witnesses.** — As already seen, witnesses are impeached in two ways: 1. By evidence of general bad reputation, or, in some jurisdictions, of general bad reputation for truth and veracity, in the neighborhood in which they reside or have recently resided.[2] 2. By evidence of having made statements contradictory to those made upon the witness stand.[3] It has been held error, under particular circumstances, to instruct the jury that a witness may be impeached by his *want of intelligence*, as well as by direct testimony.[4] And, as it is not strictly a mode of impeachment of a witness to show his *ill will* toward the party against whom he testifies, it has been held proper to refuse the following instruction: "If you believe from the evidence that either one or more of the witnesses has ill-will or unkind feelings to the prisoner, that is one of the methods of impeaching a witness, and that weakens the testimony of the witnesses." [5] As the credibility of witnesses is exclusively a question for the jury, whether a witness has been successfully impeached, or how far the value of his testimony has been impaired by impeaching evidence, whether attempted in either of the above modes, is exclusively a *question for the jury*. It is hence error for the court to direct the jury that they should "throw aside" the testimony of a witness whose impeachment has been attempted by evidence of

[1] State *v.* Shelledy, 8 Ia. 477, 489.
[2] *Ante*, § 520, *et seq.*
[3] *Ante*, § 480, *et seq.*
[4] Chicago &c. R. Co. *v.* Bert, 69 Ill. 388; Hansell *v.* Erickson, 28 Ill. 257.
[5] Skipper *v.* State, 59 Ga. 65.

previous contradictory declarations.[1] For the same reason, it is not error to refuse to instruct the jury that "the testimony of an impeached witness is to be taken with great care by the jury, and, unless fully corroborated, the jury will be justified in giving to it no weight whatever, and it is only on such points as the witness may be corroborated, that the witness is entitled to credence and weight with the jury."[2] An instruction which informs the jury that, while the law permits the impeaching of a witness by proof that his reputation for truth and veracity is bad, they are to determine his credibility under all the facts and circumstances as proved upon the trial, and that if a witness against whom such impeaching testimony has been given, "gave a fair, candid and honest statement of the facts and circumstances surrounding the whole transaction in controversy, they should not disregard his testimony," is erroneous.[3] So, it is improper to instruct the jury, in a criminal case, that "the testimony of a witness for the prosecution, who is shown to be unworthy of credit, is not sufficient to justify a conviction, without corroborating evidence; and such corroborating evidence, to avail anything, must be a fact tending to show the guilt of the defendant."[4] It is error, for the same reason, after testimony has been given tending to impeach a witness on the ground of bad character, for the judge to charge the jury that they should throw aside the testimony of such witness and not consider it, except in so far as it might be sustained or corroborated by other testimony in the case.[5] In

[1] Addison *v.* State, 48 Ala. 478, 482.

[2] Green *v.* Cochran, 43 Iowa, 545, 553.

[3] McCasland *v.* Kimberlin, 100 Ind. 121; quoting Smith *v.* Grimes, 43 Iowa, 356.

[4] Ray *v.* State, 50 Ala. 104. In the very next case printed in the same volume, an instruction in the identical language of the above was held to assert a correct legal proposition, and it was held that its refusal was error. A different judge wrote the opinion of the court, but both decisions seem to have been unanimous. Cohen *v.* State, 50 Ala. 108.

[5] Addison *v.* State, 48 Ala. 478, 482. Compare Hyman *v.* Wheeler, 29 Fed. Rep. 347, 357, where a Federal judge of reputation, in summing up to the jury in a civil case, according to the practice in the Federal courts, animadverted severely upon the testimony of a witness who had confessed to the making of statements for fraudulent purposes, contrary to his statements on the witness stand. It is scarcely necessary to caution the reader that

instructing juries as to how witnesses may be impeached, it is error to specify, as one of the heads of impeachment, evidence of general bad character, when there is no such evidence in the case.[1] It is also error to charge, in general terms, that a witness may impeach himself "by confessions to infamous conduct, which, if true, would exclude him from respectable society." What respectable society might do, but has not yet done, with a person, was not regarded as a standard by which to test his credibility.[2] In cautioning the jury in respect of the testimony of such witnesses, it is usual to advise them that they are at liberty to disregard such testimony unless it has been corroborated — thus: "In determining the guilt or innocence of the defendants, the jury are to consider the entire evidence in the case; but they are at liberty to disregard the statements of such witnesses (if any there be) as have been successfully impeached, either by direct contradiction or by proof of general bad character, unless the statements of such witnesses have been corroborated by other evidence which has not been impeached."[3] It is also proper, where the evidence warrants it, to tell them that, if it is shown that the reputation of a witness for truth and veracity is bad, his evidence is, nevertheless, not necessarily destroyed, but is to be considered, under all the circumstances described in the evidence, and is to receive such weight as the jury may believe it entitled to, or be disregarded if they believe it to be entitled to no weight.[4] It may be doubted whether the court is *bound* to give any caution to the jury under this head at all; but it has

the latitude which is allowed to the judge in summing up, both in civil and criminal cases, in the English practice, in that of the Federal courts and also in that of the courts of New York and some other States — is quite inadmissible in most American jurisdictions, especially in criminal cases.

[1] City Bank *v.* Kent, 57 Ga. 284.

[2] *Ibid.*

[3] Miller *v.* People, 39 Ill. 463. For models of similar instructions, see Harper *v.* State, 101 Ind. 109, 113; State *v.* Orniston, 66 Iowa, 152; Haymond *v.* Saucer, 84 Ind. 12. Compare Garber *v.* State, 94 Ind. 219; Crabtree *v.* Hagenbaugh, 25 Ill. 233. For a model of a cautionary instruction in a criminal prosecution for the crime of rape, as to the credit to be given to the testimony of the prosecutrix as affected by evidence of her bad character for chastity, see Anderson *v.* State, 104 Ind. 467, 472.

[4] State *v.* Miller, 53 Ia. 209.

been held that, where the verdict in a criminal case depended upon the evidence of the prosecuting witness alone, and the defendant, after laying a proper predicate, had proved that on several occasions she had made statements materially conflicting with her testimony at the trial, the court should, as a part of the law applicable to the case, have instructed the jury with reference to the principles which control the application and effect of impeaching evidence.[1]

§ 2427. Necessity of the Corroboration of the Testimony of Accomplices. — There is a difference of opinion whether, as a *rule of law*, the testimony of one or more accomplices in the crime charged will sustain a conviction without corroborating evidence, either in the form of testimony delivered by other witnesses, or in the form of surrounding circumstances.[2] Whichever view prevails, it is in all jurisdictions proper,[3] and in one jurisdiction necessary, even where not requested,[4] to give to the jury, in a criminal case, where the prosecution depends, in whole or in part, upon the testimony of an accomplice, a cautionary instruction touching the care required by the jury in dealing with such testimony. Such instructions generally take the form of an admonition to the jury that such testimony ought not to afford the basis of a conviction, unless corroborated by untainted

[1] Henderson *v.* State, 1 Tex. App. 432.

[2] That it must be corroborated: Lowery *v.* State, 72 Ga. 649; State *v.* Dietz, 67 Iowa, 220 (under Iowa Code of 1880, § 4559); Anderson *v.* State, 20 Tex. App. 312, and many other cases. That it need not be: Ayers *v.* State, 88 Ind. 275; United States *v.* Neverson, 1 Mackey (D. C.), 152; State *v.* Russell, 33 La. Ann. 135; Olive *v.* State, 11 Neb. 1.

[3] State *v.* Williams, 42 Conn. 261; State *v.* Kellerman, 14 Kan. 137. In a case of felony in Minnesota, it was held no ground of reversal that the trial court *omitted* to charge the jury that the defendant could not be convicted upon the uncorroborated testimony of an accomplice, no *request* for such a charge having been made on behalf of the prisoner. State *v.* Lawlor, 28 Minn. 216, 224.

[4] Hunnicut *v.* State, 18 Tex. App. 500, 522; Howell *v.* State, 16 Tex. App. 93; Winn *v.* State, 15 Tex. App. 169; Powell *v.* State, 15 Tex. App. 441; Dunn *v.* State, 15 Tex. App. 560; Zollicoffer *v.* State, 16 Tex. App. 312; Fuller *v.* State, 19 Tex. App. 380; and especially if so requested, Coffelt *v.* State, 19 Tex.App. 436.

testimony, or by circumstances.[1] One court has held it proper to give the following instruction: "The court instructs the jury that it is competent to convict upon the uncorroborated evidence of an accomplice, if the jury, weighing the probability of his testimony, think him worthy of belief."[2] Another court, on the other hand, approved the following instruction: "The jury are charged that the admission of accomplices [to testify] as witnesses for the State is permitted and justified by the necessities of the case, it often being impossible to bring the principal offender to justice without their testimony. But in determining the weight and credit to be given to such testimony, the jury should use great caution; and unless the testimony of the witness Allen Roberts [an accomplice] is corroborated by other evidence in some material point in issue, the defendant should be acquitted, as it would be unsafe to convict upon the sole and uncorroborated testimony of an accomplice."[3] Again, if the corroborating testimony is that of other accomplices, this circumstance, it has been well observed, requires an additional caution to the effect that the additional testimony of other accomplices is no corroboration, if the accomplices have had the opportunity of mingling together and concocting a story to be told by each.[4] It has been added that while it might not, under some facts, be proper for the court, in charging the jury, to assume and instruct them that a particular witness was an accomplice,[5] still, it is not error to submit the question to the jury.[6]

[1] State *v.* Williams, 42 Conn. 261, 264; Fuller *v.* State, 19 Tex. App. 380, and the other Texas cases above cited; State *v.* Kellerman, 14 Kan. 137. For an erroneous charge on the law of accomplices, see Hornsberger *v.* State, 19 Tex. App. 335.

[2] Earll *v.* People, 73 Ill. 333.

[3] State *v.* Kellerman, 14 Kan. 137.

[4] State *v.* Williams, 42 Conn. 261, 264. The learned judge stated that such were the views of the text writers, with perhaps a single exception. 1 Phil. Ev., Cow., Hill & Edw. Notes (4th Am. ed.), 113; 1 Greenl. Ev., § 381; 2 Tayl. Ev. 798. Chief Baron Joy forms the exception, he favoring the idea that one accomplice may corroborate another. Joy on the Evidences of Accomplices, 100 *et seq.*

[5] Williams *v.* State, 42 Tex. 392; Barrara *v.* State, *Id.* 260.

[6] Zollicoffer *v.* State, 16 Tex. App. 313, 317. The court said: "It has been the practice in such cases to submit this issue to the jury, and believing the practice to be a safe and proper one, and in harmony with the spirit of

§ 2428. PRECEDENT OF AN INSTRUCTION UNDER THIS HEAD. — "1. A conviction cannot be had upon the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with the offense committed, and the corroboration is not sufficient if it merely shows the commission of the offense. 2. Nor can one or more accomplices corroborate each other, but the evidence must be from some other source. 3. An accomplice, in the sense used in the foregoing, means any one connected with the crime committed, either as principal or otherwise." [1]

§ 2429. As to the Weight to be Attached to Expert Testimony. — It is customary in criminal trials, where expert testimony has been adduced, as it often is in capital cases where insanity is interposed as a defense, for the court to give a cautionary instruction to the jury as to the weight to be attached to such testimony. Such instruction should not take the form of disparaging this class of testimony, because this would infringe the exclusive right of the jury to say what credit is to be attached to it. It is, therefore, error, even in a civil case, to tell the jury that such testimony should be "received with great caution." [2] The true rule is that "the testimony of experts is to be considered like any other testimony — is to be tried by the same tests, and is to receive just as much weight and credit as the

our system of procedure, we are not disposed to change it." The same court has added: "In submitting this issue to the jury, however, the court should be very careful to instruct clearly and fully as to what will constitute an accomplice within the meaning of article 741 of the Code of Criminal Procedure. The word 'accomplice,' as used in that article, signifies any person who has participated in the commission of a crime, whether as a principal offender, an accessory, or in any other manner which makes him a *particeps criminis*." Zollicoffer *v.* State, 16 Tex. App. 313, 317; citing Roach *v.* State, 4 Tex. App. 46; Smith *v.* State, 13 Tex. App. 507.

[1] In Harrison *v.* State, 17 Tex. App. 442, 444, it was held error to refuse this instruction, the court citing Winn *v.* State, 15 Tex. App. 169; Powell *v.* State, 15 Tex. App. 441; Dunn *v.* State, 15 Tex. App. 560. See also, Tisdale *v.* State, 17 Tex. App. 444; Bean *v.* State, 17 Tex App. 60; Phillips *v.* State, 17 Tex. App. 169; Mercer *v.* State, 17 Tex. App. 452. Another and somewhat fuller instruction, embodying the same proof, will be found in House *v.* State, 19 Tex. App. 235, 236.

[2] Atchison &c. R. Co. *v.* Thul, 32 Kan. 255; *s. c.* 49 Am. Rep. 484.

jury deem it entitled to when viewed in connection with all the circumstances."[1] The following is a good model of an instruction in respect of expert testimony in a criminal case: "The opinions of medical experts are to be considered by you, in connection with all the other evidence in the case; but you are not bound to act upon them to the entire exclusion of other testimony. Taking into consideration these opinions and giving them just weight, you are to determine for yourselves, from the whole evidence, whether the accused was or was not of sound mind, yielding him the benefit of a reasonable doubt, if such arises from the evidence."[2] It is error, in a case where the question at issue is not one of common observation, but one of science, calling for the opinions of experts, to instruct the jury that they may, in determining it, not only look to the evidence, but take into consideration their own practical knowledge of the

[1] Carter *v.* Baker, 1 Sawy. (U. S.) 512. To the same effect, see Lawson Exp. & Op. Ev. 240; Rogers Exp. Test. § 42; Anthony *v.* Stinson, 4 Kan. 221. As to the consideration which is to be given to the testimony of experts, see Pannell *v.* Commonwealth, 86 Pa. St. 260; Eggers *v.* Eggers, 57 Ind. 461; Humphries *v.* Johnson, 20 Ind. 190; Tinney *v.* New Jersey &c. Co., 12 Abb. Pr. (N. S.) (N. Y.) 1; Cuneo *v.* Bessoni, 63 Ind. 524; Jarrett *v.* Jarrett, 11 W. Va. 584, 626; Thomas *v.* State, 40 Tex. 65; Wood *v.* Barker, 49 Mich. 295, 298; Getchell *v.* Hill, 21 Minn. 471; Flynt *v.* Boderhamer, 80 N. C. 205; Choice *v.* State, 31 Ga. 424, 481; Templeton *v.* People, 3 Hun (N. Y.), 357 (affirmed in 60 N. Y. 643); Pitts *v.* State, 43 Miss. 472, 480.

[2] Approved in Guetig *v.* State, 66 Ind. 94, 107, the court holding that this instruction properly expresses the law and is fully sustained by the following authorities: Davis *v.* State, 35 Ind. 496; Greenley *v.* State, 60 Ind. 141; Reg. *v.* Frances, 4 Cox C. C. 57; Negro Jerry *v.* Townshend, 9 Md. 145; Potts *v.* House, 6 Ga. 324; Clark *v.* State, 12 Ohio, 483; People *v.* Thurston, 2 Park. Cr. (N. Y.) 49; Commonwealth *v.* Rogers, 7 Metc. (Mass.) 500; Woodbury *v.* Obear, 7 Gray (Mass.), 467; United States *v.* McGlue, 1 Curt. C. C. (U. S.) 1; McAllister *v.* State, 17 Ala. 438; Rex *v.* Wright, 1 Russ. & R. 456; Lake *v.* People, 1 Park. Cr. (N. Y.) 495; People *v.* Robinson, 1 Park. Cr. (N. Y.) 649; Reg. *v.* Southey, 4 Fost. & F. 864; White *v.* Bailey, 10 Mich. 155; Rex *v.* Offord, 5 Car. & P. 168; Bishop *v.* Spining, 38 Ind. 143. See further, Tatum *v.* Mohr, 21 Ark. 349; Chandler *v.* Barrett, 21 La. Ann. 58; State *v.* Bailey, 4 La. Ann. 376. An instruction in nearly the same language was approved in Goodwin *v.* State, 96 Ind. 550, 561, and in Epps *v.* State, 102 Ind. 539, 553.

subject.[1] One court has, in a civil case, apologized for an instruction which told the jury, in substance, where there was a conflict of opinion among expert witnesses, that, other things being equal, the greater number of witnesses would carry the greater weight.[2] Such an admonition clearly ought not to be given in any case, and the giving of it would ordinarily operate to reverse a judgment of conviction in a criminal case.

§ 2430. **Cautions as to the Acceptance of the Facts Stated in the Hypothetical Questions.** — It is extremely important to caution the jury not to take for granted the statements contained in the hypothetical questions which have been propounded to the expert witnesses in their hearing, but to scrutinize the evidence and to determine from it which, if any, of the hypotheses is true. The following instruction under this head has been twice approved: "You are not to take for granted that the statements contained in the hypothetical questions which have been propounded to the witnesses are true. Upon the contrary, you are to carefully scrutinize the evidence, and from that determine what, if any, of the averments are true, and what, if any, are not true. Should you find from the evidence that some of the material statements therein contained are not correct, and they are of such a character as to entirely destroy the reliability of opinions based upon the hypothesis stated, you may attach no weight whatever to the opinions based thereon. You are to determine, from all the evidence, what the real facts are, and whether they are correctly or not stated in the hypothetical question or questions. I need hardly remind you (for it will suggest itself to your own minds), that an opinion based upon an hypothesis wholly incorrectly assumed, or incorrect in its material facts, and to such an extent as to impair the value of the opinion, is of little or no weight. Upon the matters stated in these hypothetical questions, and which are involved in this investigation, you

[1] Douglas *v.* Trask, 77 Me. 35; citing State *v.* Bartlett, 47 Me. 388, and Schmidt *v.* New York &c. Co., 1 Gray (Mass.), 529.

[2] Spensley *v.* Lancashire Ins. Co., 62 Wis. 443, 453.

are to give the defendant the benefit of all reasonable doubt, if any there should be; and, where there is a reasonable doubt as to the truth of any one of the material facts stated, resolve it in the defendant's favor." [1]

§ 2431. As to Verbal Admissions and Confessions. — It is clearly the rule in civil cases that for the judge in his instructions to disparage evidence of verbal admissions, made by a party against his interest, will be an invasion of the right of the jury to determine the weight to which such admissions are entitled; but if, in a criminal trial, the State has presented evidence of verbal admissions or confessions made by the defendant, and the judge cautions the jury, however strongly, against giving too much credence to such evidence, the error, if any, cannot be judicially declared, since the State has no writ of error or appeal in such cases from a judgment on the merits. The question can only be the subject of review in criminal cases where the judge is requested by the defendant to give such an instruction, and refuses to do so, and a conviction follows, from which the defendant prosecutes a writ of error or an appeal. Cases where such instructions have been given, and where convictions have followed which have been affirmed, cannot, therefore, be cited as authorities in favor of the propriety of giving such instructions; since the error, if any, was in favor of the prisoner.[2]

[1] Guetig *v.* State, 66 Ind. 94, 107; Goodwin *v.* State, 96 Ind. 550. In both of these cases the defendant was convicted of murder in the first degree, and the judgment was affirmed. For a similar hypothetical instruction in a civil case, which recently met the approval of the Supreme Court of the United States, see Forsyth *v.* Doolittle, 110 U. S. 73; *s. c.* 7 Sup. Ct. Rep. 408.

[2] Such was the case of State *v.* Shelledy, 8 Ia. 477, 496, where a very strong instruction, drawn partly in the language of the text of Greenleaf, was given, disparaging this kind of evidence. As this instruction would be an excellent model of a request for an instruction in behalf of the defendant in a criminal case, if the court can be persuaded to give it, it is here given: "With respect to all verbal admissions, declarations or conversations, evidence of them should always be received with great caution. Consisting, as it does, in the repetition of oral statements, it is subject to much imperfection and mistake; the party himself being misinformed, or not having expressed his own meaning, or the witness having misunderstood him, or from the infirmity

Although the instruction copied from the case just cited was drawn from the text of the most authoritative work on evidence in our language,[1] it has been frequently ruled, both in civil and criminal cases, that it is error to give an instruction framed in the argumentative language of that passage, because such an instruction is an invasion of the province of the jury.[2] In like

of human memory. It frequently happens also, that the witness, unintentionally altering a few of the expressions really used, gives an effect to the statement completely at variance with what the party actually did say. And especially where the witness has not heard all the admissions, declarations or conversation, and testifies only to parts thereof, should caution be exercised. It then becomes very unsatisfactory and imperfect evidence—the lowest grade of evidence."

[1] 1 Greenl. Ev., § 200.

[2] Lewis *v.* Christie, 99 Ind. 377; Finch *v.* Bergins, 89 Ind. 360; Davis *v.* Hardy, 76 Ind. 272; Garfield *v.* State, 74 Ind. 60; Newmann *v.* Hazelrigg, 96 Ind. 73; Shorb *v.* Kinzie, 100 Ind. 429; Unruh *v.* State, 105 Ind. 118, 120. The instruction thus condemned in Lewis *v.* Christie, *supra*, and other cases above cited, was the following, which, with a verbal variation, is found in section 200 of the first volume of Greenleaf: "Evidence of the admissions of the parties to this action has been given to you. Such evidence ought to be received with great caution. Such evidence, consisting of mere repetitions of oral statements, is subject to much imperfection and mistake, the party himself either being misinformed, or not having clearly understood his own meaning, or the witness having misunderstood him. It frequently happens also, that the witness by unintentionally altering a few of the expressions really used, gives an effect to a statement completely at variance with what the parties actually did say. But in a case where you find that an admission is deliberately made and precisely identified, the evidence it affords is often of the most satisfactory nature." Nor was a similar instruction, given in Shorb *v.* Kinzie, *supra*, rendered innocuous by the addition of the sentence, "the jury are to be the exclusive judges of the weight of the evidence;" since this did not withdraw the preceding matter, often held by that court objectionable. The following, drawn from section 201 of the first volume of Greenleaf, is the instruction condemned in Unruh *v.* State, *supra:* "Certain admissions, claimed to have been made by both the relatrix and also by the defendant, are in evidence. Such admissions are competent evidence, and may be of the most satisfactory character, or they may be the very weakest kind of testimony, depending upon the surrounding circumstances. If you can see from the evidence that the alleged admissions are clearly and understandingly made; that they are precisely identified; that the language is correctly remembered and accurately repeated by the witness, then such testimony is entitled to great weight. On the other hand, if the person making the admission may not have expressed his or her meaning clearly and understandingly; or if the witness may have misunderstood him

manner, the Supreme Court of Texas have condemned a charge wherein the court told the jury that evidence of the admissions of a party is regarded as "dangerous and liable to abuse." "Such expressions as these," said the court, "found in every treatise on evidence, are to be regarded as matters of argument, rather than rules of evidence, having the force of law, upon which the court should instruct the jury."[1] While it is conceded, as a general rule, that confessions of persons accused of crime should be received with great caution,[2] yet so to charge the jury would be, it has been held, to charge them directly upon the weight of evidence, and would be in contravention of a statute prohibiting judges from so charging.[3] On the other hand, the judge is not bound to charge that a certain kind of evidence, such as *confessions*, is entitled to a certain degree of credit.[4] So, it is error to charge "that the confessions of the accused of his guilt, when confirmed by circumstances, become the highest evidence of his guilt; and the jury have the right to receive a portion of the confession and reject other portions, if the attendant circumstances, in their opinion, warrant such rejection," because this is a charge upon the "effect, grade and weight of evidence."[5] For a similar reason, it is error to charge that confessions made by a prisoner charged with an offense, when

or her; or if the witness had no reason or motive for remembering the exact language used; or if from lapse of time, it is seen that the witness is liable to be mistaken; or if, from interest, bias or prejudice, the admission appears to be unreasonable, or colored and exaggerated, then but little reliance should be placed upon this class of testimony." The court found no fault with this language as a legal proposition, but held that it was error to embody it in an instruction to the jury, because the court thereby declared, as a matter of law, what ought to have been left for the jury to determine as a matter of fact. See also Woollen *v.* Whitacre, 91 Ind. 502; Nelson *v.* Vorce, 55 Ind. 455; Pratt *v.* State, 56 Ind. 179; Millner *v.* Eglin, 64 Ind. 197; *s. c.* 31 Am. Rep. 121; Jackman *v.* State, 71 Ind. 149; Works *v.* Stevens, 76 Ind. 181; Morris *v.* State, 101 Ind. 561; Commonwealth *v.* Galligan, 113 Mass, 202; Mauro *v.* Platt, 62 Ill. 450.

[1] Castleman *v.* Sherry, 42 Tex. 59, 61.

[2] Gay *v.* State, 2 Tex. App. 128; Walker *v.* State, 2 Tex. App. 326.

[3] Thurston *v.* State, 18 Tex. 27; Colling *v.* State, 20 Tex. App. 400, 420.

[4] Hunter *v.* State, 43 Ga. 484.

[5] Hogsett *v.* State, 40 Miss. 522.

made voluntarily and not obtained by force, fraud or threats, are regarded by the law as the highest and most satisfactory character of proof. If, therefore, the jury believe, from the confession of defendant, as given in evidence, that the defendant shot the deceased at a time when deceased had no power to do him any injury, then such shooting was unlawful,"[1] etc.

§ 2432. PRECEDENT OF INSTRUCTIONS UNDER THIS HEAD. — In Indiana, where, as we have seen, instructions under this head, drawn from the text of Greenleaf, have been repeatedly condemned, the following has been approved: "Verbal admissions, consisting of mere repetitions of oral statements by the defendant, made several months ago, may be subject to much imperfection and mistake, for the reason that the defendant may not have expressed his meaning, or that the witness may have misunderstood him, or, by not giving his exact language, and in the connection used, may have changed the meaning of what was said; but you are the exclusive judges of the weight to be given to such evidence in this case. But if you find that the defendant did make any admissions or statements at any time, you will consider these things, together with his knowledge of the English language, and his power to express himself clearly, and his intelligence. If the admissions were freely, voluntarily, without fear, hope of reward, understandingly and deliberately made, and clearly proved, the jury may, in their discretion, and are at liberty to give them great weight in their deliberations."[2] In Missouri, less nicety seems to have been exhibited in dealing with this question, and the following instruction has been approved in words in the case first cited, and in substance in several others: "The jury are instructed that in considering what the defendant said after the fatal act, they must consider it all together. He is entitled to the the benefit of what he said for himself, if true, as is the State to the benefit of what he said against himself in any conversation proved by the State. What he said against himself the law presumes to be true, because against himself; but what he said for himself the jury are not bound to believe, because said in a conversation proved by the State. They may believe it or disbelieve it, as it may be shown to be true or

[1] Brown *v.* State, 32 Miss. 433, 450.

[2] Koerner *v.* State, 98 Ind. 718. The court distinguish Finch *v.* Berggins, 89 Ind. 360; Davis *v.* Hardy, 76 Ind. 272, and Garfield *v.* State, 74 Ind. 60.

false, by the evidence in the case." [1] In the same State, the following instruction, drawn upon a similar model, as applicable to the case of two defendants jointly indicted for murder in the first degree, was given, and approved by the Supreme Court: "If the jury believe, from the evidence, that the defendants, Albert P. Talbott and Charles E. Talbott, made any statements after the commission of the homicide, and in relation thereto, the jury must consider all that each one said together, and what one of them said cannot be used against the other, unless assented to or acquiesced in by the other; and while each of said defendants is entitled to what he said for himself, if true, the State is entitled to anything he said said against himself in any conversation proved by the State. What each defendant said against himself the law presumes to be true, because against himself; what, however, he said for himself, the jury are not bound to believe, because said in a conversation proved by the State, but they may believe it, or disbelieve it, accordingly as it is shown to be true or false by the evidence in the case." [2] A better model is the following from a case in Illinois: "It is the duty of the jury to treat and consider any confessions proven by the defendant precisely as any other testimony; and hence, if the jury believe the whole confession to be true, they will act upon the whole as truth. But the jury may believe that which charges the prisoner, and reject that which is in his favor, if they see sufficient grounds in the evidence, or in any inherent improbability in the statement itself. The jury are at liberty to judge of it in like other evidence, by all the circumstances of the case.[3]

§ **2433. Defense of Alibi not to be Disparaged.** — This defense is disparaged by writers on evidence, and, in popular speech, it is often called "a rogue's defense." But it is obvious that it may be, and often is, the only defense of an innocent

[1] State *v.* Peak, 85 Mo. 190, 192. The court say that this instruction is sanctioned by their decisions in State *v.* Talbott, 73 Mo. 347, and State *v.* Curtis, 70 Mo. 594. Similar instructions were approved in State *v.* Hill, 65 Mo. 85, and in State *v.* Vansant, 80 Mo. 67, 71. See also State *v.* Carlisle, 57 Mo. 102. 106.

[2] State *v.* Talbott, 73 Mo. 350, 351; citing State *v.* Hollenscheit, 61 Mo. 302; State *v.* Hays, 23 Mo. 287; State *v.* West, 69 Mo. 401; State *v.* Curtis, 70 Mo. 594. For a precedent of an instruction as to the admissions of the deceased in a civil action against a railway company, grounded on negligence, for the death of the deceased, see Cooper *v.* Central Railroad, 44 Ia. 137.

[3] Approved in Jackson *v.* People, 18 Ill. 271.

man; and, unless the writer is mistaken in the observations hereafter made in respect of it,[1] it is a defense of so complete a nature that, to the precise extent to which it is supported by evidence, is the case of the State overthrown. Whether it has been established by the evidence to that degree of certitude which the law requires is exclusively a question for the jury, with which the judge has nothing to do, except in those jurisdictions where the judge is privileged to give his opinion to the jury upon questions of fact. It is therefore error for the court, in charging the jury, to disparage this defense.[2] It is an invasion of their province for him to tell them that "an *alibi* is a species of defense which the law looks upon with great suspicion." So far from this being the law, as was well said by Haight, J., "the defense is as honorable, and, when clearly proved, as satisfactory as any defense which the law permits."[3] It is, in the opinion of one court, error to tell them that "such testimony (supporting an *alibi*) should be weighed with great caution, in connection with all the evidence in the case, because it is a defense easily fabricated, and often attempted by contrivance or perjury," And this error is not cured by adding: "But when it is fully and satisfactorily established by the evidence, to the satisfaction of a jury, it is a good and complete legal defense to the prosecution, and entitles the defendant to an acquittal."[4]

§ 2434. CAUTION AS TO THIS DEFENSE IN WEBSTER'S CASE. — But the above rule applies only in those courts where the judge is prohibited from commenting upon the weight of the evidence.[5] In other jurisdictions, the judges are at liberty to give to the jury the proper caution concerning a defense which the experience of the judges has shown to be often attempted by contrivance and perjury. This was done in the charge of Chief Justice Shaw to the jury in Webster's case; and, as that charge was, on all questions covered by it, one of the most lucid that was ever delivered from the bench to a trial jury, the part of it

[1] *Post*, § 2335, *et seq.*

[2] Dawson *v.* State, 62 Miss. 241; following Simmons *v.* State, 61 Miss. 243, and qualifying the *dictum* in Nelms *v.* State, 58 Miss. 362.

[3] People *v.* Kelly, 35 Hun (N. Y.), 295, 303.

[4] Dawson *v.* State, 62 Miss. 241, 243.

[5] *Ante*, § 2287.

which relates to this defense is subjoined: "The next rule to which I ask attention is that all the facts proved must be consistent with each other, and with the main fact sought to be proved. When a fact has occurred with a series of circumstances preceding, accompanying and following it, we know that these must all have been once consistent with each other; otherwise the fact would not have been possible. Therefore, if any one fact necessary to the conclusion is wholly inconsistent with the hypothesis of the guilt of the accused, it breaks the chain of circumstantial evidence upon which the inference depends; and, however plausible or apparently conclusive the other circumstances may be, the charge must fail. Of this character is the defense usually called an *alibi*, that is, that the accused was *elsewhere* at the time the offense is alleged to have been committed. If this is true, it being impossible that the accused should be in two places at the same time, it is a fact inconsistent with that sought to be proved, and excludes its possibility. This is a defense often attempted by contrivance, subornation and perjury. The proof, therefore, offered to sustain it is to be subjected to a rigid scrutiny; because, without attempting to control or rebut the evidence of facts sustaining the charge, it attempts to prove affirmatively another fact wholly inconsistent with it; and this defense is equally available, if satisfactorily established, to avoid the force of positive, as of circumstantial evidence. In considering the strength of the evidence necessary to sustain this defense, it is obvious that all evidence tending to show that the accused was in another place at the time of the offense, is in direct conflict with that which tends to prove that he was at the place where the crime was committed, and actually committed it. In this conflict of evidence, whatever tends to support the one tends in the same degree to rebut and overthrow the other; and it is for the jury to decide where the truth lies." [1]

§ 2235. Application of the Rule of "Reasonable Doubt" to this Defense. — It is not error to refuse an instruction which is so drawn as to apply the rule of "reasonable doubt" to particular features of the evidence,[2] for instance, in the opinion of some courts, to the defense of *alibi*,[3] or *insanity*.[4] The "rea-

[1] Commonwealth *v.* Webster, 5 Cush. (Mass.) 295, 318.

[2] Ashlock *v.* State, 16 Tex. App. 14, 23; McCall *v.* State, 14 Tex. App. 353.

[3] Mullins *v.* People, 110 Ill. 42, 47.

[4] Webb *v.* State, 9 Tex. App. 491.

sonable doubt" which the jurors are permitted to entertain must, according to the prevailing view, be a reasonable doubt as to the guilt of the accused, on the whole evidence, and not as to a particular fact in the case. Accordingly, where the evidence of the defendant's guilt was direct, a request to instruct the jury that "if there is any one single fact proved to your satisfaction on the part of the defendant, by a preponderance of evidence, which is inconsistent with the defendant's guilt, this is sufficient to raise a reasonable doubt, and you should acquit the defendant," was properly refused.[1] So, it is generally not necessary, where the court gives a proper cautionary instruction as to the rule of reasonable doubt applied to the general issue of guilt or innocence, to instruct the jury also that they must acquit, if they have a reasonable doubt of the defendant's *sanity* at the time of doing the act.[2] The prevailing rule in regard to the defense of *insanity* seems to be that it is an affirmative defense, the burden to establish which is upon the accused, and that it must be shown by evidence which *satisfies* the minds of the jurors; which is quite a different thing from raising a reasonable doubt as to whether or not the accused was sane at the time when he committed the act.

§ 2436. View that a Reasonable Doubt of the Presence of the Accused at the Place of the Crime Acquits. — There is, however, room for invoking a different principle in respect of the defense of *alibi*. That defense is of such a nature that, if made out, it excludes the possibility of the defendant's guilt to a demonstrative certainty. If the defendant was not at the place where the crime was committed, at the time when it was committed (excluding those cases where he is charged as an absent principal or accessory), he is not the guilty person; therefore, in so far as the evidence raises any doubt as to whether he was present at the time and place of the commission of the offense, precisely to that extent it raises a doubt of his guilt. It is,

[1] State *v.* Roberts, 15 Ore. 187; *s. c.* 13 Pac. Rep. 896.

[2] Webb *v.* State, 9 Tex. App. 491.

therefore, unavoidably logical, and hence proper, to instruct the jury that the defendant cannot be convicted if the evidence adduced by him tending to show an *alibi*, raises a reasonable doubt of his having been present at the time and place of the crime. Some courts have taken this view, holding it proper to instruct the jury that if, from the evidence, they have a reasonable doubt as to whether the defendant was at the place where the crime was committed at the time, or was at the place where the evidence tends to show that he was, they should find him not guilty.[1] "An *alibi* is a legitimate defense, and if the evidence touching it was sufficient to raise a reasonable doubt of the appellant's guilt in the minds of the jury, it should have been considered, although the *alibi did not cover the whole time* during which the crime was committed." Accordingly, it was error to instruct the jury to disregard this defense, if it failed to cover the whole time during which the crime may have been committed.[2] Where this rule prevails it is, of course, error to instruct the jury to the effect that the defense of *alibi* must be fully and satisfactorily established by the evidence, or that it must be established by the evidence to the satisfaction of the jury.[3] The courts which so hold, necessarily proceed upon the view that *alibi* is not an extrinsic defense which confesses the fact and avoids it, but that it is rather a defense which, if it could be spoken of in the language applied to pleadings in civil cases, might be called a special traverse of the indictment. It is an attack upon the evidence which tends to prove guilt. It is a defense which, if made out, meets and overthrows every allegation in the indictment. Under this view, the burden is not upon the defendant to establish it by a preponderance of evidence, as is the case in other extrinsic defenses.[4] It does not seem to fol-

[1] Binns *v.* State, 46 Ind. 311; French *v.* State, 12 Ind. 670. It has been said in the same State, for obvious reasons, that it is improper to instruct the jury that "the defense of *alibi* does not belong to the doctrine of doubts, which entitles the defendant to be acquitted." Binns *v.* State, *supra*.

[2] Kaufman *v.* State, 49 Ind. 248, 251.

[3] Dawson *v.* State, 62 Miss. 241; Walker *v.* State, 42 Tex. 360, 369.

[4] Johnson *v.* State, 21 Tex. App. 368, 380, 381; Ayers *v.* State, 21 Tex. App. 399, 401; Walker *v.* State, 42 Tex. 360, 369; Humphreys *v.* State, 18 Tex. App. 302, 309. See also Cunning-

low, however, that, because this defense is in the nature of a special attack upon the inculpatory evidence of the State, the burden is not upon the defendant to prove it, as these courts hold. The burden of proving it certainly cannot be upon the State; and if it does not rest upon the defendant, upon whom does it rest? Certainly not on the judge or the court crier. The courts which so reason seem to forget that the *burden* of proof — which is merely another name for the *necessity* of proof — is one thing, and that the *quantum* of evidence to sustain the burden is another thing. Certainly the burden of establishing this defense is upon the defendant, in spite of all the casuistry by means of which judges have led themselves to the contrary conclusion. Suppose the defendant is indicted for a crime committed at a given date in St. Louis, and his defense is that on that date he was in Chicago. If he is not to prove this, by whom is it to be proved? Is the State to undertake the task of proving that he was not in ten thousand different places at the time when the crime was committed? But upon the most unshaken grounds, this burden is sustained, and an adequate *quantum* of proof produced by the defendant, when he succeeds in raising a reasonable doubt in the minds of the jurors as to whether or not he was at the place of the crime when it was committed.[1]

§ 2437. View that an Alibi is an Extrinsic Defense, as to which the Burden is on the Accused to Establish it by a Preponderance of Evidence. — This doctrine seems to have been first formulated by Chief Justice Shaw in Webster's case. The *alibi* which was set up in that case was not the *alibi* of the ac-

ham *v.* State, 56 Miss. 269; Hawthorn *v.* State, 58 Miss. 778; Smith *v.* State, 58 Miss. 867; Ingram *v.* State, 62 Miss. 142.

[1] In this view, the reasoning upon which the Court of Appeals of Texas held the following instruction erroneous seems strangely untenable: "If the jury believe the *alibi* that has been set up as the defense in this case has been proven, or if they have a reasonable doubt as to the fact of whether said *alibi* has been proven, they will give the defendant the benefit of it and acquit him. When an *alibi* is relied upon as a defense, it rests on the defendant to prove it to the extent of raising a reasonable doubt as to whether the accused is the person who committed the offense charged." Humphreys *v.* State, 18 Tex. App. 302, 309.

cused, but that of the deceased. In other words, evidence was given, on behalf of the accused, tending to show that on the day following that on which the murder had been located, Dr. Parkman, the supposed murdered man, had been seen walking in one of the streets of Boston. It was conceded in the charge of Chief Justice Shaw that this fact, if proved, would be conclusive in favor of the defendant. His entire charge on this subject was as follows: "We now come to consider that ground of defense on the part of the defendant, which has been denominated, not perhaps with precise legal accuracy, an *alibi;* that is, that the deceased was seen elsewhere out of the medical college after the time when, by the theory of the proof on the part of the prosecution, he is supposed to have lost his life at the medical college. It is like the case of an *alibi* in this respect, that it proposes to prove a fact which is repugnant to and inconsistent with the facts constituting the evidence on the other side, so as to control the conclusion, or at least render it doubtful, and thus lay the ground of an acquittal. And the court are of opinion that this proof is material; for, although the time alleged in the indictment is not material, and an act done at another time would sustain it, yet in point of evidence it may become material; and in the present case, as all the circumstances shown on the other side, and relied upon as proof, tend to the conclusion that Dr. Parkman was last seen entering the medical college, and that he lost his life therein, if at all, the fact of his being seen elsewhere afterwards would be so inconsistent with that allegation, that, if made out by satisfactory proof, we think it would be conclusive in favor of the defendant. Both are affirmative facts; and the jury are to decide upon the weight of the evidence. When you are called upon to consider the proof of any particular fact, you will consider the evidence which sustains it in connection with that which makes the other way, and be governed by the weight of the proof. Proof which would be quite sufficient to sustain a proposition, if it stood alone, may be encountered by such a mass of opposite proof as to be quite over-balanced by it. In the ordinary case of an *alibi*, when a party charged with a crime attempts to prove that he was in

another place at the time, all the evidence tending to prove that he committed the offense, tends in the same degree to prove that he was at the place when it was committed. If, therefore, the proof of the *alibi* does not outweigh the proof that he was at the place when the offense was committed, it is sufficient."[1] This view, that the doctrine is that the burden of proof to establish an *alibi* is upon the defendant, and that this defense must be established by a preponderance of the evidence, has gained considerable foot-hold, and is possibly the prevailing view. It obtains in Iowa, and the cases in that State hold that it is proper so to instruct the jury.[2] A minority of that court,[3] have recently endeavored to break away from this rule and establish the doctrine in conformity with that held in Indiana,[4] elsewhere expounded.[5]

§ 2438. JURY HOW INSTRUCTED WHERE THIS VIEW PREVAILS. — In a jurisdiction where this view prevails, it has been held proper to refuse an instruction which tells the jury that "if, in view of all the evidence, the jury have a reasonable doubt as to whether the defendant was in some other place when the offense was committed, they should give the defendant the benefit of the doubt, and acquit him."[6] On the other hand, an instruction has been approved in a late case which told the jury. "The burden of establishing an *alibi* is cast upon the defendants, and the evidence introduced to sustain it should outweigh the proof introduced by the State tending to show that the defendants participated in the crime. They are not bound to establish such defense beyond a reasonable doubt; but if, upon the whole case, the testimony raises in your minds a reasonable doubt that the defendants were present at the place where the assault was committed, that of course would create a reasonable doubt as to their guilt, and would entitle them to an acquittal."[7] The following instruction, drawn on the contradictory con-

[1] Com. *v.* Webster, 5 Cush. (Mass.) 296, 323, 324.

[2] State *v.* Vincent, 24 Ia. 570, 578; State *v.* Hardin, 46 Ia. 623, 629; State *v.* Red, 53 Ia. 69; *s. c.* 4 N. W. Rep. 831; State *v.* Reed, 62 Iowa, 40; *s. c.* 17 N. W. Rep. 150; State *v.* Kline, 54 Ia. 183; *s. c.* 6 N. W. Rep. 184; State *v* Northrup, 48 Ia. 583; State *v.* Hamilton, 11 N. W. Rep. 5; *s. c.* 57 Ia. 598.

[3] Adams, C. J. and Day, J.

[4] French *v.* State, 12 Ind. 670.

[5] State *v.* Hamilton, *supra.*

[6] Mullins *v.* People, 110 Ill. 43.

[7] State *v.* Fry, 67 Iowa, 478. See also, State *v.* Reed, 62 Iowa, 40, and State *v.* Hemrick, *Id.* 414.

ception that the defendant must prove the *alibi* by a preponderance of evidence, but that the jury must nevertheless acquit him if, on all the evidence, they have a reasonable doubt of his guilt, has been approved: "The defendant has offered evidence tending to show that, at the time of the alleged assault, he was absent some considerable distance from where the transaction occurred. On this subject you are instructed that if you believe, from a preponderance of evidence, that the defendant was at the house of Michael McLaughlin at the time the alleged crime was committed, your verdict should be for the defendant. The defendant is not required to prove an *alibi* beyond a reasonable doubt, but it is sufficient if you are satisfied by a preponderance of evidence that the defendant was at the house of said Michael McLaughlin at the time said crime, if any, was committed. By a preponderance of evidence, as herein mentioned, is meant, not a greater number of witnesses, but greater weight of testimony. If the circumstances in evidence, taken together, in your judgment, outweigh the testimony of any number of witnesses, then you will be authorized to award the preponderance to the circumstances, and render your verdict accordingly. But you will remember that if, from all the evidence, there is a reasonable doubt of defendant's guilt, he must be acquitted, whether that doubt arises from a defect in the evidence on the part of the State, or from evidence introduced by defendant."[1]

§ 2439. Other Instructions as to this Defense. — Other instructions given by the courts which entertain the opposing theories above pointed out respecting this defense, present less dissimilarity than might be supposed. Where the view that this defense is to be established by the defendant by a preponderance of evidence prevails, it is usual to instruct the jury that, if they have a reasonable doubt, on all the evidence in the case, whether the defendant was present at the place of the crime and at the time of its commission, they should acquit.[2] Where the opposing view, that it is sufficient that the evidence raises a reasonable doubt as to the presence of the accused at the time and place of the crime, prevails, it is usual to instruct the jury in such terms as the following: "If you entertain a reasonable doubt that at the time the defendant was not there, but elsewhere or at his own house, then the defendant would be entitled to the benefit of such doubt, and in such case

[1] Approved in State *v.* Kline, 54 Ia. 185. See also, State *v.* Vincent, 24 Iowa, 570; State *v.* Hardin, 46 Iowa, 623; State *v.* Waterman, 1 Nev. 552.

[2] State *v.* Fry, 67 Iowa, 478.

you will acquit him."[1] Or thus: "If, after considering all the evidence introduced by the prosecution, and all the evidence introduced by the defense, you entertain a reasonable doubt as to whether the defendant has been identified as one of the persons present and participating in the offense charged, you should find him not guilty."[2] It has been held proper, where the indictment was for arson, to instruct the jury that, "to render the proof of an *alibi* satisfactory to the jury, the evidence must cover the whole of the time of the setting of said fires (if the jury believe from the evidence that said stacks were set on fire), so as to render it impossible, or very improbable, that the defendants, or any of them, could have committed the act."[3] Apparently, on the same view, it has been held proper to charge the jury "that an *alibi* must be very clearly made out before the jury should be called on to believe it."[4]

§ 2440. Model of a Complete Hypothetical Instruction as to this Defense. — It will be safe and proper, in any case where this defense is set up, for the trial judge to frame an instruction to the jury on the following model, taken from a recent case: "Where a person on trial for a crime shows that he was in another place at the time when the act was committed, he is said to prove an *alibi*. One of the defenses interposed by the defendant in this case is what is known as an *alibi* — that is, the defendant was at another place at the time of the commission of the crime. The court instructs the jury that such defense is as proper and as legitimate if proved, as any other, and all evidence bearing upon that point should be carefully considered by the jury. If, in view of all the evidence, the jury have a reasonable doubt as to whether the defendant was in some other place when the crime was committed, they should give the defendant the benefit of the doubt and find him not guilty. As regards the defense of an *alibi*, the jury are instructed that the defendant is not required to prove that defense beyond a reasonable doubt, to entitle him to an acquittal. It is sufficient if the defense upon that point raises a reasonable doubt of his presence at the time and place of the commission of the crime charged. The court further instructs the jury that if they believe from the evidence that, at the time of the alleged larceny, and at the hour the crime was com-

[1] Approved in Thornton *v.* State, 20 Tex. App. 519, 535.

[2] Mullins *v.* People, 110 Ill. 43.

[3] Approved in Creed *v.* People, 81 Ill. 568, 569.

[4] State *v.* Drawdy, 14 Rich. L. (S. C.) 88.

mitted, the defendant McLain was at the restaurant of William Ince, as testified to by some of the defendant's witnesses, and was not present at the scene of the larceny at the time of its commission, then you must acquit the defendant. The jury are instructed that if you entertain any reasonable doubt as to whether or not the defendant McLain was at Ince's restaurant or at the scene of the larceny, Calmelet's store, at the time the larceny was committed, then it is your sworn duty, under the law, to give the benefit of the doubt to the defendant, and acquit him. The jury are instructed that if you should entertain a reasonable doubt as to the defendant's guilt he should be acquitted, although the jury might not be able to find that the *alibi* was fully proved." [1]

§ 2441. When Court not Required to Charge as to this Defense. — In those jurisdictions where, in criminal cases, mere non-direction is not error, unless the court is requested to give an appropriate instruction and refuses, it is obvious that a failure to give an instruction directing the attention of the jury to this defense will not entitle the prisoner to a new trial; and even in a State where the court is bound to charge the law, without request, in respect of the defense set up by the accused, it has been reasoned that this defense is, in general, sufficiently embraced in the general charge that a defendant is by law presumed to be innocent, until his guilt is established by competent evidence, beyond a reasonable doubt.[2] But while in that State the court is not bound to do this, except upon request, it is, of course, held entirely proper to do so; [3] and where this is the only defense set up, it is held that the court is bound to charge the law in respect of it.[4] Where there is evidence tending to support this defense, it is, in that jurisdiction, held error for the court to refuse, upon request, to charge the law in respect of it; [5] and it seems that the failure of the court to so charge will

[1] Approved in McLain *v.* State, 18 Neb. 159, 160, citing Campbell *v.* People, 109 Ill. 565.

[2] Ayers *v.* State, 21 Tex. App. 399, 401; Davis *v.* State, 14 Tex. App. 645; McAfee *v.* State, 17 Tex. App. 131.

[3] Deggs *v.* State, 7 Tex. App. 359.

[4] McGrew *v.* State, 10 Tex. App. 539; Granger *v.* State, 11 Tex. App. 454; Hunnicutt *v.* State, 18 Tex. App. 500.

[5] Long *v.* State, 11 Tex. App. 381; Ayers *v.* State, 21 Tex. App. 399, 405.

be fatal to the conviction, provided an exception is saved to the omission,[1] and this omission has been held in some cases fatal, although not excepted to at the time of the trial.[2]

§ 2442. Effect of an Unsuccessful Attempt to Prove an Alibi. — It is said by writers on circumstantial evidence, that "an unsuccessful attempt to establish an *alibi* is always a circumstance of great weight against a prisoner, because a resort to that kind of evidence implies an admission of the truth and relevancy of the facts alleged, and the correctness of the inferences drawn from them, if they remain uncontradicted."[3] It has been held proper to instruct the jury that an unsuccessful attempt to prove an *alibi*, in a criminal case, is a circumstance to be weighed against the defendant.[4] The propriety of such an instruction, especially in those jurisdictions which scrupulously uphold the independence of juries, may be doubted; since the weight to be attached to this circumstance is exclusively for the jury, and where they receive such an admonition from the bench, they are liable to give undue weight to it. Accordingly, where the judge charged the jury thus: "An *alibi*, if proved, constitutes a complete defense; if not proved, and you think it has not been proved, the attempt to manufacture evidence is a circumstance which always bears against the person. No innocent man is driven to manufacture evidence," — this was held to be error and ground of reversal.[5] So, where the jury were instructed that the defense of *alibi* "was a great risk to the defendant who attempted to set it up, and that when it fails, such failure ought to raise a strong presumption against the *bona fides* of the defense; not that such failure is conclusive of the guilt of a defendant, but that it raises a fair presumption against

[1] Hunnicutt *v.* State, 18 Tex. App. 498, 522; McAfee *v.* State, 17 Tex. App. 131; Deggs *v.* State, 17 Tex. App. 359; McGrew *v.* State, 10 Tex. App. 539; Long *v.* State, 11 Tex. App. 381; Granger *v.* State, 11 Tex. App. 454.

[2] Davis *v.* State, 14 Tex. App. 645; Ninnon *v.* State, 17 Tex. App. 650.

[3] Willis Cir. Ev. 83; Burrill Cir. Ev. 519.

[4] Kilgore *v.* State, 74 Ala. 1, 8. Compare Porter *v.* State, 55 Ala. 107; Gordon *v.* People, 33 N. Y. 501.

[5] Turner *v.* Com., 86 Pa. St. 54, 73.

him, on the ground on which he had chosen to rest his defense," — it was held that this was a misdirection, for which there must be a new trial.[1]

§ **2443. As to the Strength of Evidence to Establish Identity.** — Where the question of the identity of the accused as the person who committed the crime is in doubt or dispute, no rule is known which requires the judge to give a special instruction to the jury as to the strength of evidence necessary to establish identity. The general instruction touching the presumption of innocence, and the necessity of overcoming this presumption by evidence which satisfies the minds of the jury of the guilt of the accused, beyond a reasonable doubt, will ordinarily be sufficient for the purposes of justice in such a case. It has been held that an instruction which tells the jury that, in considering the evidence in the case as to the identity of the defendant as being present at the crime and participating in it, "the jury must feel an abiding confidence and full faith that the witnesses who have undertaken to testify are not mistaken in their testimony," is properly refused.[2] And where the identity of the accused depended upon the testimony of the prosecutrix alone, it was held proper to instruct them that if the prosecutrix "may be mistaken as to his identity, then the jury ought to acquit." The court reason that a mere possibility of a mistake does not authorize an acquittal, the rule being that it is a reasonable doubt upon the whole evidence of the defendant's guilt which requires this. "A mere possibility of mistake," said Stone, C. J., "is not the equivalent of that insufficiency of proof which, as a matter of law, generates a reasonable doubt, and demands an acquittal."[3]

§ **2444. As to Evidence of Good Character.** — The defendant in a criminal trial is always entitled to introduce evidence of his good character, as a fact to weigh in his favor: and it seems that he is entitled, if he requests it, to have the jury advised as to the

[1] Com. *v.* Fisher, 15 Phila. (Pa.) 387.
[2] Hughes *v.* State, 75 Ala. 31, 35.
[3] Booker *v.* State, 76 Ala. 22, 25.

weight to be given to such evidence. In one jurisdiction it has been held: "The good character of the party accused, satisfactorily established by competent witnesses, is an ingredient which ought always to be submitted to the consideration of the jury, together with the other facts and circumstances of the case. The nature of the charge, and the evidence by which it is supported, will often render such ingredients of little or no avail; but the more correct course seems to be, not in any case to withdraw it from consideration, but to leave the jury to form their conclusions upon the whole of the evidence, whether an individual whose character was previously unblemished, has or has not committed the particular crime for which he is called upon to answer."[1] The caution which is generally given under this head is rather against than in favor of the accused. In one case it was said: "If you believe the defendant guilty, you must so find, notwithstanding his good character."[2] In another case it was this: "The character of the defendant is also a matter for your consideration. The evidence as to his character should be given such weight, in explanation of the transaction between himself and the deceased, as to you seems proper. But if you shall conclude, from all the evidence, that the defendant is guilty, you should not acquit him because you may believe that he has heretofore been a person of good repute."[3] The following, in a case of robbery, seems to be fuller and better: "Some evidence has been offered by the defendants in regard to their character for honesty. This evidence should be considered by the jury as tending to establish a defense. If, however, the jury should be satisfied, beyond a reasonable doubt, of the guilt of the defendants, after a full consideration of all the evidence in the case, including the testimony in regard to the character of the defendants for honesty, then, in that view of the case, though the jury might believe that the defendants had a good character for honesty before the alleged robbery, that would not avail them as

[1] Felix *v.* State, 18 Ala. 720, 725; Booker *v.* State, 76 Ala. 22, 25.

[2] Approved in People *v.* Samsels, 66 Cal. 99.

[3] Approved in State *v.* Vansant, 80 Mo. 67, 70. For another similar instruction, see State *v.* Jones, 78 Mo. 278, 283.

a defense, or entitle them to an acquittal."[1] Beyond such cautions as the above, evidence of this kind ought not to be disparaged, and therefore the grounds upon which the following instruction was approved must be considered doubtful: "Evidence of good character is, in law, to be considered by the jury, in all doubtful cases, of great weight; yet, if the proof of guilt is direct and clear, it is entitled to little consideration."[2] On the other hand, where the judge gave the usual caution in respect to such evidence, it was held not error to refuse to charge, on the request of the defendant, "that the good character of the defendant, up to his eighteenth year, is sufficient to generate a reasonable doubt of his guilt, if the jury so believe;" the reason being that the sufficiency of such evidence is always for the jury, while this charge asserted its sufficiency as a matter of law.[3] It has been held proper to refuse an instruction that "the law says if the defendants have proved a good character, such good character may be looked to, independent of the evidence in the case, to generate a doubt of their guilt;" since this species of evidence is "not to be considered independent of, but in connection with, the other evidence; and the jury are to say, after a deliberate consideration of all the evidence, whether the defendant is guilty or innocent."[4]

§2445. As to the Value of the Testimony of the Accused.— In the opinion of most American courts, it is proper for the judge, in a case where the accused person has testified as a witness in his own behalf, to advise the jury that, in determining the value of his testimony, they are at liberty to take into consideration the fact of his interest in the result of the trial, pro-

[1] Approved in McQueen *v.* State, 82 Ind. 74. See also Rollins *v.* State, 62 Ind. 46; Kistler *v.* State, 54 Ind. 400.

[2] Approved in Creed *v.* People, 81 Ill. 569.

[3] Booker *v.* State, 76 Ala. 22, 25. Compare Hall *v.* State, 40 Ala. 698.

[4] Williams *v.* State, 52 Ala. 412, 413. The Supreme Court of Iowa condemn an instruction on the subject, drawn in the language of Webster's Case (5 Cush. (Mass.) 295). State *v.* Clemons, 51 Iowa, 274; *s. c.* 1 N. W. Rep. 546, 549; State *v.* Northrup, 48 Iowa, 583 (Anno 1878); State *v.* Harding, 46 Iowa, 623 (Anno 1877).

vided he, at the same time, cautions them that the weight which they shall give to his testimony is exclusively for their determination.[1] In most of the decisions cited in the last preceding note, models of cautionary instructions under this head are given. These instructions, though couched in varying language, for the most part unite in conveying to the jury the following admonitions: 1. That under the law the accused is a competent witness in his own behalf, and that the jury are bound to consider his testimony. 2. That, in determining what weight to give to it, it is proper for them to take into consideration his interest in the result of the trial. 3. That they may give to his testimony such weight as, under all the circumstances, they think it entitled to. He may caution them that they are not bound to believe the testimony of the accused;[2] but he should not so frame such an instruction as to cast discredit upon the testimony which the accused has given.[3] In such instructions the jury are sometimes

[1] People *v.* Wheeler, 65 Cal. 77; People *v.* Morrow, 60 Cal. 146; People *v.* O'Neal, 67 Cal. 378; People *v.* Cronin, 34 Cal. 195; People *v.* Knapp, 71 Cal. 1; *s. c.* 8 Crim. L. Mag. 640; State *v.* Sterrett, 71 Iowa, 386; *s. c.* 32 N. W. Rep. 387; Bressler *v.* People, 117 Ill. 439, 440; Rider *v.* People, 110 Ill. 13; Bulliner *v.* People, 95 Ill. 407; Hirschman *v.* People, 101 Ill. 568; Chambers *v.* People, 105 Ill. 415; Creed *v.* People, 81 Ill. 569; People *v.* Calvin, 60 Mich. 113; *s. c.* 26 N. W. Rep. 851; Haines *v.* Territory (Wyo.), 13 Pac. Rep. 8; State *v.* Elliott, 90 Mo. 350; *s. c.* 2 S. W. Rep. 411; State *v.* McGinnis, 76 Mo. 326; State *v.* Maguire, 69 Mo. 197; State *v.* Zorn, 71 Mo. 415; State *v.* Cook, 84 Mo. 40; People *v.* Petmecky, 99 N. Y. 415, 421; State *v.* Wisdom, 84 Mo. 177, 190. Contrary to the statement in the text, it is ruled in Kentucky that, in the trial of an indictment for a felony, the court should not give instructions directing the attention of the jury to the interest of witnesses in the result of the trial, the court reasoning that this is an invasion of the province of the jury. Wright *v.* Commonwealth (Ky.), 2 S. W. Rep. 905. Such, also, seems to be the view in Mississippi, where, in condemning such an instruction, it was said by Campbell, C. J.: "There is little danger that juries will be unduly influenced by the testimony of defendants in criminal cases. They do not need any cautioning against too ready credence to the exculpation furnished by one on trial for felony. The accused should be allowed to exercise his right to testify, unimpaired by any suggestions calculated to detract from its value in the estimation of the jury." Buckley *v.* State, 62 Miss. 705, 706.

[2] Rider *v.* People, 110 Ill. 13; State *v.* Sterrett, 71 Iowa, 386; *s. c.* 32 N. W. Rep. 387; People *v.* O'Neal, 67 Cal. 378: Creed *v.* People, 81 Ill. 569.

[3] Commonwealth *v.* Pease, 137 Mass. 576; Buckley *v.* State, 62 Miss. 705.

advised (perhaps inaccurately) in determining the weight to be given to the testimony of the accused, to apply to it the same tests which they would apply to the testimony of any other witness.[1] It is sometimes added that "the jury are also to take into consideration the fact, if such is the fact, that he has been contradicted by other witnesses."[2] Authority is found for the conclusion that the judge may, in cautioning the jury concerning the testimony of the accused, apply to such testimony the maxim "*Falsus in uno, falsus in omnibus*," which has already been referred to, cautioning them that if they find "that the accused has willfully and corruptly testified falsely to any material fact to the issue in this case, they have the right to entirely disregard his testimony, except in so far as his testimony is corroborated by other credible evidence.[3] But this conclusion seems to be unsound; for, as seen, the judge is not at liberty, even in a civil case, to apply this maxim to the testimony of a particular witness, and he ought not to be allowed, in a criminal case, so to apply it as to discredit the testimony of the defendant in the minds of the jury.

§ 2446. No Rule of Law Enjoining Distrust of Such Testimony. — Nor is it the law, even in civil cases, that the testimony of a party must be corroborated in order to be believed by the jury.[4] It is scarcely necessary to add that it will be no error for the judge to refuse to tell the jury that the testimony of a witness who is interested in the result of the trial "should be received with great caution and distrust."[5] On the other hand, it has been held error, in a criminal case, to frame such an instruction in the following language: "It is true that, under the laws of this State, the defendant is a competent witness in his own behalf; but, in weighing his testimony, the jury should

[1] People *v.* Petmecky, 99 N. Y. 415, 421; Anderson *v.* State, 104 Ind. 467, 472.

[2] Rider *v.* People, 110 Ill. 13. Compare Hinton *v.* Cream City R. Co., 65 Wis. 335; Hatfield *v.* Chicago &c. R. Co., 61 Iowa, 440.

[3] Rider *v.* People, 110 Ill. 13.

[4] Prowattain *v.* Tindall, 80 Pa. St. 295.

[5] Commonwealth *v.* Pease, 137 Mass. 576.

consider the interest he has in the result of the same, and they may disregard it altogether." The court regarded this as having the effect of annulling the statute, by admonishing the jury of the interest of the defendant in the result, and authorizing them capriciously and wantonly to disregard his evidence.[1] It is equally obvious that it will be error for the judge so to frame such an instruction as to admonish the jury, as a matter of *law*,[2] or of *duty*,[3] to consider the interest of the accused in determining the credibility of his testimony. But the Indiana court does not seem to have been consistent in applying this principle. In a very recent case an instruction was approved by that court which embodied the following language: "In determining the weight to be given to the testimony of the different witnesses, you *should* take into account the interest, or want of interest, they have in the case, their manner on the stand, the probability or improbability of their testimony, with all other circumstances before you which can aid you in weighing their testimony. The defendant has testified as a witness, and you *should* weigh his testimony as you weigh that of any other witness. Consider his interest in the result of the case, his manner, and the probability or improbability of his testimony."[4] Soon afterwards the same court condemned an instruction couched in the following language: "The jury are the judges of the credibility of the witnesses; and, in determining the weight to be given to the testimony of the different witnesses, you *should* consider the relationship of the witnesses to the party, their interest in the event of the suit," etc.[5] The court saw no vice in the former instruction, but conceived that the latter enjoined it upon the jury as a duty, to consider the interest of witnesses in the event of the suit, their

[1] Buckley *v.* State, 62 Miss. 705, 706.

[2] Hartford *v.* State, 96 Ind. 461, 466; Pratt *v.* State, 56 Ind. 179; Greer *v.* State, 53 Ind. 420. Compare Woollen *v.* Whitacre, 91 Ind. 502; Nelson *v.* Vorce, 55 Ind. 455; Millner *v.* Eglin, 64 Ind. 197; *s. c.* 31 Am. Rep. 121; Works *v.* Stephens, 76 Ind. 181; Fulwider *v.* Ingels, 87 Ind. 414; Finch *v.* Bergins, 89 Ind. 360; Dodd *v.* Moore, 91 Ind. 522; State *v.* Sutton, 99 Ind. 300.

[3] Unruh *v.* State, 105 Ind. 117, 123; Bird *v.* State, 107 Ind. 154; *s. c.* 8 N. East. Rep. 14.

[4] Anderson *v.* State, 104 Ind. 467, 472. The italics are the present writer's.

[5] Unruh *v.* State, 105 Ind. 117, 124.

relationship to the parties, etc. It is submitted with confidence that there is no substantial difference between the two instructions. In a still later case, the same court has condemned an instruction calling attention to the interest of the accused, and stating that, to have controlling weight, this testimony should be consistent with other facts and circumstances." [1]

§ 2447. INSTRUCTIONS UNDER THIS HEAD. — "Defendant is a proper witness in his own behalf, but the jury may consider the fact that he is the accused person testifying in his own behalf, in determining what weight and credibility they will give to his testimony." [2] - - - - "You are not bound to consider the testimony of the prisoner as absolutely true, nor any part of it as absolutely true, nor as equal to the testimony of one disinterested witness. You are to bear in mind that the prisoner speaks in her own behalf to discharge herself of a criminal accusation; that the law does not permit the people's attorney to call witnesses to contradict or impeach her subsequent to the giving of her testimony, and you are to consider the great temptation which one so situated is under, so to speak as to procure an acquittal. Upon consideration of these circumstances, taken in connection with all the evidence, you are to accord to the testimony of the person such credit and effect as you think it entitled to." [3]

§ 2448. As to the Credence to be Given to the Unsworn Statement of the Accused. — Under the statutes of several of the States, the accused in a criminal trial is allowed to make an unsworn statement to the jury.[4] It is ruled, following the express terms of such statutes, or as a reasonable implication therefrom, that their effect is to make the unsworn statement of

[1] Bird *v.* State, 107 Ind. 154; *s. c.* 8 N. East. Rep. 14.

[2] Approved in State *v.* Jones, 78 Mo. 280.

[3] Approved in Solander *v.* People, 2 Colo. 48, 56.

[4] *Ante*, § 663, *et seq.* The statute of Florida was repealed by a statute in 1870 which provided: "In the courts of Florida there shall be no exclusion of any witness in a civil action because he is a party to or interested in the issue tried. In all the criminal prosecutions, the party accused shall have the right of making a statement to the jury, under oath, of the matter of his or her defense." This statute, it will be observed, takes from the court the discretion allowed by the statute of 1865 and establishes the unqualified right of the accused to make such a statement under oath. It is held that the intention of the legislature in this en-

the accused *evidence*, to be considered by the jury together with the other evidence in the case; that the jury are at liberty to give it such weight as they think it entitled to; and that it is error to instruct the jury that they are not to regard it as evidence,[1] or so to frame an instruction as to lead the jury to suppose that they are at liberty to reject such a statement merely because it is not supported by other evidence.[2] But it has been held not error for the judge to refuse, on the request of the accused, to instruct the jury that such a statement is to be given no less credence on account of its not being made under oath — since this would infringe the province of the jury of determining what credence it is to receive.[3]

§ 2449. Jury Instructed to Give it what Weight they think it Entitled to. — It has been held proper to admonish them that "the defendant in every criminal case has the right to make his statement; the jury may give whatever weight to such statement they may think it entitled to. You may believe it in preference to the sworn testimony in the case, or you may disbelieve it. The statement is not made on oath, and, defendant not being under oath, there is no penalty attached to him for not speaking the truth." The reviewing court, after pointing out that this charge was in the substantial language of the statute,[4] said: "Surely there can be no wrong in calling the attention of the jury to circumstances which should impair the force of such testimony, or which should enable them to give it the weight to which it is entitled. The charge in this instance is free from exception or criticism, and is just what it should have been."[5] The same view has been taken by

actment was to allow the accused to become a witness in his own behalf, without subjecting him to the ordeal of a cross-examination. Miller *v.* State, 15 Fla. 577, 584.

[1] Barber *v.* State, 13 Fla. 675, reaffirmed in Miller *v.* State, 15 Fla. 577.

[2] People *v.* Arnold, 40 Mich. 710.

[3] Blackburn *v.* State, 71 Ala. 319; *s. c.* 46 Am. Rep. 323.

[4] Ga. Code, § 4637.

[5] Poppell *v.* State, 71 Ga. 276. Compare Ross *v.* State, 59 Ga. 248, where the court saw no error in the charge that such a statement was not evidence and was entitled only to such weight as the jury might choose to give it.

other courts under similar statutes. In one of these courts it has been well said that "it cannot be assumed by the judge on submitting it (the statement) that it is not to be believed; and hence, it is not proper to lead the jury to suppose that they may reject the facts given in the statement, simply because they are not proved by others." [1] In another such court it has been said: "It is the jury alone who are entitled to consider the statement, and if it be remarked upon at all, it should be to suggest to the jury, in effect, that they are to attach to it such importance, in view of the nature of the offense charged and of the testimony before them, as in their good judgment it is entitled to. It is for their consideration alone, and they may disregard it entirely. * * * The defendant is entitled, when permitted to make the statement, to the benefit or disadvantage of such impression as he may be able to make upon the judgment of the jury." [2] It has therefore been held error to charge the jury that the court "did not think such statement would warrant them in setting aside unimpeached sworn evidence;" since if the jury should believe such statement to be true, against sworn evidence to the contrary, there was no arbitrary rule of law to prevent them, in rendering their verdict, from acting upon such belief.[3]

§ 2450. WHAT FURTHER CAUTIONS GIVEN CONCERNING IT.— "In charging the jury on the effect of the prisoner's statement," said Bleckley, J., in giving the opinion of the court, "nothing is better to be used than the language of the statute. The statute says the statement is to have such force only as the jury think proper to give it." [4] An instruction that, in estimating the weight to be given to the prisoner's statement, they "should consider whether it is consistent with the other facts proven to their satisfaction, and whether it is corroborated or not

[1] People *v.* Arnold, 40 Mich. 710, 715. See the extended observations of Christiancy, J., in DeFoe *v.* People, 22 Mich. 224, 226, enforcing the view that the jury are not to be precluded by any artificial rule, from giving such weight to such a statement as they may think it entitled to.

[2] Barber *v.* State, 13 Fla. 681, repeated in Miller *v.* State, 15 Fla. 577, 584.

[3] Durant *v.* People, 13 Mich. 351, 355.

[4] Brown *v.* State, 60 Ga. 210, 212.

by the other proofs, facts or circumstances of the case," — is not objectionable, as laying down an arbitrary or artificial rule on the subject.[1] In a case in Michigan, where the statement was not under oath, though under the terms of the statute the defendant was liable to cross-examination in making it, the court approved the following cautionary instruction as to its value: "To determine the guilt or innocence of the accused, you may and should take into consideration all the facts and circumstances, as they appear to you from the proofs in the case. And, in connection with all the other proofs in the case, you have a right to take into consideration the statement of the prisoner, and give it such weight and credit as you think it entitled to, under all the facts and circumstances of the case. And you may even give it more weight than the sworn testimony of unimpeached witnesses, if, under all the facts and circumstances of the case, you honestly believe it entitled to such weight; but, in order to find what weight you ought to give to his statement, you should consider whether it is consistent with the other facts which may have been proven to your satisfaction, and whether his statement is corroborated or not by other proofs, facts and circumstances of the case." The Supreme Court, in approving this instruction added: "Such a statement, not being upon oath, and being made under very strong temptation to favor himself, should be subjected at least to all the scrutiny to which sworn testimony is subject."[2]

§ 2451. Failure of the Accused to Testify. — As already seen,[3] it is generally (though not always) held that the failure of the prisoner to avail himself of this privilege cannot be referred to by the State's counsel in argument to the jury, and that for the court to permit such a course of argument is error for which a conviction will be reversed. On parallel lines of reasoning, the conclusion must follow that the court is not at liberty to advise the jury that they may consider such circumstances as tending to increase the probabilities of the guilt of the accused. There is not, however, an entire uniformity of opinion upon the question. In a case in New York, where the trial was for larceny, the judge charged the jury that they were at liberty to consider as a circumstance the failure of the accused, while tes-

[1] People *v.* Jones, 24 Mich. 216, 226.

[2] People *v.* Jones, 24 Mich. 215, 226.

[3] *Ante*, § 1001, *et seq.*

tifying as a witness, to give any account as to where the money found upon him had been kept in the interval between the time at which he had received it and the time when it was so found. This portion of the charge was challenged by the prisoner's counsel and strenuously controverted on appeal; but it was affirmed, on the ground that the presumption which arises from the failure of a party to give exculpatory evidence which is manifestly within his power if he is innocent, is the same in a criminal as in a civil case.[1]

§ 2452. **Absence of Countervailing Evidence.** — It is a proper cautionary instruction, where there is evidence strongly tending to show a given state of facts, to tell the jury that they may consider the absence of countervailing evidence.[2] Thus, where evidence had been given, on the trial of an indictment for murder, strongly tending to show that the homicide was committed by the defendant in the county of Norfolk, the jury were rightfully instructed that if they thought that if the homicide had been committed elsewhere, the defendant would have the means of showing it by other witnesses, they might consider the absence of evidence that it was committed in another county.[3]

[1] Stover *v.* People, 56 N. Y. 315. In Brashears *v.* State, 58 Md. 563, 568, this ruling was quoted with approval. For a model of an instruction in a civil case, where the defendant failed to avail himself of the privilege of the statute (Iowa Code of 1873, § 3639), see Miller *v.* Dayton, 57 Iowa, 424. In May *v.* People, 8 Colo. 224, 226, the following instruction was approved on appeal: "The court instructs the jury that the defendant has a right to decline going upon the stand, and that his refusal to testify can in no case be considered as evidence of his guilt or innocence. The law is express to this point."

[2] Commonwealth *v.* Costley, 118 Mass. 1, 27; Rex *v.* Burdett, 4 Barn. & Ald. 95, 122, 140, 141, 150, 161, 162; Commonwealth *v.* Webster, 5 Cush. (Mass.) 295, 316; Commonwealth *v.* Harlow, 110 Mass. 411: People *v.* Dyle, 21 N. Y. 578. See People *v.* Arnold, 40 Mich. 710, 715, where, in view of the fact that the prisoner had made an unsworn statement under the statute, and had failed to produce or obtain the depositions of witnesses who might have corroborated the same, and the prosecuting attorney, in his argument, deduced the conclusion therefrom that the statement was a lie, the charge of the judge as to the circumstance was on the whole regarded as liable to mislead the jury.

[3] Commonwealth *v.* Costley, 118 Mass. 1, 27.

The rule that the failure of a person who is found in possession of recently stolen goods to give a reasonable explanation, consistent with innocence, as to how he came to have possession of them, creates a presumption — or at least authorizes a jury to draw an inference of his guilt — is but a branch of the broader principle that the failure of a defendant, in a criminal trial, to introduce evidence explaining suspicious circumstances, is a circumstance which may be considered by the jury as tending to increase the probability of his guilt. The failure to introduce such evidence is always the subject of fair comment in argument to the jury; and, for the same reason, it would seem that the judge commits no error in referring to the circumstance in charging the jury. This is certainly true in the courts of England, and in those of such of the States as allow the judge in his charge to "sum up" the evidence to the jury. On the other hand, it is error, in a criminal case, to instruct the jury not to consider at all the omission of the State's counsel to introduce a witness named.[1]

§ 2453. PRECEDENTS OF INSTRUCTIONS ON THIS SUBJECT. — In Kansas, where the judge does not sum up the evidence, but where the more modern American practice of delivering to the jury hypothetical instructions prevails, it has been held proper, in an ably reasoned opinion by Mr. Justice Brewer, to give the jury the following admonition: "The jury should not find the defendant guilty because he may have no evidence to show his whereabouts at the time the offense charged is alleged to have been committed, nor to show where, or from whom he may have received any of the money spoken of by witnesses. Nor will they presume that his character is bad simply because he has offered no testimony of his good character. But where evidence which would rebut or explain certain facts and circumstances of a grave and suspicious nature, is peculiarly within the defendant's knowledge and reach, and he makes no effort to procure that testimony, the jury may very properly take such fact into consideration in determining the prisoner's guilt or innocence. But no inference of guilt is to be drawn from the omission

[1] State *v.* Smallwood, 75 N. C. 104. But the court cannot require the State's attorney to produce a particular witness; he is the sole judge of what he will produce and examine. State *v.* Martin, 2 Ired. L. (N. C.) 101.

of the defendant and his wife to testify." [1] - - - - In a case of murder in Indiana the judge charged the jury as follows: "If you have a reasonable doubt whether the material facts have all been given to you in evidence, and whether other relevant and material facts, necessary to a right understanding of the case, or any part thereof, and not in evidence, exist, and whether such facts not in evidence might lead to the just conclusion that the defendant is not guilty, and you should believe that the State could have known and produced such evidence, then you ought to find the defendant not guilty. But, if you should believe that such other facts, if exculpatory in their character, could have been proven to you by the defendant, or that, if not guilty, she could have so explained those given in evidence as to show their consistency with her innocence, and has failed to do one or the other, then this failure may be considered in connection with the other circumstances offered to show her guilt. A conviction cannot be had, whether the defendant does or does not disprove any of the circumstances arrayed against her, unless the circumstances proved convince you, beyond a reasonable doubt, that she is guilty as charged in the indictment." The Supreme Court, in a long analysis of this instruction, concluded that it had the effect of telling the jury, "without any modification or attempted correction, that if there were other facts not before them, which were exculpatory in their character, and they could have been proved by the defendant, but were not, they might consider such failure with the other circumstances offered to show her guilt." [2]

§ 2454. Instructions as to Inference from Failure of Prisoner to Offer Explanation. — In another case, the jury were instructed that, "when all the circumstances proved raise a strong presumption of the guilt of the accused, his failure to offer any explanation, where it is in his power to do so, tends to confirm the presumption of his guilt." It was likewise held that this instruction was erroneous, the court saying: "If the jury knew that it was in the power of the accused to offer an explanation of circumstances which, unexplained, raised a strong presumption of his guilt, that knowledge of his ability to explain these circumstances, destroyed the presumption which would otherwise be indulged against the accused. The defendant was not to be convicted of burglary because he failed to satisfy the curiosity of the jury, by giving an explanation of circumstances which created no presumption

[1] Approved in State *v.* Grebe, 17 Kan. 459.

[2] Clem *v.* State, 42 Ind. 420, 433, 436.

of guilt against him, because the jury knew that he was able to explain them, and thereby destroy any presumption which might have arisen, had the jury been uninformed of his ability to make such explanation." [1]

§ 2455. As to the Declarations of Co-Conspirators. — "That where two or more persons conspire to do, and are associated for the purpose of doing, an unlawful act, the act or declaration of one of such persons, while engaged in, and in pursuance of the common object, is the act and declaration of all, for which all are liable, as each person so associated is deemed or presumed to have assented to, or commanded, what is done by any other of the conspirators, in furtherance of the common object.[2] - - - - The declarations of the defendant, and those engaged with him, while engaged in the unlawful act, are to be received as evidence of their motives and intentions, only so far as their acts are consistent with those declarations; or, in other words, that, where the acts of a person are inconsistent with his declarations, the former are better evidence of his intentions than the latter.[3] - - - - If the jury believe from the evidence that the State has proven a conspiracy between the defendant and others acting with him, to take the life of deceased, and that the defendant, and others acting with him, did so take the life of deceased, then you are charged that, in considering the guilt or innocence of the defendant, you may take into consideration every act and declaration of each member of the confederacy, in pursuance of the original concerted plan, and with reference to the common object, which has been given in evidence before you." [4]

§ 2456. As to the Necessity of Enforcing the Criminal Law. — Although there is authority to the effect that it is error to allow prosecuting counsel, in their arguments to juries in criminal cases, to allude to the prevalence of crime,[5] yet there seems no good reason why the judge, in charging the jury, should not give them a temperate admonition as to the necessity of enforcing the criminal laws, even in respect of the offense of which the accused is on trial. The Supreme Court of Indiana seems to have thought so, in approving the following instruc-

[1] Doan *v.* State, 26 Ind. 495, 498, opinion by Ray, J.

[2] Approved in State *v.* Shelledy, 8 Iowa, 477, 486.

[3] *Ibid.* 489.

[4] Approved in Hardin *v.* State, 4 Tex. App. 355, 365. Citing Phil. Ev. (5th ed.) 168; State *v.* Simons, 4 Strobh. L. (S. C.) 266; Reg. *v.* Mears, 1 Eng. Law & Eq. 581; State *v.* Ripley, 31 Me. 386; Glory *v.* State, 13 Ark. 236; Kelley *v.* The People, 55 *N.* Y. 565; *s. c.* 14 Am. Rep. 342.

[5] *Ante*, § 977.

tion given in a criminal case, in which the owner of a house was convicted of letting it to be kept as a house of ill-fame: "The statute upon which the prosecution is based was enacted for the first time in this State in 1881. Prior statutes had proven insufficient to restrain what all good citizens regarded as an alarming evil. This statute aims to lessen the evil, by interposing a formidable obstacle to the securing of houses and shelter by prostitutes."[1] The same court, in a case of murder, approved the following charge: "It is proper for the court to remind you that the issue in this cause is to the defendant of so grave a nature, and to the public safety of such vital importance, that upon your part there should be no error. The accused, if he be innocent, ought not to be erroneously convicted, and, on the contrary, if he be guilty, he ought not to be erroneously acquitted. You were, after careful effort, selected as intelligent and qualified jurors, sworn to impartially try and determine this cause, and a true verdict render according to the law and the evidence. If you comply with your oaths, error against either side must be precluded. Remember that the defendant's life and liberty are his most sacred and highest rights, and can only be forfeited by him for the causes, upon the conditions, and in the manner prescribed by law. In considering his rights, do not forget that, by each acquittal of a guilty criminal, the safeguard erected by society for its protection is weakened; for, by the non-enforcement of penalties affixed to criminal acts, contempt for the law is bred among the very classes that it is intended to restrain. The evidence has been placed before you; an exhaustive discussion of the facts by counsel on either side has been had in your hearing, and such instructions as, in the judgment of the court, would aid you in arriving at a correct decision, have been given."[2]

[1] Graeter *v.* State, 105 Ind. 271, 275.

[2] Approved in Stout *v.* State, 90 Ind. 1, 13, 14. It was urged against this instruction that it told the jury in effect that the defendant was a guilty criminal, and that public policy demanded his conviction. But the court, speaking through Niblack, C. J., said: "In our opinion the instruction cannot have such a construction fairly placed upon it. The instruction, taken as a whole, constituted a careful and unobjectionable admonition to the jury of the importance of the cause they had been called upon to decide, considered first with reference to the rights of the appellant, and next to the interests of society, for the protection of which laws had been enacted. Both aspects of the case appear to us to have been fairly presented, and we see nothing in the instruction of which the appellant has any just cause of complaint.

Article II. — As to the Presumption of Innocence and the Doctrine of Reasonable Doubt.

Section

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SECTION
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§ **2461. General Rule.** — In civil cases the well known rule is that the party sustaining the burden of proof is entitled to succeed in his action or defense, if he supports his side of the issue by what is termed a *preponderance of evidence*, — that is, if the evidence adduced by him is of greater weight or probative value than that adduced by his opponent, so as to turn the scales of justice in his favor. But the charity of the law and its solicitude for the safety of the innocent are such, that an artificial presumption of innocence attends a person accused of crime throughout every stage of the trial, until it is overcome by the degree of proof hereafter stated. This presumption is in the nature of evidence in his favor. A knowledge of it should therefore be communicated to the jury. Accordingly, it is the duty of the judge, in all jurisdictions when requested, and in some when not requested, to explain it to the jury in his charge. The strength of this presumption is not overcome by a mere preponderance of the evidence, nor by any weight of preponderant evidence; but it stands as the shield of the accused until it is overthrown by evidence possessing such a degree of probative force that it satisfies the minds of the jurors, *beyond a reasonable doubt*, that he is guilty of the crime charged. The usual formula in which this doctrine is expressed is, that every man is presumed to be innocent until his guilt is proved beyond a reasonable doubt. The accused is entitled, if he so requests it — and no careful or conscientious judge will omit it even when not requested — to have this rule of law expounded to the jury, in this or in some equivalent form of expression.

§ **2462. Whether a Conviction will be Reversed for Failing to Charge this Principle.** — The practice of stating this principle to juries is so nearly universal that very few cases are found

where error has been assigned upon the failure or refusal of the judge so to do. In Texas, where the judge is required by statute, in cases of felony, to instruct the jury concerning the law applicable to the case, it has been held that this principle must be expounded to them in every such case, whether requested or not.[1] In another jurisdiction, where the prosecution was for a misdemeanor only, the refusal of the judge to instruct the jury concerning this rule was held no ground of reversal, where the reviewing court found the state of the evidence to be such that *no doubt* of any kind of the defendant's guilt could properly arise thereupon, — holding that in such a case the instruction requested would have been nothing more than the enunciation of an abstract proposition of law.[2] In another case, where the judge stated this principle to the jury inaccurately, the reviewing court refused to reverse the judgment, being satisfied from the whole record that it could not have influenced the jury to the prejudice of the accused, by leading them to a misunderstanding of their duty.[3] This last decision may be regarded as an application of a principle very commonly applied in civil cases, but very guardedly in criminal cases, — that, where a series of instructions embrace the law of the case, when taken and considered together, though one of them may be erroneous, still, for such error a judgment will not be reversed, provided it shall appear from the whole record that substantial justice has been done, that no prejudice has resulted by reason of such erroneous instruction, and that the law of the case has been fully given to the jury.[4]

§ 2463. Futility of Attempting to Define the Phrase "Reasonable Doubt." — Judges and text writers have frequently observed upon the futility of attempting by definitions to make this expression clearer to the minds of jurors.[5] Referring to

[1] Hutts *v.* State, 7 Tex. App. 44, 49.

[2] McGuire *v.* State, 37 Miss. 703, 378.

[3] Pate *v.* People, 8 Ill. 661.

[4] Kennedy *v.* People, 40 Ill. 488, 497; Howard &c. Ins. Co. *v.* Cormick, 24 Ill. 455; Springdale Cemetery Assn. *v.* Smith, 24 Ill. 480; Warren *v.* Dickson, 27 Ill. 115; *ante*, § 2407.

[5] State *v.* Kearley, 26 Kan. 77, 87; Miles *v.* United States, 103 U. S. 304, 312, per Woods, J.; McKleroy *v.* State, 77 Ala. 95, 97, per Clopton, J.

this subject, it has been well observed by a judge of reputation: "If a jury cannot understand their duty, when told they must not convict when they have a reasonable doubt of the prisoner's guilt, or of any fact essential to prove it, they can very seldom get any help from such subtleties as require a trained mind to distinguish. Jurors are presumed to have common sense, and to understand common English; but they are not presumed to have professional or any high degree of technical or linguistic training."[1] Another judge in the same court has also said: "Language that is within the comprehension of persons of ordinary intelligence can seldom be made plainer by further definition or refining. All persons who possess the qualifications of jurors know that a 'doubt' is a fluctuation or uncertainty of mind arising from defect of knowledge, or of evidence, and that a doubt of the guilt of the accused, *honestly entertained*, is a 'reasonable doubt.'"[2] All the definitions are little more than metaphysical paraphrases of an expression invented by the common-law judges, for the very reason that it was capable of being understood and applied by plain men in the jury box. The danger of attempting these definitions and explanations is, that they are liable to impress jurors with the idea that their verdict is not to be the result of the natural impression which the evidence has made upon their minds, but of some artificial rule which the law has created for them to apply in reaching it. Some courts have proceeded upon this view, holding that an instruction that the jury should be satisfied of the defendant's guilt beyond a reasonable doubt, is sufficient without further explanation.[3] Following out the same idea, it is held in one jurisdiction that, while it is error, in charging the jury in respect of the burden of proof in a criminal case, to follow the language of the statute, yet, in charging them in respect of the meaning of the term reasonable doubt, all that

[1] Hamilton *v.* People, 29 Mich. 194; per Campbell, J., repeated in People *v.* Steubenvoll (Mich.), 8 Crim. Law Mag. 265, 269.

[2] People *v.* Steubenvoll (Mich.), 8 Cr. Law Mag. 265, 268; *s. c.* 28 N. W. Rep. 883. See also 1 Bish. Crim. Proc., § 1094.

[3] Com. *v.* Tuttle, 12 Cush. (Mass.) 502; Com. *v.* Cobb, 14 Gray (Mass.), 257; Com. *v.* Harman, 4 Pa. St. 269. 72; Reg. *v.* White, 4 Fost. & F. 383, note.

the court is required to do is to charge in the language of the statute, and that this is exactly what it should do, — the reason being that efforts to elucidate the meaning of the statute[1] have been found unnecessary and mischievous.[2] Most American courts have, however, felt called upon, in instructing juries in criminal cases, to explain this expression, although it is one of the most exact expressions known to the law, and to define this definition, although the original words convey a more exact idea to the minds of average men than can be derived from any attempt to define them. In so doing, they have attempted to lead juries into maizes of subtlety and casuistry, in which they were lost themselves, and into which the minds of plain men were incapable of following them. The reader is invited to follow them with me through this labyrinth, if, perchance, we shall be able to get through at all. We shall soon find ourselves in a sort of anarchic realm, where doctrines, distinctions and subtleties seem to contend forever and hopelessly with each other, like the four elements in Milton's Chaos: —

> "* * * * they around the flag
> Of each his faction, in their several clans,
> Light-armed or heavy, sharp, smooth, swift or slow,
> Swarm populous, unnumbered as the sands
> Of Barca or Cyrene's torrid soil,
> Levied to side with warring winds, and poise
> Their lighter wings. To whom these most adhere,
> He rules the moment. Chaos umpire sits,
> And *by decision* more embroils the fray,
> By which he reigns. Next him, high arbiter,
> Chance governs all."

§ 2464. "Satisfactory" or "Sufficient" Evidence: General Rule as Stated by Dr. Greenleaf. — Dr. Greenleaf, not speaking specially with reference to criminal evidence, uses the

[1] The statute referred to is as follows: "The defendant in a criminal case is presumed to be innocent until his guilt is established by legal evidence; and, in case of reasonable doubt as to his guilt, he is entitled to be acquitted." Tex. Code Crim. Proc., art. 727.

[2] Bramlette *v.* State, 21 Tex. App. 611, 619; Schultz *v.* State, 20 Tex. App. 316; Bland *v.* State, 4 Tex. App. 15; Fury *v.* State, 8 Tex. App. 471; Ham *v.* State, 4 Tex. App. 645, 675.

following language: "By *satisfactory evidence*, which is sometimes called *sufficient* evidence, is intended that amount of proof which ordinarily satisfies an unprejudiced mind, beyond reasonable doubt. The circumstances which will amount to this degree of proof can never be previously defined; the only legal test of which they are susceptible is their sufficiency to satisfy the mind and conscience of a common man; and so to convince him that he would venture to act upon the conviction, in matters of the highest concern and importance to his own interest."[1] From this statement of doctrine, the courts have sometimes drawn their explanations of what is understood by evidence which satisfies the mind beyond a reasonable doubt. Referring to this passage, the Supreme Court of Minnesota say: "This we consider the well settled rule, applicable to all criminal cases, whatever charge may be involved. In actions of this nature, the life, liberty or character of the defendant is at stake. These are all matters of the highest importance, and are guarded by the law with jealous care."[2] The reader should be cautioned, however, that the expressions "satisfactory evidence", and "sufficient evidence," are not the linguistic equivalents of the expression "evidence which satisfies the mind beyond a reasonable doubt," and cannot properly be substituted for it in explaining its meaning to a jury.

§ 2465. Whether Absence of Reasonable Doubt Implies "Entire Satisfaction" in the Conclusion of Guilt. — Authority is found for the proposition that satisfaction in the conclusion of guilt, beyond a reasonable doubt, is not equivalent to an entire satisfaction in such conclusion. Accordingly, the following instruction has been several times approved: "The jury must be satisfied from the evidence of the guilt of the defendant, beyond a reasonable doubt, before they can legally find him guilty of the crime charged against him: but in order to justify the jury in finding the defendant guilty of said crime, it is not necessary that the jury should be satisfied from evidence of his

[1] 1 Greenl. Ev., § 2.

[2] State v. Dineen, 10 Minn. 408, 416.

guilt, beyond the possibility of a doubt. All that is necessary, in order to justify the jury in finding the defendant guilty, is that they should be satisfied from the evidence of the defendant's guilt, to a moral certainty and beyond a reasonable doubt, although they may not be entirely satisfied from the evidence that the defendant, and no other or different person, committed the alleged offense;[1] and if the jury are satisfied from the evidence, beyond a reasonable doubt, that the defendant committed the crime charged against him, they are not legally bound to acquit him because they may not be entirely satisfied that the defendant, and no other or different person, committed the alleged offense."[2]

§ 2466. Absence of Reasonable Doubt Equivalent to a "Moral Certainty of Guilt."— Mr. Baron Parke, in a case tried before him, defined the absence of reasonable doubt as "such a moral certainty as convinces the minds of the tribunal, as reasonable men, beyond all reasonable doubt."[3] The phrase "moral certainty" is said by Mr. Chief Justice Gray, to have been introduced into our jurisprudence from the publicists and metaphysicians, and signified a very high degree of probability.[4] And he quotes the expression of Puffendorf: "We would declare such a thing to be morally certain, because it has been confirmed by credible witnesses. This moral certitude is nothing

[1] This instruction, down to this point, was approved in State *v.* Nelson, 11 Nev. 334, 340, and again in State *v.* Jones (Nev.), 11 Pac. Rep. 317; *s. c.* 19 Nev. 365.

[2] This instruction, in its entirety, was approved by the Supreme Court of California in People *v.* Cronin, 34 Cal. 191, 195. The court regarded the objections which were made to this instruction as "nothing more than hypercriticism." In subsequent cases, however, the same court disapproved of so much of the foregoing instruction as advised the jury that they were not legally bound to acquit, although they may not be entirely satisfied that the defendant and no other person committed the offense. People *v.* Phipps, 39 Cal. 326, 334, *per* Crocker, J.; People *v.* Padillia, 42 Cal. 536, 540. See also People *v.* Carrillo, 70 Cal. 643; *s. c.* 11 Pac. Rep. 840. The Supreme Court of Nevada, notwithstanding this backsliding of the California court, continued to regard the objection to this qualification as mere hypercriticism. State *v.* Nelson, 11 Nev. 334, 342.

[3] Reg. *v.* Sterne, cited in 1 Best on Ev., § 95, and in 3 Greenl. Ev., § 29.

[4] Com. *v.* Costley, 118 Mass. 1, 23.

less but a strong presumption, grounded upon probable reasons, and which very seldom fails and deceives us."[1] The expression "moral certainty" was used by Chief Justice Shaw, in two passages of his charge to the jury in the celebrated case of Professor Webster, hereafter set out at length.[2] We shall find that the expression "moral certainty" is almost universally regarded as that state of mind which exists when there is an absence of reasonable doubt, and that the trial courts, in various forms of expression, are in the habit of so instructing juries, with the approval of the appellate tribunals.[3] Thus, it has been held proper to tell the jury that they must be satisfied to a moral certainty, beyond a reasonable doubt.[4] In another jurisdiction, a charge that the defendant should be found not guilty unless the evidence against him was such as to exclude, to a moral certainty, every supposition but that of his guilt, has been held an indisputably correct statement of the law.[5] The same court has held it error to refuse the following charge: "The State is required to show by evidence, beyond all reasonable doubt, and to a moral certainty, the existence of every fact necessary to establish the guilt of defendants, before they can be convicted. If, from all the evidence, the jury believe the State has failed as to one single fact necessary to be proved, then they must find the defendants not guilty."[6]

§ 2467. Or to a "Reasonable and Moral Certainty." — In the charge of Chief Justice Shaw in Webster's case, the expression "reasonable and moral certainty" is twice employed, for the purpose of conveying to the minds of the jurors the degree

[1] Puff. Law of Nature and Nations (Eng. ed. 1749), book 1, ch. 2, § 1.

[2] Com. *v.* Webster, 5 Cush. (Mass.) 295, 320.

[3] State *v.* Vansant, 80 Mo. 67, 72; Dunn *v.* People, 109 Ill. 635, 644; McKleroy *v.* State, 77 Ala. 95, 97; Coleman *v.* State, 59 Ala. 52.

[4] People *v.* Padillia, 42 Cal. 536, 540.

[5] Turbeville *v.* State, 40 Ala. 715, 717, on the authority of Mose *v.* State, 36 Ala. 211, 231. But it was nevertheless held no error for the court to explain this charge by saying: "The charge given only meant that the jury must be satisfied, beyond a reasonable doubt, of the guilt of the defendant. Turbeville *v.* State, *supra*.

[6] Williams *v.* State, 52 Ala. 411, 412.

of certitude required by the law in order to warrant a conviction in a criminal case; and he defines it as "a certainty that convinces and directs the understanding, and satisfies the reason and the judgment of those who are bound to act conscientiously upon it." In a later case in the same State, it was ruled, in a well-reasoned opinion by Chief Justice Gray, that it was not error for the judge, in framing an instruction in such a case, to substitute for the words "moral certainty" in the instruction requested, the words "a reasonable degree of certainty."[1] In another jurisdiction, it has been held proper to instruct the jury that "a reasonable doubt arises, when the evidence is not sufficient to satisfy the minds of the jury, to a moral or reasonable certainty, of the defendant's guilt;" the reviewing court saying: "The instruction, as given, is correct; and if the appellants desired a more particular definition of a reasonable doubt, they should have prepared and submitted to the court an instruction on such point."[2]

§ 2468. Or to an "Abiding Conviction" of Guilt. — This expression, was also used in the celebrated charge of Chief Justice Shaw in Webster's case, in defining the meaning of the expression, "a reasonable doubt," in the following language: "It is that state of the case which, after an entire comparison of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge."[3] This expression has been embodied in instructions, in numerous subsequent cases in other jurisdictions, and always, so far as the writer has observed, with the approval of the appellate tribunals.[4] In California and Kansas it has been used, after combining with it another expression used in the charge of Chief Justice Shaw, a few sentences further on, thus: "A reasonable doubt is that state of the case

[1] Com. *v.* Costley, 118 Mass. 1, 24.

[2] Sullivan *v.* State, 52 Ind. 309.

[3] Com. *v.* Webster, 5 Cush. (Mass.) 295, 320.

[4] Dunn *v.* People, 109 Ill. 635, 645; State *v.* Pierce 65 Iowa, 89, 90; Miller *v.* People, 39 Ill. 457, 463, 464; Minich *v.* People, 8 Colo. 440, 454; State *v.* Vansant, 80 Mo. 67, 72; People *v.* Ashe, 44 Cal. 288, 290; James *v.* State, 45 Miss. 572 575.

which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say that they feel an abiding conviction to a moral certainty of the truth of the charge; that is, to a certainty that convinces and directs the understanding and satisfies the reason and judgment of those who are bound to act conscientiously upon it."[1] In Iowa, in a case depending upon circumstantial evidence, the court, after announcing to the jury the principle of reasonable doubt, and admonishing them to give all the circumstances a careful and conscientious consideration, said to them: "If, upon such consideration, the minds of the jury are not firmly and abidingly satisfied of the defendant's guilt — if the conscientious judgment of the jurors wavers and oscillates, then the doubt of the defendant's guilt is reasonable, and you should acquit."[2]

§ 2469. Or to an "Abiding Conviction to a Moral Certainty." — Combining the two expressions observed upon in the two preceding sections, we find that the courts frequently inform juries, that the state of mind which excludes a reasonable doubt, is an abiding conviction to a moral certainty. This expression, it will also be observed, has been extracted from the exuberant language of Chief Justice Shaw in his charge in Webster's case.[3] In another jurisdiction, it has been held proper to instruct the jury that "a juror is understood to entertain a reasonable doubt, when he has not an abiding conviction to a moral certainty that the accused is guilty as charged."[4]

§ 2470. Or to a Conviction upon which a Man would Act in Matters of the Highest Concern and Importance to his own Interest. — This expression, or its equivalent, which is very much

[1] People *v.* Ashe, 44 Cal. 288, 290; State *v.* Bridges, 29 Kan. 138, 141; following People *v.* Cadd, 14 Reporter, 200; *s. c.* 60 Cal. 640.

[2] Approved in State *v.* Hayden, 45 Ia. 17.

[3] Com. *v.* Webster, 5 Cush. (Mass.) 295, 320.

[4] State *v.* Vansant, 80 Mo. 67, 72. See also the charge which was approved in Dunn *v.* People, 109 Ill. 635, 644.

used by American courts in instructing juries, is to be credited to Mr. Starkie, who, in speaking about circumstantial evidence, says that "a juror ought not to condemn, unless the evidence exclude from his mind all reasonable doubt as to the guilt of the accused; and, as has been well observed, unless he be so convinced by the evidence that he would venture to act upon the conviction in matters of the highest concern and importance to his own interest."[1] This conception of the meaning of the rule is also traceable, through a note in Greenleaf on Evidence,[2] to Lord Tenterden, though he perhaps borrowed it from some previous judge or writer. Lord Tenterden's language was said to have been given in a capital case, and was as follows: "The jury should be persuaded of the guilt of the prisoner before they find him guilty, to the same extent, and with the same certainty that that they would have in the transaction of their own most important concerns. They ought to have the highest practicable degree of certainty; demonstration was not required, nor was absolute certainty; for that was not attainable in any case whatever. Direct testimony might be always got rid of by the suggestion that the witnesses were perjured; and they never could have absolute, positive certainty. It was idle to speculate as to what might be to one man the most important matter in his life; but there were occasions, with reference, for instance, to the deepest interests of those whom one loved most dearly; there were interests that might be called in question to require the highest consideration, and all the certainty that could be attained in human affairs. He did not think it necessary to say certainty as to this or that particular matter; but it was the certainty men would require in their own most important concerns in life; and he thought that, to hold any other doctrine, or to act on any other view, would be to paralyze the law entirely in its criminal application, and to make it difficult, if not impossible, to have a satisfactory administration of justice." In the case of *Rex* v. *Kohl*, reported in the London *Times* of January 12th, 1865, Chief Baron Pollock (it would seem in charging the jury) repeated

[1] Stark. Ev. (9th Am. ed.) 865.

[2] 3 Greenl. Ev. (14th ed.), § 29, note *a*.

this language, with the following prefatory statement: "There was no doubt that it had been said that there ought to be certainty; there ought to be the highest certainty there was in human affairs." In jurisdictions where this conception is adopted, instructions have been approved drawn in the following language: "To exclude such doubt, the evidence must be such as to produce in the minds of prudent men such certainty that they would act on the conviction without hesitation in their own most important affairs."[1] Or thus: "If the whole evidence, taken together, produced such a conviction on the minds of the jury of the guilt of the prisoner, as they would act upon in a matter of the highest importance to themselves, in a like case, it was their duty to convict."[2]

§ **2471. This Conception Repudiated by some Courts.**— Cases are not wanting where this conception of the degree of certitude required in criminal cases has been disapproved. Where a judge told the jury that if "there is that degree of certainty in the case that they would act on in their own grave and important concerns, that is the degree of certainty which the law requires, and which will justify them in returning a verdict of guilt," it was held error.[3] Another court has held it error to charge the jury that "to exclude rational doubt, the evidence should be such as, that men of fair ordinary capacity would act

[1] State *v.* Kearley, 26 Kan, 77, 87. See also Polin *v.* State, 16 N. W. Rep. 898, 900; *s. c.* 14 Neb. 540, where an instruction in similar language was approved.

[2] State *v.* Nash, 7 Ia. 350, 385. In United States *v.* Jackson, 29 Fed. Rep. 503; *s. c.* 9 Crim. Law Mag. 325, Mr. District Judge Speer said to a jury, in defining this term: "I mean such a doubt as a reasonable man would act upon, or decline to act upon, when his own concerns were involved." In another Federal case, Mr. District Judge Billings, in charging a jury, said to them: "The proof must exclude reasonable doubt; not necessarily all doubt. The meaning of this expression is, that the jury, in order to render a verdict of guilty, must find the facts to be established to such a degree of certainty as they would regard as sufficient in the important affairs of life." United States *v.* Wright, 16 Fed. Rep. 112, 114. But, as will presently appear, neither of the definitions given by these two Federal judges satisfies the rule, in the opinion of most of the State courts. See also People *v.* Dewey (Idaho), 6 Pac. Rep. 103, 106.

[3] Jane *v.* Com., 2 Metc. (Ky.) 30, 33.

upon it in matters of high importance to themselves;" since men of this description may, and often do, act upon evidence which is comparatively slight and insignificant.[1] In the opinion of another court, a charge that, "before the defendant can be convicted, the evidence must be such as will exclude every doubt, to that certainty which controls and decides the conduct of men in the highest and most important affairs, and to that moral certainty which excludes every supposition but that of his guilt, and every reasonable doubt," — was held calculated to confuse and mislead the jury, and therefore properly refused.[2]

§ 2472. INSTRUCTIONS WHICH DO NOT SATISFY THIS RULE. — It is perceived that Mr. Starkie uses the expression, "in matters of the highest concern and importance to his own interest."[3] The expressions, "in his own important affairs,"[4] "the important affairs of life,"[5] "an important matter pertaining to his own affairs,"[6] "in their own private affairs,"[7] "in matters of great importance to themselves,"[8] and "the more important concerns of life,"[9] have been disapproved in the various jurisdictions indicated, chiefly on the ground that they do not satisfy the principle announced in the text of Starkie. In California[10] and Minnesota,[11] the expressions above quoted were disapproved on the ground that men may and frequently do, in such affairs, act upon the mere preponderance of evidence.[12]

§ 2473. [CONTINUED.] In a case in Indiana, an instruction given for the State was held erroneous, which contained the following language: "By a reasonable doubt, in law, is intended this: when the evidence is

[1] State *v.* Oscar, 7 Jones L. (N. C.) 305.

[2] Ray *v.* State, 50 Ala. 104, 106. Similar instructions were condemned in Leonard *v.* Territory, 7 Pac. Rep. 872, 879; *s. c.* 2 Wash. Terr. 381.

[3] *Ante*, § 2470.

[4] Bradley *v.* State, 31 Ind. 492, 498, 505.

[5] People *v.* Brannon, 47 Cal. 96.

[6] Territory *v.* Bannigan, 1 Dak. Ter. 452, 465.

[7] Territory *v.* Lopez (New Mex.), 2 Pac. Rep. 364, 368.

[8] State *v.* Dineen, 10 Minn. 408, 416, 417.

[9] State *v.* Crawford, 34 Mo. 200.

[10] People *v.* Brannon, *supra*.

[11] State *v.* Dineen, *supra*.

[12] In the case in Missouri, which was loosely reasoned and of little authority, the court concluded, while disapproving the instruction, to affirm the judgment, thinking that the jury could not have been misled by it. State *v.* Crawford, *supra*.

not sufficient to satisfy the judgment of the truth of a proposition, with such certainty that a prudent man would feel safe in acting upon it in his own important affairs. And, if the evidence in the case, upon any material point for the State and defense considered [together], does not satisfy your judgment of the truth of all material propositions in the case, and of the criminal liability of the defendant, with such certainty that a prudent man would feel safe in acting upon said matters in his own important affairs, then, in such case, there would be a reasonable doubt in the case, within the meaning of the law as to reasonable doubts in criminal cases." The court, speaking through Mr. Justice Ray, after quoting the language of Starkie, above set out,[1] said: "There must be this certainty of conviction before a reasonable doubt can be excluded. And we may add to Mr. Starkie's definition this qualification, that it must be such a conviction of the truth of the proposition that a prudent man would feel safe to act upon the conviction under circumstances where there was no compulsion resting upon him to act at all. In other words, a prudent man, compelled to do one of two things, affecting matters of the utmost moment to himself, might, and doubtless would, do that thing which a mere preponderance of evidence satisfied him was for the best, and yet such a conviction would fall far short of that required to satisfy the mind of a juror in a criminal case. It must induce such faith in the truth of the facts which the evidence tends to establish that a prudent man might, without distrust, voluntarily act upon their assumed existence, in matters of highest import to himself. The test stated by the court, that the conviction must be such as would induce one to act in regard to his own 'important affairs,' is too narrow. It must be such a certainty as would justify to the mind action, not only in matters of importance, but in those of the highest import, involving the dearest interests. Nothing short of this can serve as an example of that moral certainty, which should alone authorize a verdict of guilty. Moral certainty, says Mr. Burrill, is the state of impression produced by facts, in which a reasonable mind feels a sort of coercion or necessity to act in accordance with it; the conclusion presented being one which cannot, morally speaking, be avoided, consistently with adherence to truth.[2] This certainty alone excludes all reasonable doubts. One may act in important matters without having reached this degree of rest from doubt; and nothing, therefore, short of the highest personal interests involved, should be placed before the juror as a test, when upon his action may depend the

[1] *Ante*, § 2470.

[2] Quoting Burrill Circ. Ev. 199.

life of another. The highest interests of the prisoner being involved in the decision, the juror's supposed action on no matter of mere importance to himself will serve as his guide. Nor would it be proper for the juror to apply the test to matters personal to himself, which are only important considered in comparison with other affairs. One may, perhaps, lead a life so near on the level that nothing of import disturbs the even tenor of his way. The test must be uniform, and, though in a special case the conviction of the defendant may only involve a short imprisonment or fine, still, as the rule may be also applied to cases involving the life of an accused person, the illustration employed should always refer to the highest interest." [1]

§ 2474. [CONTINUED.] In a subsequent case in the same State, the following instruction was held to satisfy the principle thus laid down, and was accordingly approved: "The rule of law touching reasonable doubts is a practical rule, for the guidance of practical men when engaged in the solemn duty of assisting in the administration of justice. It, is not, therefore, a rule about which there is anything whimsical, or chimerical. It is not a mere possibility of error or mistake that constitutes such reasonable doubt. Despite every precaution that may be taken to prevent it, there may be in all matters pertaining to human affairs, a mere possibility of error. If, then, you are so convinced by the evidence, of whatever class it may be, and considering all the facts and circumstances in evidence as a whole, of the guilt of the defendant, that, as prudent men, you would feel safe to act upon such conviction in matters of the highest concern and importance to your own dearest and most important interests, under circumstances where there was no compulsion or coercion upon you to act at all, then you will have attained such degree of certainty as excludes reasonable doubt and authorizes conviction." [2] In a still later case, the same court has approved the following form of expression, embodying the same idea: "Evidence is sufficient to remove a reasonable doubt, when it convinces the judgment of an ordinarily prudent man of the truth of a proposition,

[1] Bradley *v.* State, 31 Ind. 492, 498, 504, 505. In the opinion it is added: "In this case, from a reference by the judge who tried the cause, to the decision of Arnold *v.* State (23 Ind. 170), we must suppose that what was there given as a simple illustration of a case where a reasonable doubt would exist has been accepted as a test by which to determine all doubts. The opinion was not intended to be thus understood."

[2] Approved in Garfield *v.* State, 74 Ind. 60, 62.

with such force that he would voluntarily act upon that conviction, without hesitation, in his most important affairs." [1]

§ 2475. A Doubt such as Would Cause a Prudent Man to Pause and Hesitate in the Graver Transactions of Life. — In charging juries, courts have also, in many cases, defined a reasonable doubt to be a doubt arising from the candid and impartial investigation of all the evidence, and such as, in the graver transactions of life, would cause a reasonable and prudent man to hesitate and pause.[2] Sometimes the expression has been elaborated thus: "A doubt, to justify an acquittal, must be reasonable, and arise from a candid and impartial consideration of all the evidence in the case; and then it must be such a doubt as would cause a reasonable, prudent, and considerate man to hesitate and pause before acting in the graver and more important affairs of life." [3]

[1] Approved in Stout *v.* State, 90 Ind. 1, 12, on the authority of Jarrell *v.* State, 58 Ind. 293. The following, from the charge of a trial court, is given as an instance of an instruction which was disapproved on appeal, with the observation that it would have been better to give no explanation of the phrase "reasonable doubt" than to give it in this language: "The words 'reasonable doubt' mean what they imply; that is, that the doubt must be a reasonable one, such a doubt as might exist in the mind of a man of ordinary prudence, when he was called upon to determine which of two courses he would pursue in a matter of grave importance to himself, when two courses are open to him, and the taking of one would lead to a different result from the taking of the other, and it would be impossible for him to determine as to which of the two results would be most advantageous to him." State *v.* Bridges, 29 Kan. 138, 140. This instruction was, no doubt, the result of some strange inadvertence fallen into by an over-worked judge. It places each juror in the position of a traveler who has arrived at a fork in the road and is utterly uncertain which road to take: a state of mind in which, to relieve the pain of protracted hesitation, he will decide it by flipping a copper or standing his staff up and noticing which way it falls. Which ever way a juror, acting upon such a conception of his duty, decides, he will afterwards, like the Arkansas traveler, wish that he had taken the other road.

[2] Dunn *v.* People, 109 Ill. 635, 645; Connaghan *v.* People, 88 Ill. 460; May *v.* People, 60 Ill. 120; Miller *v.* People, 39 Ill. 457, 463; Minich *v.* People, 8 Colo. 454.

[3] Approved in State *v.* Pierce, 65 Iowa, 89, 90; *s. c.* 21 N. W. Rep. 196. It may be a nice subject for casuistic discussion whether a doubt which would cause a reasonable man to hes-

§ 2476. A Doubt for which a Good Reason Arising out of the Evidence can be Given.— Another explanation of the meaning of the words, "reasonable doubt," is, that it is "a doubt for which a good reason can be given, which reason must be based on the evidence, or the want of evidence."[1] Or, as was well said by the same learned judge to a jury in another case: "It is a doubt that you may entertain, as reasonable men, after a thorough review and consideration of the evidence, — a doubt for which a good reason, arising from the evidence, can be given. If you find such a doubt, it is your duty to give the prisoner the fullest and amplest benefit of it, and acquit him; but this doubt must arise from the evidence, or the want of evidence."[2] Commenting upon this instruction, the *Daily Register* (New York), edited by that able thinker and law writer, Austin Abbott, says: "The advantage of this test is that it gives the jurors something to corner an unreasonable dissentient with. Few phrases have had more labor and skill expended in the task of fitting them with a definition than this very one of reasonable doubt; but nearly, if not all the resulting paraphrases have been metaphysical equivalents, more or less exact, but equally indeterminate to the common mind. Every obstinate minority juryman can shake his head and affirm that he is exercising guarded discretion, that the evidence does not command his moral conviction, and the like; but when his fellows can press him for a reason for his doubt, they have at least a chance of making him reasonable, for he must then justify his position intelligibly." In a late case in Maine it was said: "It is not an unreasonable doubt. The very term implies that there may be doubts not reasonable or rational. It cannot be a merely possible doubt, for anything relating to human affairs may be in some way subject to possible doubt. It is such an actual and substantial and well founded doubt as would be entertained by a reasonable and conscientious man, —

itate and pause is the metaphysical antithesis of a conviction upon which such a man would venture to act in matters of the highest concern and importance to his own interests.

[1] United States *v.* Jackson, 29 Fed. Rep. 504; *s. c.* 9 Crim. Law Mag. 325, charge by Speer, J.

[2] United States *v.* Johnson, 26 Fed. Rep. 682, 685.

such a doubt that the reason for it can be examined and discussed."[1] "It is," said the same court in an earlier case, "a doubt which a reasonable man of sound judgment, without bias, prejudice or interest, after calmly, conscientiously and deliberately weighing all the testimony, would entertain as to the guilt of the prisoner."[2] Again: "It is not enough to establish merely a probability of guilt. The rule requires that the guilt shall be established to a reasonable, but not an absolute, demonstrative or mathematical certainty."[3]

§ 2477. **Continued.** — In the following explanation, the Court of Appeals of New York saw nothing calculated to perplex or mislead a jury: "You must understand what a reasonable doubt is. It is not a mere guess or surmise that the man may not be guilty. It is such a doubt as a reasonable man might entertain after a fair review and consideration of the evidence — a doubt for which some good reason, arising from the evidence, can be given. When you find such a doubt as that in a case, it is your duty to give the prisoner the fullest and amplest benefit of it." In so holding, the court questioned the following passage in a note to Greenleaf: "An indefinable doubt, which cannot be stated, with the reason upon which it rests, so that it may be examined and discussed, can hardly be considered a reasonable doubt, as such an one would render the administration of justice impracticable;[4] and, as to this, it has not been too strongly said, 'All the authorities agree.'"[5] In Michigan, an instruction defining reasonable doubt as "a doubt arising out of the facts and circumstances of the case, in maintaining which you can give some good reason," while not accurate, has been held not necessarily erroneous.[6] In Vermont, the defendant requested the court to charge that, "if they believe that the evidence, upon

[1] State *v.* Rounds, 76 Me. 123, 125, opinion by Peters, C. J.

[2] State *v.* Reed, 62 Me. 129; quoted with approval in State *v.* Rounds, 76 Me. 125.

[3] State *v.* Rounds, *supra*.

[4] 3 Greenl. Ev. (14th ed.), § 29, note *a*.

[5] People *v.* Guidici, 3 N. East. Rep. 495; *s. c.* 100 N. Y. 503, 509.

[6] People *v.* Stenbenvoll (Mich.), 8 Crim. Law Mag. 265; *s. c.* 28 N. W. Rep. 883.

any essential points in the case, admits of the *slightest doubt* consistent with reason, the prisoner is entitled to the benefit of that doubt and should be acquitted." The court declined so to charge, but instructed the jury that if they believed "that the evidence upon any essential point in the case admitted of any reasonable doubt, — a doubt consistent with reason, — the prisoner is entitled to the benefit of it." It was held that this was correct.[1]

§ 2478. **Continued.** — The following definition of this term is found in the opinion of the court in an important case, given by a judge then young, but who has since acquired great reputation: "In regard to the quantum or degree of proof required in criminal cases to convict, the teachings of the law may, perhaps, be thus briefly expressed: Full and satisfactory proof is required. No mere weight of evidence is sufficient, unless it excludes all *reasonable*, not unreasonable, doubts as to the guilt of the prisoner. The proof of guilt must be inconsistent with any other rational supposition. The doubt that entitles to an acquittal must be *real*, not *captious*, or *imaginary*. It must not be a forced or artificial doubt, manufactured, so to speak, by the sympathy of the jury. But it must be a doubt which, without being sought after, fairly and naturally arises in the mind, after comparing the whole evidence and deliberately considering the whole case. If, upon such comparison and consideration, the minds and consciences of the jurors are not abidingly and firmly satisfied of the defendant's guilt — if moral certainty is not produced, — if the judgment wavers and oscillates, — the charities of the law and the presumption of innocence concur in requiring the jury to give the accused the benefit of the doubt thus arising, and to acquit him. But this charity and this presumption ought not to be perverted, as they not unfrequently are, to justify the acquittal of those of whose guilt no *reasonable* doubt exists. The proof is sufficient if it establishes guilt to a moral certainty — such a certainty as firmly and fully convinces the understanding of jurors."[2] On the other hand, a disposition to strain and re-

[1] State *v.* Meyer, 3 Atl. Rep. 195, 198; *s. c.* 58 Vt. 457, 462.

[2] State *v.* Ostrander, 18 Ia. 437, 459, opinion by Dillon, J.

fine in favor of the supposed rights of persons accused of crime, has enabled an appellate court to find error in the following instruction: "Unless all the material facts proven to your satisfaction, lead to and establish the conclusion that the defendant is guilty of burglary as alleged, to the exclusion of a reasonable belief to the contrary, you must find the defendant not guilty."[1]

§ **2479. Not a Possible or Conjectural Doubt.** — On the other hand, it has been the practice of trial courts, in which they have been sustained on error or appeal, to admonish juries, in varying language, that a reasonable doubt is not a mere possible, conjectural or imaginary doubt. Recurring to the celebrated charge of Chief Justice Shaw in Webster's case, we find that they were told that "it is not mere possible doubt; because everything relating to human affairs and depending upon moral evidence is open to some possible or imaginary doubt." Juries have been admonished that such a doubt means, "not a possible doubt, not a conjectural doubt, not an imaginary doubt, not a doubt of the absolute certainty of the guilt of the accused; because everything relating to human affairs and depending on moral evidence is open to conjecture or imaginary doubt, and because absolute certainty is not required by law."[2] They have been told that "a doubt, to authorize an acquittal, should be reasonable and substantial, and one fairly deducible from the evidence, considered as a whole;" and that "a mere possibility that the defendant may be innocent will not warrant a verdict of not guilty."[3] They have also been told "not to go beyond the evidence to hunt for doubts," nor to "entertain such doubts as are merely chimerical or based on groundless conjecture."[4]

[1] Blocker *v.* State, 9 Tex. App. 279. A similar instruction was condemned in Wallace *v.* State, 9 Tex. App. 299.

[2] Approved in Dunn *v.* People, 109 Ill. 635, 644, the court citing May *v.* People, 60 Ill. 119; Miller *v.* People, 39 Ill. 457; Connaghan *v.* People, 88 Ill. 460.

[3] Approved in State *v.* Vansant, 80 Mo. 67, 72. See also State *v.* Gee, 85 Mo. 647; State *v.* Butterfield, 75 Mo. 297, 301.

[4] Approved in State *v.* Pierce, 65 Ia. 89, 90. See also Miller *v.* People, 39 Ill. 463, 464, where an instruction, approved on error, embodied similar language.

Again, they have been told that such a doubt "means a serious, substantial and well founded doubt, and not a mere possibility of doubt."[1] "If," said another court, "after subjecting the facts to the test of reason, there is still a doubt as to his guilt, it is the duty of the jury to acquit;" but "a mere misgiving of the imagination, suggestion of ingenuity, or sophistry, or misplaced sympathy, is not a reasonable doubt to which the law accords any influence."[2] Or, as was said to a jury, "it is not any fanciful conjecture, or strained inference."[3] Or, as was said to another jury by the same judge, "It is not a mere guess — a mere surmise — that one may not be guilty of what is charged."[4] It is not the "skepticism which can conjure up an argument," but the "fair, rational difficulty which the mind at times experiences in weighing conflicting statements or opposing arguments, and which renders abortive our best efforts to arrive at a satisfactory conclusion."[5] Nor is it "a mere possible doubt, nor a captious imaginary doubt."[6] "This doubt," said Mr. Circuit Judge Jackson, in charging a jury, "must be real and substantial, not an imaginary or speculative doubt. It must rest upon the fact that the evidence is insufficient, in your judgment, to justify you in returning a verdict of guilty against the accused."[7] So, an instruction containing the following passage has been approved and the language re-affirmed: "That which amounts to mere possibility only, or to conjecture or supposition, is not what is meant by reasonable doubt."[8] The following explanation of the term passed the judgment of the Supreme Court of Michigan without disapproval: "The expression itself seems to comprehend the whole subject-matter. 'Reasonable doubt,'

[1] Minich *v.* People, 8 Colo. 454; Earll *v.* People, 73 Ill. 334. See also Kennedy *v.* People, 40 Ill. 488.

[2] State *v.* Murphy, 6 Ala. 846, 851, opinion by Collier, C. J.

[3] United States *v.* Jackson, 29 Fed. Rep. 503; *s. c.* 9 Crim. Law Mag. 325, charge by Speer, J.

[4] United States *v.* Johnson (U. S. Cir. So. Dist. Ga.), 26 Fed Rep. 682, 685.

[5] Com. *v.* Carey, 2 Brewst. (Pa.) 404, 406. It does not appear that this instruction was reviewed on error.

[6] People *v.* Dewey (Idaho), 6 Pac. Rep. 103, 106.

[7] United States *v.* Keller, 19 Fed. Rep. 633, 636.

[8] Cicely *v.* State, 13 Sm. & M. (Miss.) 202, 210, re-affirmed in Bowler *v.* State, 41 Miss. 571, 578.

of course — that is: not a far-fetched one. It is not a speculative one; it is not an arbitrary one; but it is just what it assumes to be, a 'reasonable doubt.' If you, after looking over the testimony, and considering all the facts proven to your satisfaction in the case, and the natural circumstances that surround those facts,— if you are still unable to say that the prisoner is guilty, it is your duty to acquit. And that, we apprehend, is what is understood by 'reasonable doubt' in the law."[1] In a case in Illinois, an instruction that "a reasonable doubt means in law, serious, substantial and well-founded doubt, and not the mere possibility of doubt," seems to have been regarded as sufficient to cure inaccuracies on this subject in other portions of the charge.[2]

§ 2480. **Not a "May-be-so" nor a "Might-be-so."**— In a criminal action for libel in Georgia, the court charged the jury that, though the defendant was entitled to any doubts they might have of his guilt, they must be reasonable doubts, not a "may-be-so" or a "might-be-so." It was held that in this there was no error. Mr. Justice Lumpkin, in giving the opinion of the court, said: "It is conceded, that, in all criminal cases whatsoever, it is essential to a verdict of condemnation, that the guilt of the accused should be fully proved; and that neither a mere preponderance of evidence nor any weight of preponderant evidence, in the language of Mr. Starkie, is sufficient for the purpose, unless it generate full belief of the fact to the exclusion of all reasonable doubt. Still, absolute, mathematical or metaphysical certainty, is not essential; and besides, in judicial investigations, it is wholly unattainable. Moral certainty is all that can be required. The proof should be such as to control and decide the conduct of men in the highest and most important affairs of life, and not a mere vague conjecture, a fancy, a trivial supposition, a bare possibility of innocence. To acquit upon *such* doubts, is a virtual violation of the juror's oath, and an offense of great magnitude against the interests of society,

[1] McGuire *v.* People, 44 Mich. 286, 290; *s. c.* 6 N. W. Rep. 669.

[2] Kennedy *v.* People, 40 Ill, 488, 497.

directly tending to the disregard of the obligation of a judicial oath, the hindrance and disparagement of justice and the encouragement of malefactors.[1] We consider this to be the fair import of the language used by the court." [2]

§ 2481. Hypercritical Objections to the Words "Imaginary," "Captious," "Real."— It will be remembered that Mr. Justice Dillon, in his justly admired passage in Ostrander's case,[3] said that "the doubt that entitles to an acquittal must be *real*, not *captious*, or *imaginary*." Although these three words, or their equivalents, are constantly used by trial judges in instructing juries, with the approval of the appellate tribunals, the juridical wisdom of Texas and Missouri has condemned each of them in succession. The Court of Appeals of Texas has condemned instructions which embody this admonition to the jury in the following language: "By the words 'beyond a reasonable doubt,' is not meant beyond a possible doubt, nor beyond an imaginary doubt, nor beyond a doubt which might arise in a supposed case; but such a doubt as naturally presents itself to the mind in view of all the evidence, and as would arise in the minds of men of good judgment and sense. Unless all the material facts proven should establish the conclusion that the defendant is guilty, to the exclusion of reasonable belief that he is not, the jury should acquit." The Texas court point out that the substance of the first sentence in this instruction had been condemned by a previous decision in that State,[4] and take the view that the concluding sentence magnified the error.[5] A needless hypercriticism led the Supreme Court of Missouri to condemn, as an innovation, an instruction on this subject which, after pursuing the usual language, added that "a captious doubt, or mere possibility of innocence, is not to be regarded as a reasonable doubt." The court could see no good reason why the usual formula as to

[1] Citing 1 Stark. Ev. 514.

[2] Giles *v.* State, 6 Ga. 276, 285.

[3] *Ante*, § 2478.

[4] Referring to Bray *v.* State, 41 Tex. 560.

[5] Smith *v.* State, 9 Tex. App. 150; Robertson *v.* State, 9 Tex. App. 209. See also Munden *v.* State, 37 Tex. 353; McMillan *v.* State, 7 Tex. App. 142; Hampton *v.* State, 1 Tex. App. 652.

a reasonable doubt should have been changed by receiving the addition of the word "captious," and added: "It is better to adhere to well settled instructions, than to attempt new departures and experiments in criminal procedure."[1] A similar disposition led the appellate courts of that State into the conclusion that it is error for the judge to define this doubt as "such a doubt as must be a *real*, substantial doubt,"[2] etc., or a "*real* doubt touching the defendant's guilt, and not a mere guess, conjecture, or mere possibility that the defendant may be innocent."[3] That there is no sense in this objection is too obvious for discussion. The word "real" adds nothing to the word "substantial" in such a connection. It is, as the court, in the case first cited above, said, a mere expletive, — and therefore the use of it should not have been regarded as error. But the good sense of the profession finally drove that court to the conclusion that the definition of reasonable doubt as a *real* and substantial doubt, is not, even in a capital case, an error for which a judgment will be reversed; but the court cling to their former folly so far as to disapprove of the use of the word.[4] They now hold, even in cases of murder, that an instruction that, to authorize an acquittal on the ground of reasonable doubt alone, such doubt should be a real, substantial, well-founded doubt, arising out of the evidence in the case, and not a mere possibility that the defendant is innocent, — is no ground of reversal.[5]

§ **2482. Common Sense not a Guide on this Question.** — It is but one step from the absurdities of the preceding section to the conclusion that common sense is not the guide to be resorted to by juries in determining what is a reasonable doubt; but that they are to reach their conclusions according to an artificial sense communicated to them from the bench, which they have neither

[1] State *v.* Swain, 68 Mo. 605, 616, opinion by Sherwood, J.

[2] State *v.* Owens, 79 Mo. 619, 631.

[3] State *v.* Smith, 21 Mo. App. 595.

[4] State *v.* Payton (Mo.), 2 S. W. Rep. 394; *s. c.* 90 Mo. 220. The court say: "In State *v.* Jones (86 Mo. 627), the instruction was the same as in State *v.* Owens (79 Mo. 632), and yet we did not regard the use of the word 'real' as error for which the judgment should be reversed."

[5] State *v.* Blunt (Mo.), 4 S. W. Rep. 394.

the capacity to understand nor the skill to apply. Thus, in Texas, the following instruction has been condemned: "In this, as in all other criminal cases, it is the province of the jury to judge both of the weight of evidence and of the credibility of witnesses. The law, however, contemplates that juries of the country, in exercising their judgment in such matters, will act in a sensible, rational manner, and give in all cases no more and no less weight or credit than is rightfully due." The reasoning was that it tended to trench upon the province of the jury,[1] — which would seem to lead to the conclusion that it is the province of the judge, and not that of the jury, to exercise common sense. So, in Indiana, the following instruction was held error, on the ground that jurors are to decide according to the rules of law, and not what they may deem common sense: "Bearing in mind clearly all I have said to you, as to how you are to consider the evidence and arrive at your verdict, I may add that what is commonly called common sense is, perhaps, the jurors' best guide in these particulars."[2] It is hard to conceive on what ground such a conclusion can be supported, unless we are to consider that it is a species of contempt for jurors to use, in the discharge of their functions, something which the appellate judges do not possess. The absurdity of the ruling culminates when it is remembered that in that State the court is bound to instruct the jury that they are the judges of the law as well as the fact, and that they are not bound to follow the law as given them in charge by the judge, nor even as laid down by the Supreme Court of the State.[3] These demigods in the jury box have the power to disregard the instructions from the bench and to overrule the Supreme Court, but are not allowed to follow the teachings of common sense.

§ 2483. [Contra.] Common Sense a Guide in some Jurisdictions. — More sensibly, the Supreme Court of Michigan commended in high terms an instruction which, in defining reasonable

[1] Sisk *v.* State, 9 Tex. App. 246, 248, opinion of the court by Clark, J.

[2] Densmore *v.* State, 67 Ind. 306.

[3] *Ante*, § 2143.

doubt in a case of murder, subjected it to the standard of common sense, the language of the instruction being: "A reasonable doubt is a fair doubt growing out of the testimony in the case; it is not a mere imaginary, captious or possible doubt, but a fair doubt based upon reason and common sense; it is such a doubt as may leave your minds, after a careful examination of all the evidence in the case, in that condition that you cannot say you have an abiding conviction to a moral certainty of the truth of the charge here made against the respondent." In giving the opinion of the court, Mr. Justice Campbell said that this was "one of the clearest and most sensible definitions we have ever seen, and such as to be intelligible to any jury, — a merit not always presented by the requests to charge which are sometimes made in such cases." [1] In like manner, it was held in Iowa no error for the judge, in response to a question of the jury, who had returned into court for further instructions, to tell them that "jurors are not artificial beings, governed by artificial or fine-spun rules; but they should bring to the consideration of the evidence before them their every-day common sense and judgment as reasonable men; and those just and reasonable inferences and deductions which you, as men, would ordinarily draw from facts, and circumstances proven in the case, you should draw and act on as jurors." [2] Commenting on this and other instructions given in the same case, the court say: "There was doubtless an apparent necessity for instructing on the question. Jurors are often reluctant to find a verdict of conviction on evidence of that character, however convincing the circumstances proven may be, and the weight and value of such testimony are often disparaged by counsel for the defendant in criminal causes. It is therefore proper, in any case in which evidence of that character is relied upon, for the court to admonish the jury as to their duty in dealing with it; and it doubtless often happens that a necessity exists for the court to do this, in order to secure a just and faithful administration of the law. In such cases, the jury should be admonished that such evidence

[1] People *v.* Finley, 38 Mich. 482.

[2] State *v.* Elsham, 31 N. W. Rep. 66; *s. c.* 70 Ia. 531, 533.

should be fairly and reasonably considered, and that such deductions and inferences should be drawn from the facts and circumstances proven as would be drawn from them by just and reasonable men, if they were called to take action in the grave and important affairs of life, with reference to them." [1] In striking contrast with the two decisions quoted in the preceding section, was the rugged sense of Chief Justice Gibson, of Pennsylvania, which told a jury, in a case where a woman was tried for child murder and the evidence against her was circumstantial, that "it is sufficient for the purpose when it [circumstantial evidence] excludes disbelief, — that is, *actual* and not *technical* disbelief; for he who has to pass upon the question, is not at liberty to disbelieve as a juror, while he believes as a man." [2]

§ **2484. A Probability of Innocence.** — On the most obvious grounds, it has been held error to refuse an instruction that "a probability of defendant's innocence is a just foundation for a reasonable doubt of his guilt, and therefore, for his acquittal." [3] In a case in Mississippi, the following instruction was held erro-

[1] State *v.* Elsham, 31 N. W. Rep. 66, 68; *s. c.* 70 Ia. 531, 534, opinion by Reed, J.

[2] Com. *v.* Harman, 4 Pa. St. 269, 273. In a subsequent case in the same State, it was ruled that the expression "you should be convinced as jurors where you would be convinced as citizens, and you should doubt as jurors only where you would doubt as men," when used in connection with the evidence, and when the jury are instructed that they should be convinced from the evidence, — is not erroneous. McMeen *v.* Com., 9 Atl. Rep. 878; *s. c.* 114 Pa. St. 300, 305; following Com. *v.* Harman, *supra*, and qualifying Fife *v.* Com., 29 Pa. St. 429, where it was said that similar language, though liable to be misunderstood, was not erroneous as matter of law.

[3] Bain *v.* State, 74 Ala. 38. In the opinion of the court, given by Somerville, J., the prior discordant decisions of the same court were reviewed: Cohen *v.* State, 50 Ala. 108; Ray *v.* State, 50 Ala. 104; Williams *v.* State, 52 Ala. 411. It will be observed, on examining the charge of Chief Justice Shaw in Webster's case, that he admonished the jury that "it is not sufficient that they the [circumstances] create a probability, though a strong one," — meaning a probability of guilt. In Williams *v.* State, *supra*, it was held that a charge that the jury must acquit, "if from all the evidence, there is a probability of the innocence of the accused," is, without more, calculated to mislead the jury, and is properly refused. "It would have involved the jury in doubt and uncertainty, unless it had been carefully explained to them what was intended by a probability of innocence."

neous: "A reasonable doubt is not probability only, or conjecture, or supposition; the doubt which should properly induce a jury to withhold a verdict of guilty should be such a doubt as would reasonably arise from the testimony before them." In so holding, it was said: "Where the probabilities are in favor of a party on trial, the jury may, nevertheless, entertain a doubt of his innocence. But where, in the estimation of a jury, the probability arising from the evidence is in favor of the innocence of accused, it is impossible for them not to doubt as to his guilt. If the jury entertained a well-founded doubt of the prisoner's guilt, arising from the testimony, the law made it their duty to acquit. The instruction, if it meant anything, reverses this rule. The jury were instructed that, 'probability only' was not what is meant in law by a reasonable doubt; in effect, that a probability of the prisoner's innocence, arising upon the testimony, was not a legal foundation for a reasonable doubt of his guilt. The instruction imposed upon the jury the obligation to convict, although the evidence might preponderate in favor of the accused." [1]

§ 2485. Something more than mere Probability and less than Absolute Certainty. — Continuing through these deviations of expression, we may rest upon the conclusion that the *quantum* of evidence necessary to support a conviction must be such as, on the one hand, to create something more than a mere probability of guilt, and that it need not be so much, on the other hand, as to produce absolute certainty.[2] A jury has been told: "You must not be satisfied by a mere probability of the truth of the charges in the indictment, but the evidence must produce in your minds an assurance and certainty of guilt, beyond a reasonable doubt, before you can properly pronounce the defendant guilty." [3] On the other hand, the following definition to a jury was approved on error: "By reasonable doubt is

[1] Browning *v.* State, 30 Miss. 657, 672, opinion by Smith, C. J.

[2] State *v.* Rounds, 76 Me. 123, as quoted, *ante*, § 2476.

[3] United States *v.* Searcey, 26 Fed. Rep. 435, 441, *per* Dick, J.

not meant absolute certainty. There is no such thing as absolute certainty in human affairs. But the proof must be such as to exclude from your mind all reasonable doubt of the guilt of the accused. * * * If, upon a careful review of all the evidence, you ask your own inward conscience: 'Is *he* the guilty one,' and it answers: 'I doubt if he *is*,' you should acquit. But if the answer is: 'I have no doubt of it,' you should say so, and leave the consequences to Providence." This instruction, challenged by the prisoner, was approved by the whole court, as being in conformity with the definition of reasonable doubt given by Chief Justice Shaw in his charge in Webster's case.[1] One court reasoned itself into the conclusion that an uncertainty of guilt is not tantamount to a reasonable doubt, and that there was no error in refusing the following instruction: "If the jury find that none but Chinese witnesses testify to the circumstances of the killing, and as to the parties concerned in it, and the jury are in such doubt as to the credibility or truthfulness of such witnesses as to feel uncertain whether they should be believed, the jury should acquit the defendants." "This instruction," said the court, "was refused, and we think properly, because the word 'uncertain' may include any doubt, whether reasonable or not. There is more or less uncertainty as to all facts attempted to be established by parol evidence. Nothing is absolutely certain that rests on the testimony of men, and where evidence is given to establish any proposition tending to prove guilt, it is sufficient if it remove all reasonable doubt."[2] The true ground of refusing this instruction was that it intimated doubts in the mind of the court as to the credibility of particular witnesses, which should never be done.

§ 2486. Something less than "a Sentiment Clear and Strong." — The following instruction has, however, been disapproved: "A reasonable doubt is not vague conjecture, nor mere hypothesis, but a *sentiment clear and strong*, arising in the mind

[1] Donnelly *v.* State, 26 N. J. L. 602, 614.

[2] State *v.* Ah Lee, 7 Ore. 237, 258, opinion by Boise, J. The judgment was reversed and a new trial ordered on other grounds.

of an enlightened and conscientious jury, which, upon a full survey of the facts, forbids its going forward to a conviction." The court said: "We do not think it need be a 'clear and strong' doubt; the proper word is 'reasonable,' that is, just, rational, conformable or agreeable to that faculty of the mind by which it distinguishes truth from falsehood and good from evil, and which enables the possessor to deduce inferences from facts or from propositions. It implies a want of that fullness and completeness of proof which would enable the mind satisfactorily to draw the conclusion of guilt from the facts in evidence. A 'sentiment clear and strong, which forbids the mind to go forward to a conviction' of the accused, might seem to favor the idea that there should be a reasonable certainty of his innocence, in order to justify his acquittal. We think the expression used was too strong, and that the instruction was liable to the exception taken to it." [1]

§ 2487. Must Arise out of the Evidence or the Want of Evidence. — It is the general practice of courts, in expounding to juries the meaning of the words reasonable doubt, to tell them that such a doubt must arise from the evidence,[2] or sometimes from the evidence or the want of evidence.[3] The rule that the State must establish the guilt of the accused beyond a reasonable doubt, or to the exclusion of every other hypothesis, where the evidence is circumstantial, is, in the view of one court, limited to cases where the doubt arises out of the evidence introduced, and not out of the facts which, by possibility, may exist, and of which there is no proof.[4] Accordingly, the following instruction has been approved: "The court instructs the jury that a reasonable doubt means, in law, a serious, substantial and well founded doubt, and not the mere possibility of a doubt, and the jury have no right to go outside of the evidence to search for or

[1] Bower *v.* State, 41 Miss. 571, 578, opinion of the court by Ellett, J.

[2] Cicely *v.* State, 13 Smed. & M. (Miss.) 202, 210; Bowler *v.* State, 41 Miss. 571, 578; United States *v.* Foulke, 6 McLean (U. S.), 349, 355.

[3] State *v.* Porter, 34 Ia. 131, 135; Earll *v.* People, 73 Ill. 330, 333.

[4] State *v.* Porter, 34 Ia. 131, 135.

hunt up doubts, in order to acquit the defendant, not arising from the evidence or want of evidence." [1] So, an instruction has been approved, and the approval re-affirmed, which contained the following language: "The doubt which should properly induce a jury to withhold a verdict of guilty, should be such a doubt as would reasonably arise from the evidence before them; and if such a reasonable doubt should arise from the evidence, the prisoner should have the benefit of that doubt." [2] Pursuing the same idea, in a charge to the jury, Mr. Justice McLean concluded by saying: "You, gentlemen, are to judge of the weight of evidence, and the credibility of witnesses. There is no tribunal but that before which we must all appear, which can rightly judge of the motives of human action. We have no such standard; and, at best, we can only determine matters of controversy, civil and criminal, on the highest probability of facts, from the evidence. But, in every criminal case, where a conviction is utterly ruinous to the accused, a jury will acquit, if they have reasonable doubts of his guilt; but these doubts must not arise from our sympathies, but from a deliberate consideration of the evidence." [3]

§ 2488. [Contra.] Not a Doubt Suggested by or Arising out of the Evidence. — A very strained view of the subject has resulted in the conclusion that error was committed in defining reasonable doubt as follows, after warning the jury that "the presumption of innocence continues until the proof of guilt is made clear and conclusive, leaving no other reasonable inference, and excluding all reasonable doubt:" — "A reasonable doubt is one suggested by, or arising out of the proof made; and, after a full and fair consideration of all the evidence, *pro* and *con*, remains in the mind, causing some degree of uncertainty as to the alleged guilt." In holding this statement erroneous, the court reason thus: "Is it true that a reasonable doubt must be 'one

[1] Approved in Earll *v.* People, 73 Ill. 330, 333, as being fully sustained by Kennedy *v.* People, 40 Ill. 488.

[2] Cicely *v.* State, 13 Smed. & M. (Miss.) 202, 210; re-affirmed in Bowler *v.* State, 41 Miss. 571, 578.

[3] United States *v.* Foulke, 6 McLean (U. S.), 349, 355.

suggested by, or arising out of the proof made?' It seems to us that this definition is much too narrow and limited. The words 'suggested by, or arising out of the proof made,' imply that the doubt must be such an one as is created or produced by the proof made." That they were used to convey this idea is shown by the latter part of the charge, in which the court said: "It is not a reasonable doubt, which may be raised by conjecturing something for which there is no foundation nor suggestion in the evidence adduced." It is thus seen that, according to the charge, it is the "proof made" or "evidence adduced" that is the foundation of a reasonable doubt. This excludes all reasonable doubts that may arise from the lack or want of evidence. The State may make out a case, *prima facie*, beyond a reasonable doubt; but the defendant's evidence may be such as to raise a reasonable doubt of his guilt. The charge may have been drawn with a view to such case. But, on the other hand, the lack of evidence on the part of the State may leave a reasonable doubt as to the defendant's guilt. And it is not the law, as we think, that a reasonable doubt may not be raised upon the conjecture of the defendant's innocence, though there is nothing in the "evidence adduced" that furnishes a foundation for, or suggestion of, the conjecture. The evidence adduced may have no tendency whatever to show the defendant's innocence, and yet it may utterly fail to establish his guilt.[1] So, in Texas the following charge has been held erroneous: "If you have any reasonable doubt of the guilt of the defendants, such as naturally and fairly presents itself from the evidence before you which you believe to be true, you will find that they are not guilty." The error which the court discovered in this paragraph was thus stated: "It does not rest the reasonable doubt upon a lawful basis, in that it limits the reasonable doubt to the facts naturally and fairly arising from the evidence, and such evidence as the jury believe to be true."[2]

[1] Densmore *v.* State, 67 Ind. 306, 308.

[2] Holmes *v.* State, 9 Tex. App. 314. It has been held error to tell the jury that reasonable doubts should arise either from want of evidence or from a conflict of evidence, — in a case where the doubt could not

§ 2489. Whether the Doctrine of Reasonable Doubt should be Applied to Specific Hypotheses or Defenses.— The general, and perhaps the better view is, that the reasonable doubt which entitles to an acquittal, is a doubt arising in the minds of the jurors upon a comparison of all the evidence, and not a doubt arising upon any specific fact, although the existence or non-existence of this fact may be decisive upon the question of guilt or innocence. It is undeniably logical that if the jury are in doubt as to the existence of any fact which is of such a nature that, if true, the defendant cannot be guilty of the crime charged, he is entitled to an acquittal. The general proposition first advanced does not dispute this, but it proceeds upon the idea that, by singling out a particular defensive fact or hypothesis, such as an *alibi*, insanity, appearance of danger of death or great bodily harm, or the like, and instructing the jury that, if they have a reasonable doubt as to the existence of such a fact they are to acquit, has a tendency to lead their minds from that comparison of all the evidence which is necessary to a satisfactory result, and to concentrate them upon some portion of the evidence, which is directed to the particular fact or hypothesis. As has been elsewhere observed in respect of the defense of *alibi*,[1] judicial opinion is divided upon this question. "There is," says the Supreme Court of Missouri, "no warrant for the course of selecting each fact constituting the offense with which one is accused, and asking the court for an instruction to the effect that, if the jury have a reasonable doubt of that fact, they must acquit. All that is required of the court is that, in suitable cases for such an instruction, it should tell the jury that if, upon the

arise from either of those causes, but turned upon the internal credibility of an explanation which the defendant had given of the circumstances against him, when they were first brought to his notice. McElven *v.* State, 30 Ga. 869. An instruction which contained the following language has been held, on obvious grounds, calculated to mislead the jury, and therefore erroneous: "Persons sometimes say they are morally certain of the existence of a fact or facts, but have not the evidence to prove it. This is the condition of mind one is in when convinced beyond a reasonable doubt." Heldt *v.* State, 30 N. W. Rep. 626, 629; *s. c.* 20 Neb. 492, 499.

[1] *Ante*, § 2433, *et seq.*

whole case, they have a reasonable doubt of the guilt of the accused he should be acquitted." [1] "When such an instruction is given," said Seevers, J., "it covers the whole ground, and necessarily includes each material fact required to convict, and sufficiently directs the jury that each material fact must be established beyond a reasonable doubt." [2] Accordingly, it has been held not error to refuse an instruction directing them to apply this rule to the question of *identity*, — thus: "The jury must be satisfied, beyond a reasonable doubt, that Newton Crawford was the person who committed the act complained of, or they must find the defendant not guilty." [3] So, it has been held not error to refuse the following instruction, seeking to apply the rule to the *appearances of danger* which will justify killing in *self-defense:* "If the jury have a reasonable doubt whether the circumstances were such as to impress the mind of a reasonable man that he was in great danger of great bodily harm at the time of the killing, they must give the prisoner the benefit of that doubt, and acquit him." [4]

§ 2490. [Contra.] **That a Reasonable Doubt as to any Essential Fact Acquits.** — Other courts proceed upon the view that a reasonable doubt as to any essential inculpatory fact or circumstance entitles the accused to an acquittal, whether such doubt arises from the weakness of the evidence for the prosecution, or from the strength of the evidence for the defense, and whether the fact or circumstance is one which it is incumbent upon the State to prove in the first instance, or an extrinsic matter of defense in respect of which the burden is upon the accused. Thus, as elsewhere seen, several courts hold that, where there is any evidence tending to show an *alibi*, as this fact, if

[1] State *v.* Dunn, 18 Mo. 419, 425; State *v.* Crawford, 34 Mo. 200. See also, Mullins *v.* People, 110 Ill. 42; Davis *v.* People, 114 Ill. 86, 98; Leigh *v.* People, 113 Ill. 372; McCullough *v.* State, 5 S. W. Rep. 175; *s. c.* 23 Tex. App. 620; State *v.* Felter, 32 Ia. 53; State *v.* Hayden, 45 Ia. 12, 17.

[2] State *v.* Stewart, 3 N. W. Rep. 99; *s. c.* 52 Ia. 284, 286.

[3] State *v.* Crawford, 34 Mo. 200.

[4] Allen *v.* State, 60 Ala. 19, 23. Upon like reasoning, it was held proper to refuse a similar instruction in Crews *v.* People, 11 N. East. Rep. 404; *s. c.* 120 Ill. 317.

true, is in most cases an absolute defense, it is proper and necessary, upon request, for the judge to instruct the jury that if, from the evidence, they have a reasonable doubt upon the question whether the accused was at the place of the crime at the time of its commission, they should acquit him.[1] So, in regard to *insanity*. There is a wide divergence of opinion as to the probative force of the evidence necessary to establish this defense, — some courts holding that it must be established beyond a reasonable doubt, others by a preponderance of the evidence, and others that it is sufficient if the evidence throws a reasonable doubt upon the question of the sanity of the accused at the time of committing the act.[2] Thus, we find that it has been held in

[1] Black *v.* State, 1 Tex. App. 369, 386, 391; Binns *v.* State, 46 Ind, 311; Kaufman *v.* State, 49 Ind. 248, 251; following French *v.* State, 12 Ind. 670, where it is ruled that the defense of *alibi* need not be proved by a preponderance of evidence, but that it is sufficient if the defendant raises a reasonable doubt as to the fact of his presence at the scene of the crime. In Iowa, the doctrine is that the burden of proof to establish an *alibi* is upon the defendant; that this defense must be established by a preponderance of the evidence, and that it is proper so to instruct the jury. State *v.* Vincent, 24 Ia. 570, 578; State *v.* Hardin, 46 Ia. 623, 629; State *v.* Red, 53 Ia. 69; *s. c.* 4 N. W. Rep. 831; State *v.* Reed, 17 N. W. Rep. 150; *s. c.* 62 Ia. 40; State *v.* Kline, 54 Ia. 183; *s. c.* 6 N. W. Rep. 184; State *v.* Northrup, 48 Ia. 583; State *v.* Hamilton, 11 N. W. Rep. 5; *s. c.* 57 Ia. 598. A minority of that court (Adams, C. J., and Day, J.), have recently endeavored to break away from this rule and to establish the doctrine in conformity with that held in Indiana (French *v.* State, 12 Ind. 670), as above stated. State *v.* Hamilton, *supra*. The doctrine that the defense of *alibi* is an affirmative extrinsic defense, to be established by a preponderance of the evidence, seems to have taken root in the charge of Chief Justice Shaw in Webster's case (Com. *v.* Webster, 5 Cush. (Mass.) 296, 323, 324), and is one of the points of doctrine in which that celebrated charge has been generally overthrown.

[2] This question of the burden of proof in respect of extrinsic defenses in criminal cases, is of so wide a character and presents such a multitude of decisions, that the writer cannot go into it in this article. The doctrine that matter of excuse or extenuation must be established by a preponderance of the evidence, seems to have been first distinctly formulated in the opinion of Chief Justice Shaw, in Com. *v.* York (9 Metc. (Mass.) 93), but the conclusion was much shaken by the powerful dissenting opinion of Mr. Justice Wilde, in the same case. A qualification of this doctrine is that, where the matter of excuse or justification grows out of the very circumstances attending the act done, the defendant is not bound to establish them by a preponderance of the evidence, much less beyond a reasonable doubt; but that

respect of the defense of insanity, that it is sufficient if the evidence raise in the minds of the jurors a reasonable doubt as to whether the defendant was sane when he did the act imputed as criminal; since if the jurors have such a doubt, they must also have a reasonable doubt whether he purposely and maliciously did it, and must acquit him.[1] So, in two jurisdictions it has been held incumbent upon the judge, upon request, to apply the rule of reasonable doubt, in instructing the jury as to the question of *intent*, in cases of *larceny* and *receiving stolen goods*. Thus, where the prosecution was for receiving stolen goods, it was held error to refuse to charge the jury that, "if the jury are not satisfied beyond a reasonable doubt that the accused knew that the goods were stolen, he is entitled to an acquittal."[2] So, it has been held that, on a trial for larceny, when evidence is admitted which, though unsatisfactory or suspicious, tends to show that the defendant took the property under an honest though mistaken belief that it was his own, the issue should be submitted to the jury by an instruction to acquit in case they so believe from the evidence, or in case they entertain a reasonable doubt upon the issue.[3]

§ 2491. [Continued.] Rule not applied to mere Evidentiary Facts. — Whichever view is taken of this question, there

it is sufficient if all the evidence taken together raises a reasonable doubt upon the question whether the circumstances of excuse or justification did or did not exist. Tweedy *v.* State, 5 Ia. 433; *s. c.* Horr. & Thomp. Cas. Self Def. 905; McKenna *v.* State, 61 Miss. 589. In Missouri, the doctrine applicable to matters of excuse and justification is, that they must be established *to the reasonable satisfaction of the jury*. It is so held where the act done is sought to be excused or justified on the ground of necessary self defense. State *v.* Jones, 78 Mo. 278, 285. See also State *v.* Underwood, 57 Mo. 40; State *v.* Holme, 54 Mo. 153; Kelley Crim. Law, § 242. Substantially the same doctrine obtains in North Carolina. State *v.* Willis, 63 N. C. 26; State *v.* Carland, 90 N. C. 668, overruling State *v.* Johnson, 3 Jones L. (N. C.) 266, and reviving State *v.* Ellick, Winst. L. (N. C.) 56. Compare People *v.* Rodrigo, 8 Crim. Law Mag. 505; *s. c.* 69 Cal. 601; People *v.* Choong Foon Ark, 61 Cal. 528; Com. *v.* McKie, 1 Gray (Mass.), 61; Rex *v.* Greenacre, 8 Carr. & P. 35, 42; People *v.* Milgate, 5 Cal. 127.

[1] Polk *v.* State, 19 Ind. 170. Compare People *v.* McCann, 16 N. Y. 58; People *v.* Finley, 38 Mich. 482, 485; Guetig *v.* State, 63 Ind. 278.

[2] Com. *v.* Leonard, 4 N. East. Rep. 96; *s. c.* 140 Mass. 473, 477.

[3] Sisk *v.* State, 9 Tex. App. 246.

can be no doubt that it is not proper, in instructing a jury in a criminal case, to direct them to apply the rule of reasonable doubt to some particular evidentiary matter, — as, for instance, to the question whether certain foot prints, of which there was evidence, were those of the defendant,[1] or as to whether certain declarations of the deceased were made *in articulo mortis*, and had been correctly detailed by the witnesses.[2] It has been held error to charge a jury "that, although they may have a reasonable doubt of any single fact in the testimony of any witness, they cannot acquit unless such fact is *material* to the issue joined," — the effect of the instruction being to withdraw from the consideration of the jury material evidence upon which the defendants relied, and to make the question of their guilt turn upon a reasonable doubt as to any particular fact, and to submit to them the question of the materiality of facts to the issue.[3]

§ 2492. Reasonable Doubt as to the Law. — We find, to the credit of the courts, that, even in those jurisdictions which go to the extreme extent in upholding the independence of juries as judges of the law in criminal cases,[4] it is held that the reasonable doubt which authorizes a conviction is not a reasonable doubt as to the law.[5] Accordingly, it has been held not error to refuse the following instruction, requested by the prisoner: "If they [the jury] entertain doubts as to the law, the prisoner is just as much entitled to the benefit of those doubts as if they applied to the facts. If they entertain a reasonable doubt as to whether the evidence is applicable to the law as given them in charge, the prisoner is entitled to the benefit of that doubt, and it would be their duty to acquit."[6] In a late case in Vermont, the court re-

[1] McAlpine *v.* State, 47 Ala. 78, 81, 82. The criticism of the instruction in this case was rather upon the words "to a moral certainty," instead of the words "beyond a reasonable doubt."

[2] Leigh *v.* People, 113 Ill. 373, 379.

[3] Williams *v.* State, 52 Ala. 26; citing Holmes *v.* State, 23 Ala. 17.

[4] *Ante*, § 2140.

[5] O'Neil *v.* State, 48 Ga. 66.

[6] O'Neil *v.* State, 48 Ga. 66, 78. Where the presiding judge, upon deciding certain motions to quash an indictment, said in the hearing of the jury, that he had doubts about the law, and, having such doubts, would give the State the benefit of them, because the State was not allowed to carry the case to the Supreme Court, — it was held that this remark was neither error nor an irregularity to be censured. Cook *v.* State, 11 Ga. 53, 57.

fused, on the request of the accused, to charge the jury as follows: "If the jury entertain the slightest doubt upon the question of law presented by the court, the prisoner is entitled to the benefit of such doubt, and in no instance are they permitted to apply any rule of law more prejudicial to the prisoner than that laid down by the court." In lieu of this, the court charged as follows: "While it is my duty to instruct you as to what I deem to be the law, yet it is your right to judge over me. You have the right to adopt your theory of the law instead of mine, if you think proper so to do, with this qualification: you are not to adopt any rule of the law any more prejudicial to the respondent than the law which has been laid down by the court." It was held that this instruction was more favorable to the accused than the instruction which had been refused, or than the law. "There is," said Walker, J., "no qualification of the right of the jury, in a criminal cause, to disregard the law as given them by the court and adopt their own theory; and they may, in the exercise of this power, with the same propriety, adopt a rule of law more prejudicial to the respondent, as well as one less prejudicial."[1]

§ 2493. Application of the Doctrine of Reasonable Doubt to the Degrees of Crime. — Contrary to the misconception into which one court fell,[2] it is settled that the rule touching reasonable doubt applies in all criminal trials, in trials for misdemeanor as well as in trials for felony, and that it is applicable to every grade of crime of which the defendant may be convicted under the indictment.[3] With respect to the rule of reasonable doubt, as

[1] State *v.* Meyer, 3 Atl. Rep. 195, 198; *s. c.* 58 Vt. 457, 463.

[2] The writer refers to the early Ohio case of State *v.* Turner, Wright (Ohio), 29, where it was said, in charging a jury, in substance, that where, as in cases of homicide, the legislature had created degrees of guilt, the doctrine of doubts did not apply to any but the higher grades; that it was a rule of law adopted in favor of life, and was therefore only applicable to the charge of murder in the first degree, and did not apply to either of the offenses embraced in the indictment.

[3] Payne *v.* Com., 1 Metc. (Ky.) 370. This principle is embodied in the Kentucky Criminal Code as follows: "Where there is a reasonable doubt of the defendant being proven to be guilty, he is entitled to an acquittal; and where there is a reasonable doubt

applied to murder in the second degree, the rule has been held to be that the evidence must show, beyond a reasonable doubt, the absence of facts which will reduce, excuse or justify the killing.[1] In such a case, an instruction is not erroneous which cautions the jury thus: "If the jury believe from all the evidence in the case, beyond a reasonable doubt, that the defendants are guilty of murder in the first degree or second degree, as these offenses have been defined in these instructions, but have a doubt as to the degree of offense of which the defendants are guilty, the jury will give them the benefit of such doubt, and find them guilty of the less offense."[2]

§ 2494. Doctrine that a Reasonable Doubt Entertained by a Single Juror Acquits. — We pass now to the conception that the judge is bound, upon request, to instruct the jury that if a single juror entertain a reasonable doubt as to the guilt of the accused, the jury must acquit him. It has been held error, in a prosecution for assault and battery, to refuse the following instruction, requested by the defendant: "The defendant is presumed to be innocent until his guilt is established by such evidence as will exclude every reasonable doubt; therefore, the law requires that no man shall be convicted of a crime until each and every one of the jury is satisfied by the evidence in the case, to the exclusion of every reasonable doubt, that the defendant is guilty as charged. So, in this case, if the jury entertain any reasonable doubt of the defendant's guilt, they should acquit him; or, if they entertain any reasonable doubt as to whether he was excusable and justifiable in the acts complained of, if he committed them, they should acquit him. Or, if any one of the jury, after having duly considered all the evidence, and after

of the degree of the offense which the defendant has committed, he shall only be convicted of the lower degree." Ky. Crim. Code, §§ 236, 237.

[1] White *v.* State, 3 S. W. Rep. 710; *s. c.* 23 Tex. App. 154.

[2] State *v.* Anderson, 86 Mo. 309, 315. That the court ought not so to instruct the jury as to take from them the *right* of determining the grade of the crime of which the accused stands charged, see Robbins *v.* State, 8 Oh. St. 132; Adams *v.* State, 29 Oh. St. 412, 415; Rhodes *v.* Com., 48 Pa. St. 396; Lane *v.* Com., 59 Pa St. 371; Shaffner *v.* Com., 72 Pa. St. 60.

having consulted with his fellow-jurymen, should entertain such reasonable doubt, the jury cannot, in such case, find the defendant guilty."[1] So, in Kansas, it has been held error to refuse to charge, in a case of murder, that "if any one of the jury, after having considered all the evidence, and after having consulted with his fellow-jurymen, should entertain such reasonable doubt, the jury cannot, in such case, find the defendant guilty."[2] But, while each juror must proceed according to his individual convictions, his doubts, it is reasoned, ought not to control the action of his fellows; and, accordingly, it has been held not error to give the following instruction: "Each juror acts for himself in coming to a conclusion, and acts on his own convictions; and although it is true that in case any one of the jurors entertains a reasonable doubt as to the guilt of the defendant he ought not to find the defendant guilty, yet such doubt in the mind of one or more of the jurors ought not to control the action of the other jurors, so as to compel them to give a verdict of acquittal."[3] Carrying out the same idea, it has been well decided that an instruction ought not to be so framed as to lead the jury

[1] Approved in Castle *v.* State, 75 Ind. 147, on the authority of Clem *v.* State, 42 Ind. 420, — the court saying: "Each juror should feel the responsibility resting upon him, as a member of the body, and should realize that his own mind must be convinced of the defendant's guilt, beyond a reasonable doubt, before he can consent to a verdict of guilty. We think, notwithstanding the general charge of the court, the defendant had the right to have the charge asked given, thus specifically calling the attention of each juror to the duty and responsibility resting upon him, as well as to the legal rights of the defendant."

[2] State *v.* Witt, 8 Pac. Rep. 769, 774; *s. c.* 34 Kan. 488, Horton, C. J., dissented. The court followed the reasoning of the Supreme Court of Indiana in Castle *v.* State, 75 Ind. 146, already cited. The following instruction has been held a misapplication of this principle, and erroneous: "While each juror must be satisfied of the defendant's guilt beyond a reasonable doubt, to authorize a conviction, such reasonable doubt, unless entertained by all the jurors, does not warrant an acquittal." The vice of this instruction was that it reversed the rule, informing the jury that such a reasonable doubt, unless entertained by all the jurors, does not warrant an acquittal. "This," reasoned the court, "must have induced the jurors to think that, unless all concurred in entertaining a reasonable doubt, the verdict should be against the defendant." Stitz *v.* State, 4 N. East. Rep. 145, 147; *s. c.* 104 Ind. 359, 362.

[3] Fassinow *v.* State, 89 Ind. 235, 237.

to conclude that, unless the doubt arose in the minds of all the jurors, it is something less than a reasonable doubt, and should be disregarded.[1] Accordingly, it has been held error to give the following instruction: "A reasonable doubt is such a doubt as fairly and naturally arises in the minds of the whole jury." "The true idea," says Adams, J., "is that each juror, under his oath, must vote according to his own convictions, and the doubt with which he has to do is the doubt in his own mind. We do not mean that each juror may not consider and respect the views of his fellow-jurors. But when he has accorded to them all proper consideration and respect, if a reasonable doubt arises in his mind, or fails to arise, he should vote accordingly."[2]

§ 2495. [Contra.] That the Jury Ought not to be so Instructed. — On the contrary, it is held in Iowa that it is not error to refuse an instruction that, if any of the jurors entertains a reasonable doubt of the defendant's guilt, he is not required to surrender his convictions because other jurors entertain no such doubt.[3] "Of course," says Rothrock, J., "each juror is to act upon his own judgment. He is not required to surrender his convictions unless convinced. He may be aided by his fellow-jurors in arriving at the truth, but he is not to find a verdict against his judgment, merely because the others entertain views different from his own. But a jury need not be advised of so simple a proposition. The usual method of instructing upon the measure of proof required in criminal cases is sufficient."[4] So, it was held not error to refuse, as asked, the following instruction: "If any one of the jury entertain a reasonable doubt as of the sufficiency of the proof to establish any one material averment in the indictment, you must give the defendant the

[1] State *v.* Stewart, 52 Ia. 284.

[2] State *v.* Sloan, 55 Ia. 217, 220. For an elaborate charge, approved on exceptions, advising dissentient jurors to consider whether they ought not to yield their individual opinions to those of their fellows, see Com. *v.* Tuey, 8 Cush. (Mass.) 1. For another charge on the same subject, by Upton, J., a judge of the Supreme Court of Oregon, see Boydston *v.* Giltner, 3 Ore. 118, 124.

[3] State *v.* Rorabacher, 19 Ia. 154, 160; State *v.* Hamilton, 11 N. W. Rep. 5; *s. c.* 57 Ia. 596, 598. See *ante*, § 2303.

[4] State *v.* Hamilton, *supra*.

benefit of such doubt, and acquit the defendant." The trial court modified this by striking out the last words, "and acquit the defendant." The Supreme Court ruled that there was no error in so modifying it, saying: "As asked, it was clearly objectionable. Such a proposition would entitle a party to an acquittal, if any *one* juror entertained a reasonable doubt upon any material averment. It is a reasonable doubt entertained by the jury, and not any one member thereof, that justifies an acquittal." [1]

Article III. — As to Circumstantial Evidence.

Section
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2518. Other Precedents of Instructions.

§ 2500. Necessity of Instructing the Jury as to the Law of Circumstantial Evidence. — In those jurisdictions where the judge is required to instruct the jury, in a criminal case, upon

[1] State *v.* Rorabacher, 19 Ia. 154.

the law applicable to the evidence, whether requested to do so or not, there is little doubt that, if the evidence relied on by the prosecution is wholly circumstantial, his omission to give the jury the usual cautionary instruction in respect of such evidence will be error, for which a conviction will be reversed. In other jurisdictions, where the inculpatory evidence is circumstantial, either in whole or in part, there is no doubt that the judge would be equally bound, upon request of the accused, to give an appropriate instruction in respect of such evidence. In Texas, it is held, under the provisions of the criminal code of that State, the interpretation of which is elsewhere explained,[1] that, in cases of *felony*, where the inculpatory evidence is wholly circumstantial, the judge is bound to charge the law to the jury with reference to the force of this evidence, whether requested to do so or not, and his omission to do so will be error for which a conviction will be reversed.[2] It is scarcely necessary to add that, when the inculpatory evidence is circumstantial, it is error for the court to refuse a properly drawn instruction, tendered by the accused, touching the probative force of such evidence.[3] The failure to give

[1] *Ante*, § 2340.

[2] Cave *v.* State, 41 Tex. 182; Hunt *v.* State, 7 Tex. App. 212; Wallace *v.* State, 9 Tex. App. 299; Ward *v.* State, 10 Tex. App. 293; Pharr *v.* State, 10 Tex. App. 485; Barr *v.* State, 10 Tex. App. 507; Dreyer *v.* State, 11 Tex. App. 631; Pogue *v.* State, 12 Tex. App. 283; Gonzales *v.* State, 12 Tex. App. 657; Ray *v.* State, 13 Tex. App. 51; Harris *v.* State, 13 Tex. App. 309; Thomas *v.* State, 13 Tex. App. 493; Montgomery *v.* State, 13 Tex. App. 669; Cook *v.* State, 14 Tex. App. 96; Dovalina *v.* State, 14 Tex. App. 312; Lee *v.* State, 14 Tex. App. 266; Faulkner *v.* State, 15 Tex. App. 115; Garcia *v.* State, 15 Tex. App. 120; Bryant *v.* State, 16 Tex. App. 144; Allen *v.* State, 16 Tex. App. 237; Kenneda *v.* State, 16 Tex. App. 258; Cooper *v.* State, 16 Tex. App. 341; Conner *v.* State, 17 Tex. App. 1, 15; Vaughn *v.* State, 17 Tex. App. 562; Dupree *v.* State, 17 Tex. App. 591; Murphy *v.* State, 17 Tex. App. 645; White *v.* State, 18 Tex. App. 57; Counts *v.* State, 19 Tex. App. 450; Riley *v.* State, 20 Tex. App. 100, 106; Schindler *v.* State, 17 Tex. App. 408; Black *v.* State, 18 Tex. App. 124; Wright *v.* State, 18 Tex. App. 358.

[3] Wallace *v.* State, 9 Tex. App. 299; Hunt *v.* State, 7 Tex. App. 213, 235, opinion by Clark, J. See, further, Barnes *v.* State, 41 Tex. 312; Black *v.* State, 1 Tex. App. 391; Tollett *v.* State, 44 Tex. 95; Harrison *v.* State, 6 Tex. App. 42; Burrell *v.* State, 18 Tex. 713; Chester *v.* State, 1 Tex. App. 702; Brown *v.* State, 23 Tex. 195. The last two cases do not seem fully to support the conclusion of the text, and are "distinguished" on their facts by the court in its opinion in Hunt *v.* State, *supra*.

such an instruction, in such a state of the evidence, is regarded in that State as "fundamental error," for which the appellate court must reverse a conviction, without any inquiry as to its influence upon the result, the appellate court having no discretion to make such an inquiry.[1] In the same State, in cases of *misdemeanor*, where the inculpatory evidence is entirely circumstantial, the court must, if so requested, instruct the jury as to the law applicable to such evidence.[2]

§ 2501. Degree of Certainty Required in the Case of Circumstantial Evidence. — It has been well said that, "while circumstantial evidence is in its nature capable of producing the highest degree of moral certainty, yet experience and authority both admonish us that it is a species of evidence in the application of which the utmost caution and vigilance should be used."[3] The following, from the text of an authoritative writer, has been often quoted with approval in judicial opinions, in whole or in part: "What circumstances will amount to proof can never be a matter of general definition; the legal test is the sufficiency of the evidence to satisfy the understanding and conscience of the jury. On the one hand, absolute metaphysical and demonstrative certainty is not essential to proof by circumstances. It is sufficient if they produce moral certainty to the exclusion of every reasonable doubt; even direct and positive testimony does not afford grounds of belief of a higher and superior nature. To acquit upon light, trivial and fanciful suppositions and remote conjectures, is a virtual violation of the juror's oath, and an offense of great magnitude against the interests of society, directly tending to the disregard of the obligation of a judicial oath, the hindrance or disparagement of justice, and the encouragement of malefactors. On the other hand, a juror ought not to condemn unless the evidence excludes from his mind all reasonable doubt as to the guilt of the accused, and as has been well observed, unless he be so convinced by the evidence that he

[1] Counts *v.* State, 19 Tex. App. 450.

[2] Ross *v.* State, 9 Tex. App. 275; Eckert *v.* State, 9 Tex. 105.

[3] Algheri *v.* State, 25 Miss. 584, 588.

would venture to act upon that conviction in matters of the highest concern and importance to his own interest; and in no case, as it seems, ought the force of circumstantial evidence sufficient to warrant conviction, be inferior to that which is derived from the testimony of a single witness, the lowest degree of direct evidence."[1] All courts will agree to the proposition that "the legal test of the sufficiency of evidence to authorize a conviction, is its sufficiency to satisfy the understanding and consciences of the jury; that a juror ought not to convict unless the evidence excludes from his mind all reasonable doubt of the guilt of the accused."[2] Equally undisputed will stand the conclusion that "what circumstances will amount to proof, can never be matter of general definition; the legal test is the sufficiency of the evidence to satisfy the understanding and conscience of the jury.[3] To these definitions, which appear to have been drawn from the text of Starkie, it has been added: "On the one hand, 'absolute' metaphysical and demonstrative certainty is not essential to proof by circumstances. It is sufficient if they produce moral certainty, to the exclusion of every reasonable doubt."[4]

§ 2502. Whether Sufficient if it Produce "Nearly" the same Degree of Certainty as Direct Evidence.— It has been held, on extremely doubtful grounds, that a court may properly charge the jury that, "in order to convict, circumstantial evidence should be such as to produce *nearly* the same degree of certainty as that which arises from direct testimony, and to exclude a rational probability of innocence."[5] This doctrine is overruled in California, as will appear by the next section; but is retained in Nevada, as will appear from the two cases last cited. The following instruction has been several times approved: "If you believe the evidence given in this case, in order to convict, the circumstances should be such as to produce

[1] Stark. Ev. (9th Am. ed.) 865.

[2] Cicely *v.* State, 13 Smed. & M. (Miss.) 202, 211.

[3] McCann *v.* State, 13 Smed. & M. (Miss.) 471, 490.

[4] Browning *v.* State, 33 Miss. 48, 77.

[5] People *v.* Cronin, 34 Cal. 191, 201; People *v.* Padillia, 42 Cal. 535, 539; State *v.* Nelson, 11 Nev. 334, 340; Sta e *v.* Jones, 11 Pac. Rep. 317; *s. c.* 19 Nev. 365.

nearly the same degree of certainty as that which arises from direct testimony, and to exclude a rational probability of innocence. The circumstances ought to be of such a nature as not to be reasonably accounted for on the supposition of the prisoner's innocence, but perfectly reconcilable with the supposition of the prisoner's guilt."[1]

§ 2503. [Contra.] **Jury must be "Entirely Satisfied."** — Overruling the doctrine of the preceding section, it is now held in California that an instruction which allows the jury to convict, although they may not be *entirely satisfied* of the guilt of the accused, is erroneous.[2] Accordingly, the following has been condemned: "All that is necessary in order to justify the jury in finding the defendant guilty, is, that it should be satisfied, from the evidence, of the defendant's guilt, to a moral certainty and beyond a reasonable doubt, although they may not be entirely satisfied from the evidence that the defendant, and no other or different person committed the alleged offense; and if the jury are satisfied from the evidence, beyond a reasonable doubt, that the defendant committed the crime charged against him, they are not legally bound to acquit him because they may not be entirely satisfied that the defendant, and no other or different person, committed the alleged offense."[3]

§ 2504. **View that Circumstantial Evidence should not Produce a Degree of Certainty Inferior to that Derived from a Single Witness.** — The following passage of Mr. Starkie, "In no case, as it seems, ought the force of circumstantial evidence sufficient to warrant conviction, be inferior to that which is de-

[1] State *v.* Nelson, 11 Nev. 334, 340; State *v.* Jones, 11 Pac. Rep. 317; *s. c.* 19 Nev. 365; People *v.* Cronin, 34 Cal. 191.

[2] People *v.* Phipps, 39 Cal. 326, 334, per Crockett, J.; People *v.* Brown, 59 Cal. 345; People *v.* Carrillo, 11 Pac. Rep. 840; *s. c.* 70 Cal. 643. The first clause of the instruction, which told the jury that they must be satisfied from the evidence of the defendant's guilt, to a moral certainty and beyond a reasonable doubt, was approved. People *v.* Padillia, 42 Cal. 535, 539.

[3] People *v.* Padillia, 42 Cal. 535, 539. In People *v.* Kerrick, 52 Cal. 446, an instruction in almost the same language was condemned.

rived from the testimony of a single witness, the lowest degree of direct evidence," — has, like his other passages in the same text, been adopted in some instances by American courts; but the conclusion seems to be that this is an inaccurate test, and ought not to be stated to the jury in the form of an instruction. In the case of a prosecution for larceny from a dwelling house, counsel for the defendant asked the court (among other things), to give the following charge: "That in no case ought the jury to convict the defendant upon circumstantial evidence, unless their minds are as fully convinced of his guilt, as they would be if the fact of his stealing the money had been sworn to before them by at least one credible witness." This instruction was refused, and it was held that in this there was no error. The court, among other things, said: "Mr. Starkie, it is true, has intimated that the force of circumstantial testimony adequate to conviction, should not be inferior to the positive evidence of a single credible witness. But we have found no adjudged case which supports him; and if this is the law, the consequence would be, that in a large class of cases, the jury would be driven into mere speculation as to the effect which evidence different from that before them would produce upon their minds." [1]

§ 2505. Must exclude every Rational Hypothesis save that of Guilt. — The caution which is usually given in respect of circumstantial evidence is, that the circumstances which the evidence tends to show must, in order to warrant a conviction, be inexplicable, except upon the hypothesis of guilt, and must be consistent with each other. Such an instruction, it is well ruled, is not open to the objection that it is a charge upon the "weight of evidence." [2] The essential element in such an instruction seems to be, that the circumstances must be such as to exclude every other reasonable hypothesis, except that of the defendant's guilt." [3] This principle has probably never been better stated

[1] Mickle *v.* State, 27 Ala. 20, 21, 22, opinion by Goldthwaite, J. This doctrine was re-affirmed in Faulk *v.* State, 52 Ala. 416.

[2] Hunt *v.* State, 7 Tex. App. 213.

[3] Turner *v.* State, 63 Tenn. (4 Lea) 206.

than in the charge to the jury by Chief Justice Shaw in Webster's case, which has become the usual model.[1] "The proof," says Professor Greenleaf, "ought to be not only consistent with the prisoner's guilt, but inconsistent with every other rational conclusion."[2] The following rule from the text of Starkie has been often approved: "The force of circumstantial evidence being exclusive in its nature, and the mere coincidence of the hypothesis with the circumstances being, in the abstract, insufficient unless they exclude every other supposition, it is essential to inquire with the most scrupulous attention what other hypothesis there may be which may agree wholly or partially with the facts in evidence."[3] One court has said: "We can conceive of no hypothesis by which, in the order of natural causes and effects, the facts proved can be explained consistently with the innocence of the prisoner; and this is *the true test of circumstantial evidence.* It excludes all reasonable doubt of the prisoner's guilt."[4] But this principle applies only to proof of the *act*, and not to proof of the *intent.* Accordingly, in a case of burglary, an instruction which contained

[1] Commonwealth *v.* Webster, 5 Cush. (Mass.) 296.

[2] 1 Greenl. Ev., § 34. This rule was approved and adopted in People *v.* Schuler, 28 Cal. 490, and in People *v.* Strong, 30 Cal. 151; People *v.* Davis, 1 Pac. Rep. 890; *s. c.* 64 Cal. 440; People *v.* Cronin, 34 Cal. 191; State *v.* Nelson, 11 Nev. 334, 440; State *v.* Jones, 11 Pac. Rep. 317; *s. c.* 19 Nev. 365; State *v.* Shelledy, 8 Ia. 477, 498; Com. *v.* Harman, 4 Pa. St. 269, 274; State *v.* Willingham, 33 La. Ann. 537; State *v.* Vansant, 80 Mo. 67, 72; Stout *v.* State, 90 Ind. 1, 12; Binns *v.* State, 66 Ind. 428, 435; Cone *v.* State, 13 Tex. App. 483, 486; Algheri *v.* State, 25 Miss. 584; Mose *v.* State, 36 Ala. 212, 221, 231; United States *v.* Jackson, 29 Fed. Rep. 503; *s. c.* 9 Crim. Law Mag. 325, charge by Speer, J.; State *v.* Glass; 5 Ore. 73, 81; People *v.* Strong, 30 Cal. 151, 154; James *v.* State, 45 Miss. 572, 575; People *v.* Dick., 32 Cal. 213, 215. The following instruction was held not a correct application of this principle, and properly refused: "In the application of circumstantial evidence, the utmost caution should be used; it is always insufficient to convict or warrant a verdict, when, assuming all to be proved which the evidence tends to prove, some other hypothesis may still be true." The criticism of this instruction was that it was "obscure, if not without any definite meaning whatever." People *v.* Schuler, 28 Cal. 490, 495. It seems, notwithstanding, to be a perfectly good instruction.

[3] Starkie Ev. (9th Am. ed.), § 863. See, for instance, Casey *v.* State, 8 Crim. Law Mag. 597, 611.

[4] Beavers *v.* State, 58 Ind. 531, 537, opinion by Biddle, C. J.

the following sentence was properly refused: "Where a criminal intent is to be established by circumstantial evidence, the proof ought to be not only consistent with the defendant's guilt, but it must be wholly inconsistent with any other rational conclusion than that of the defendant's guilt." The court said: "This rule is proper when the *act* which is claimed to be criminal is sought to be established by circumstantial testimony. But when the *act* is proved by direct testimony, and all that remains to be found is the *intent* which accompanied the act, and which may be inferred from the circumstances accompanying the act, then this principle does not apply." [1] It is to be observed that the courts do not state the principle in uniform language. Some of them prefix before the word "hypothesis" or "supposition," the word "reasonable" [2] or "rational," [3] and others omit it.[4] But, even where it is omitted, it is necessarily understood or implied, for the meaning is not that the evidence shall exclude a hypothesis which is unreasonable or absurd.[5]

§ 2506. **But not every "Possible" Hypothesis.**—"The rule is not so severe as to deny conviction, unless the evidence should be such as to exclude to a moral certainty every *possible* hypothesis but that of guilt.[6] Human testimony is rarely so clear and full, as to exclude conjunctured, divergent possibilities:

[1] State *v.* Maxwell, 42 Ia. 208, 211, 212, opinion by Day, J.

[2] Com. *v.* Harman, 4 Pa. St. 269, 274; James *v.* State, 45 Miss. 572, 575; United States *v.* Jackson, 29 Fed. Rep. 503; *s. c.* 9 Crim. Law Mag. 325, charge by Speer, J.; State *v.* Vansant, 80 Mo. 67, 72; Stout *v.* State, 90 Ind. 1, 12.

[3] People *v.* Strong, 30 Cal. 151, 154; People *v.* Dick, 32 Cal. 213, 215.

[4] State *v.* Glass, 5 Ore. 73, 81; Coleman *v.* State, 59 Ala. 52; Black *v.* State, 1 Tex. App. 369, 391; Cone *v.* State, 13 Tex. App. 483, 486; Binns *v.* State, 66 Ind. 428, 435; Com. *v.* Webster, 5 Cush. (Mass.) 295, 320; Mose *v.* State, 36 Ala. 212, 221, 331; State *v.* Shelledy, 8 Ia. 497, 498.

[5] Applying this principle in determining whether a new trial ought to be granted because the verdict is not supported by the evidence, the court will reject as untrue an hypothesis which is improbable in itself and which the jury did not believe,—as that, after the defendant had pursued the deceased and caught up with him and cocked his gun and leveled it at him, the gun went off accidentally. Binfield *v.* State, 19 N. W. Rep. 607, 608; *s. c.* 15 Neb. 484.

[6] Mose *v.* State, 36 Ala. 211.

Neither does 'mathematical certainty' or 'physical impossibility,' define the rule. Conviction, resting on human testimony, can never attain the certainty of mathematical demonstration, or repel all possible doubt of its correctness. A rule so exacting would paralyze the punitive arm of the law. A doubt which requires an acquittal must be actual and substantial, not a mere possibility or speculation. It is not a mere possible doubt, because everything relating to human affairs, and depending upon moral evidence, is open to some possible or imaginary doubt." [1] An instruction that "circumstantial evidence is always insufficient to convict, when, conceding all to be proved that the evidence tends to prove, some other hypothesis than that of the defendant's guilt may be true," has been condemned as an inaccurate statement of this doctrine, and hence rightly refused.[2]

§ **2507. Need not be "Absolutely Incompatible" with Innocence.** — It is proper to refuse an instruction, in a case depending upon circumstantial evidence, which tells the jury that, in order to warrant a conviction, the circumstances must be "absolutely incompatible with the innocence of the accused." This language is said to "imply that proof of defendant's guilt must be beyond the possibility of a doubt, which, as already seen, is not the rule." [3] In such a case it has been well said: "The jury is never required to find that it was not possible for another to have committed the crime, before they can convict a prisoner on trial, — or in other words, to find that it is impossible for the prisoner to be innocent. Such a degree of certainty is rarely attainable in the administration of justice. It is sufficient that all the material circumstances point to guilt, and that they are inexplicable upon the theory of innocence. The guilt must be established beyond a reasonable not beyond a possible doubt." [4]

[1] Coleman *v.* State, 59 Ala. 52, 54 opinion by Stone, J.

[2] People *v.* Strong, 30 Cal. 151, 153.

[3] Cornish *v.* Territory (Wyo.), 3 Pac. Rep. 793, 795.

[4] Poole *v.* People, 80 N. Y. 646; Cornish *v.* Territory, *supra*.

§ 2508. **This Principle how Expounded to Juries.** — This principle is frequently embodied in instructions to juries, with the approval of the appellate courts, in equivalent forms of expression, — thus: "It [the evidence] must be inconsistent with any reasonable supposition of innocence;" [1] or, "If all the facts and circumstances can be reasonably reconciled with any other theory than that of guilt;" [2] or, "When the facts proved are susceptible of explanation, upon no reasonable hypothesis consistent with innocence, and point to guilt beyond any other reasonable solution, then they are sufficient to rest a conviction upon, although the crime is of the utmost malignity and the penalty attached is the highest known to the law;" [3] or, "The material facts proved must be susceptible of explanation upon no reasonable hypothesis consistent with innocence;" [4] or, "The State must prove the guilt of the accused beyond all reasonable doubt, to the exclusion of every other conclusion," — the word "conclusion" being the substantial equivalent of "hypothesis;" [5] or, "If you can reconcile it with any reasonable hypothesis of innocence, you may acquit; if not, you are bound to say so." [6]

§ 2509. **Must Exclude to a Moral Certainty every Hypothesis save that of Guilt.** — Possibly a still more emphatic expression, which is much used, and always with approval, in instructing juries in criminal prosecutions depending upon circumstantial evidence, is, that in order to warrant a conviction the circumstances proved must be of such a character as to exclude, *to a moral certainty*, every hypothesis or supposition (or, as some courts qualify it, every reasonable or rational hypothesis) save that of guilt.[7] Instructions which strengthen the phrase "moral cer-

[1] State *v.* Shelledy, 8 Ia. 497, 498.

[2] State *v.* Vansant, 80 Mo. 67, 72.

[3] Stout *v.* State, 90 Ind. 1, 12. See also Jarrell *v.* State, 58 Ind. 293.

[4] Binns *v.* State, 66 Ind. 428, 435.

[5] State *v.* Willingham, 33 La. Ann. 537.

[6] Com. *v.* Harman, 4 Pa. St. 269, 274, charge by Gibson, C. J.

[7] Stark. Ev. (9th Am. ed.) 862; quoted with approval in Algheri *v.* State, 25 Miss. 584, 589, where a conviction of murder on circumstantial evidence was reversed, as being inadequately supported by the evidence. Com. *v.* Webster, 5 Cush. (Mass.) 295, 320; McKleroy *v.* State, 77 Ala. 95; Mose *v.* State, 36 Ala. 212, 221, 231; State *v.*

tainty" by prefixing the word "*absolute*" have been approved,[1] but more properly condemned,[2] on the ground that absolute moral certainty is not attainable by the human mind. In like manner, it has been held proper to refuse an instruction which tells the jury that, in order to warrant a conviction, the circumstances must be "absolutely incompatible with the innocence of the accused."[3] This principle is embodied in the fourth rule of Starkie, relating to circumstantial evidence, as follows: "It is essential that the circumstances should, to a moral certainty, actually exclude every hypothesis but the one proposed to be proved."[4]

§ 2510. PRECEDENTS OF INSTRUCTIONS UNDER THIS RULE. — The following instruction under this head has been approved: "In order to convict the defendant upon the evidence of circumstances, it is necessary, not only that all the circumstances concur to show that he committed the crime charged, but that they are inconsistent with any other rational conclusion. It is not sufficient that the circumstances proved, coincide with, account for, and therefore render probable, the hypothesis sought to be established by the prosecution; but they must exclude, to a moral certainty, every other hypothesis but the single one of guilt, or the jury must find the defendant not guilty."[5] - - - - It has been held error to refuse the following: "(3.) Unless the evidence against the pris-

Glass, 5 Ore. 73, 81; People *v.* Strong, 30 Cal. 151, 154; Coleman *v.* State, 59 Ala. 52; James *v.* State, 45 Miss. 572, 575; Black *v.* State, 1 Tex. App. 369, 391; People *v.* Dick, 32 Cal. 213, 215; People *v.* Anthony, 56 Cal. 400; Casey *v.* State, 8 Crim. Law Mag. 597, 611; *s. c.* 20 Neb. 138.

[1] People *v.* Strong, 30 Cal. 151, 154.

[2] People *v.* Davis (Cal.), 1 Pac. Rep. 890; *s. c.* 64 Cal. 440; People *v.* Glass, 5 Ore. 73, 81.

[3] Cornish *v.* Territory (Wyo.), 3 Pac. Rep. 793, 795.

[4] Stark. Ev. (9th Am. ed.), § 862. The following passage, often quoted from earlier editions of Starkie, and approved by American judges, is not found by the writer in the 9th American edition: "It is always insufficient where, assuming all to be proved which the evidence tends to prove, some other hypothesis may still be true; for it is the actual exclusion of every other hypothesis which invests mere circumstances with the force of truth. Whenever, therefore, the evidence leaves it indifferent which of several hypotheses is true, or merely establishes some finite probability in favor of one hypothesis rather than another, such evidence cannot amount to proof, however great the probability may be." Algheri *v.* State, 25 Miss. 584, 589.

[5] People *v.* Anthony, 56 Cal. 397, 400.

oner should be such as to exclude to a moral certainty every supposition but that of his guilt of the offense imputed to him, then they must find him not guilty. (4.) Unless the evidence against the prisoner should be such as to exclude to a moral certainty every hypothesis but that of his guilt of the offense imputed to him, they must find him not guilty." It is perceived that these instructions are drawn in the same words, except that the former uses the word "supposition," while the latter uses the word "hypothesis." [1]

§ 2511. View that Jury must be Satisfied of every Essential Fact beyond a Reasonable Doubt. — It is undoubtedly a sound view that, in cases depending upon circumstantial evidence, in order to warrant them in convicting, the jury should be satisfied beyond a reasonable doubt of every *essential* fact or circumstance necessary to the conclusion of guilt.[2] This doctrine is found in the text of Starkie in the following words: "The party upon whom the burden of proof rests is bound to prove every single circumstance which is essential to the conclusion, in the same manner and to the same extent as if the whole issue had rested upon the proof of each individual and essential circumstance." [3] The same conclusion is thus stated by Mr. Burrill: "The evidentiary facts must all be proved, and the existence of none of them can be presumed." [4] The same principle was thus stated to the jury by Chief Justice Shaw in Webster's case: "The several circumstances upon which the conclusion depends must be fully established by proof. They are facts from which the main fact is to be inferred; and they are to be proved by competent evidence, and by the same weight and force of evidence, as if each one were itself the main fact in issue." [5] The

[1] Mose *v.* State, 36 Ala. 212, 221, 231; and again in Coleman *v.* State, 59 Ala. 52. Other instructions drawn upon this theory will be found in People *v.* Dick, 32 Cal. 213, 215; State *v.* Glass, 5 Ore. 73, 82; People *v.* Strong, 30 Cal. 151, 154.

[2] Bressler *v.* People, 3 N. East. Rep. 522, 528; *s. c.* 117 Ill. 422.

[3] Stark. Ev. (9th Am. ed.), § 856. So held in Lehman *v.* State, 18 Tex. App. 174; Scott *v.* State, 19 Tex. App. 325.

[4] Burrill Cir. Ev. 733. The writer is not referring to the doctrine of reasonable doubt, but is giving a rule applicable to circumstantial evidence in all cases, civil or criminal.

[5] Com. *v.* Webster, 5 Cush. (Mass.) 295, 317.

subject of circumstantial evidence was explained in that charge at considerable length, and from it the reporter has condensed the following statement of law, which is sometimes employed by judges in charging juries: "In order to warrant a conviction of a crime on circumstantial evidence, each fact necessary to the conclusion sought to be established must be proved by competent evidence beyond a reasonable doubt; all the facts must be consistent with each other, and with the main fact sought to be proved; and the circumstances taken together must be of a conclusive nature, leading on the whole to a satisfactory conclusion, and producing in effect a reasonable and moral certainty, that the accused, and no other person, committed the offense charged."[1] In applying this principle, it has been held error to refuse the following instruction: "Every circumstance material in this case must also be proved beyond a rational doubt, or it is the duty of the jury to discard such circumstance in making up their verdict."[2]

§ 2512. Doctrine that the State must Establish every "Link" in the Chain of Circumstances beyond a Reasonable Doubt. — It is but another expression of the doctrine of the preceding section to say that, in a criminal prosecution, the State is bound to establish every link in the chain of inculpatory circumstances (where they arrange themselves in the form of a chain, so as to be interdependent), by evidence which satisfies the minds of the jurors beyond a reasonable doubt. This doctrine has been stated thus: "When independent facts and circumstances are relied upon to identify the accused as the person committing the offense charged, and, taken together, are regarded as a sufficient basis for a presumption of his guilt to a moral certainty or beyond a reasonable doubt, each material independent fact or circumstance necessary to complete such chain or series of independent facts, tending to establish a presumption of guilt, should be established to the same degree of certainty as

[1] *Ibid.* 296, reporter's syllabus. This is copied into the author's note 2, in 3 Greenl. Ev., § 29.

[2] Sumner v. State, 5 Blackf. (Ind.) 579.

the main fact which these independent circumstances, taken together, tend to establish; that is, each essential, independent fact in the chain or series of facts relied on to establish the main fact, must be established to a moral certainty, or beyond a reasonable doubt." [1] In one jurisdiction, it was held error for the court to omit to charge the jury, in any case depending upon circumstantial evidence, that it is incumbent upon the State to establish every link in the chain of inculpatory circumstances beyond reasonable doubt.[2] But this court overlooks a fact frequently observed upon by other courts and by text-writers, that in many cases depending upon circumstantial evidence, the circumstances do not arrange themselves in the form of a chain, — that is, that they are not interdependent, supporting each other in such a sense that if a single one fails the chain is broken and all fail; but that they frequently array themselves in a group or multitude of isolated facts, in such a manner that each isolated fact, though insufficient of itself to raise the conclusion of guilt, points to it with more or less force, so that the whole group of facts, according to the strength and number of the isolated facts, will, when considered together, create a satisfactory conclusion of guilt. In by far the greater number of cases, it is believed, the facts thus arrange themselves, and not in the form of a chain. When they so arrange themselves, they have been more properly likened to the *strands of a cable*.[3] One or more of the strands may break, but the cable itself will not part. Where all the inculpatory facts are not interdependent, forming what may properly be called a chain of circumstances, it is obviously improper and misleading for the judge to instruct the jury as required by the doctrine of the Texas case above quoted. But where they plainly do so arrange themselves, it should seem that the judge may properly

[1] People *v.* Phipps, 39 Cal. 326, 333, opinion of the court by Sprague, J. The above statement would, perhaps, have been improved by using the word "interdependent" in the place of "independent," in same places where it occurs.

[2] Scott *v.* State, 19 Tex. App. 325.

[3] Clair *v.* People, 8 Crim. Law Mag. 184, per Helm, J.; *s. c. sub nom.* Clare *v.* People, 9 Colo. 122.

so instruct them. Accordingly, the following instruction has been approved: "When the evidence against the defendant is made up wholly of a chain of circumstances, and there is a reasonable doubt as to one of the facts essential to establish guilt, it is the duty of the jury to acquit." [1]

§ **2513. This Principle how Expounded to Juries.** — The doctrine that every link in the chain of circumstances must be established by evidence, beyond a reasonable doubt, has been thus expounded to a jury: "Each fact in any chain of facts, from which the defendant's guilt is to be inferred, must be proved by the same weight, degree and force of evidence as if it were the main fact of the defendant's guilt itself; all of such facts must be consistent, each with all the others, and with the defendant's guilt; and all, taken together, must be so strong as to exclude, to a moral certainty, every reasonable hypothesis but that of the defendant's guilt." [2] In framing such an instruction, it has been held not error for the judge to direct the attention of the jury to the circumstances relied on by the prosecution, if, at the same time, they are left free to determine whether or not the circumstances have been proved.[3]

2514. [Contra.] The "Link" Doctrine Repudiated. — This so-called "link" doctrine has been repudiated by several courts, upon one or the other of the following grounds: 1. The ground reasoned in the preceding section, that in many cases the circumstances are not interdependent, and do not arrange themselves in the form of links in a chain, — in which case a failure of satisfactory proof as to a particular circumstance would merely impair, but not necessarily overthrow the conclusion of guilt, deducible from all the other established circumstances. 2. Upon a ground hereafter stated and discussed,[4] that

[1] People *v.* Anthony, 56 Cal. 397, 400.

[2] Johnson *v.* State, 18 Tex. App. 385, 398.

[3] Koener *v.* State, 98 Ind. 7, 14.

[4] *Post*, next section.

the doctrine of reasonable doubt is a doubt arising upon a comparison of all the evidence in the case, and not upon the evidence going to establish a particular inculpatory or defensive fact. 3. (By one court)[1] that, although the circumstances do arrange themselves in the form of the links of a chain, yet, when one link is broken the chain is not necessarily broken. It has been held that an instruction which tells the jury that they "must be satisfied beyond a reasonable doubt of each link in the chain of circumstances to establish the defendant's guilt," — is properly refused, where the doctrine of reasonable doubt, in its application to circumstantial evidence, is otherwise properly explained to them.[2] Where the jury were otherwise properly instructed touching circumstantial evidence and reasonable doubt, it was held not error to refuse the following: "In order to convict the defendant upon the evidence of circumstances, it is necessary, not only that all the circumstances concur to show that he committed the crime charged, but that they are all inconsistent with any other rational conclusion." "The true rule," said the court, "was undoubtedly laid down in the case of *Com.* v. *Webster*.[3] Each fact necessary to the conclusion sought to be established, must be proved by competent evidence beyond a reasonable doubt. It is only required that 'the circumstances, *taken together*, must be of a conclusive nature, and leading on the whole, to a satisfactory conclusion, and producing in effect a reasonable and moral certainty that the accused committed the offense charged.' * * * The jury may exclude any fact from their consideration, and it is sufficient if, from the facts which are considered, their minds are drawn to conclude, to a reasonable and moral certainty, that the defendant is guilty."[4] But this falls very far short of the conception of the law which

[1] Bressler *v.* People, as quoted, *infra*.

[2] State *v.* Hayden, 45 Ia. 12, 17.

[3] 5 Cush. (Mass.) 296, 313, 317, 319.

[4] State *v.* Glass, 5 Ore. 73, 74, 82, opinion by Mosher, J. The court also pointed out that there was no substantial difference between the instructions refused under this head and these given. See also Walbridge *v.* State, 13 N. W. Rep. 209, 211; *s. c.* 13 Neb. 236; United States *v.* Wright, 16 Fed. Rep. 112.

has approved, as another court has done, the giving of the following instruction: "The jury are instructed that the rule requiring the jury to be satisfied of a defendant's guilt beyond a reasonable doubt, in order to warrant a conviction, does not require that the jury should be satisfied beyond a reasonable doubt of each link in the chain of circumstances relied upon to establish the defendant's guilt. It is sufficient if, taking the testimony all together, the jury are satisfied beyond a reasonable doubt, that the defendant is guilty."[1] The reasoning which supports the conclusion given in the note involves the solecism that, although the circumstances do arrange themselves in the form of the links of a chain, yet that when one link of the chain is broken, the chain itself may still remain entire, — ignoring the obvious conception that no chain can be stronger than its weakest link. Upon substantially this reasoning, the propriety of giving the instruction last set out has been denied in Nebraska,[2] in Colorado,[3] and in Washington Territory.[4] It has also been denied in Kentucky, — the court proceeding upon the ground that, under their criminal code, it is not incumbent on the judge to give the

[1] Bressler *v.* People, 117 Ill. 422, 437; *s. c.* 3 N. East. Rep. 522, 527. The court say the instruction is sustained by Leigh *v.* People, 113 Ill. 372; Mullins *v.* People, 110 Ill. 42, and State *v.* Hayden, 45 Ia. 17, which is not the case. The reasoning of the Illinois court, by which this conclusion was reached, was as follows: "Each material fact essential to constitute the defendant's guilt must be proved beyond a reasonable doubt. But these facts may be proved by evidence of circumstances, some of much and others of little weight, — resting on the testimony of various witnesses of different degrees of credibility and intelligence; and so in the chain relied upon, there may be links, when separately considered, about which there are reasonable doubts. But when the entire evidence is considered, each link strengthens every other link, and thus there is a complete chain of evidence, satisfying beyond a reasonable doubt of the guilt of the defendant. It is the effect of the evidence as a whole, and not of distinct parts of it, isolated from its connection with the other evidence, by which the jury are to be governed." Bressler *v.* People, 117 Ill. 422, 438; *s. c.* 3 N. East. Rep. 522, 528, opinion of the court by Scholfield, J.

[2] Marion *v.* State, 20 N. W. Rep. 290, 294; *s. c.* 16 Neb. 349, 359.

[3] Clair *v.* People, 8 Crim. Law Mag. 184; *s. c.* 9 Colo. 122, 123; *sub. nom.* Clare *v.* People.

[4] Leonard *v.* Terr., 7 Pac. Rep. 872; *s. c.* 2 Wash. Ter. 381, 397.

jury any caution at all upon the subject of the probative force of circumstantial evidence.[1]

§ 2515. Application of the Rule of Reasonable Doubt to Particular Circumstances. — In Kentucky, the conclusion has been reached that "circumstantial evidence, being conceded to be competent, and when of a satisfactory character sufficient to warrant a

[1] Brady *v.* Com. 11 Bush (Ky.), 282. In the Nebraska case, above cited, it is said, in the opinion of the court by Reese, J.: "This instruction is copied from Sackett on Instructions to Juries, and is sustained by some authorities of respectability; but yet it seems to us that a jury might be misled thereby. What is meant by the word 'link' as used therein? If the jury were given to understand that it referred only to evidentiary facts which might add force or weight to other facts from which the inference of guilt could be drawn, then the instruction might be said to be correct. But if, by the use of the word, is meant such criminative facts which of themselves form the chain of evidence from which the inference of guilt is to be drawn, then the instruction does not state the law correctly. No chain can be stronger than its weakest link. If the link is gone it is no longer a chain. If the word 'link' here refers to those circumstances which are essential to the conclusion, it is not a correct statement of the law. While, in view of other instructions which were given, and which more definitely stated the law, a new trial might not for this reason alone be given, yet we cannot recommend this instruction as worded, and think it should not be thus given." Marion *v.* State, *supra*. In the case in Washington Territory, the court, speaking through Greene, J., said: "The metaphor of the 'chain,' taken in connection with the remainder of the instruction, and the evidence, seems to us inaccurate and misleading. Probably what the judge meant to say was that the jury did not need to be satisfied, beyond reasonable doubt, of every inculpatory fact. Ordinarily, in a case resting in circumstances, a linked arrangement of fact to fact is observable in a part or parts of the evidence. But a guilty person is more commonly hemmed in by a throng of circumstances, than enclosed by facts arranged chain-wise. Release from a chain comes when the weakest link gives way; but escape from a crowd does not necessarily depend on the presence or absence of one or another, or even, perhaps, the greatest number, of the individuals composing it. In this case, the inculpatory facts were grouped about the prisoner, and only a part of them were linked together, or strictly interdependent. The fault in the instruction lies in its tendency to lead the jury to regard all the facts as disposed in a chain, every link in which, if such were the case, would need to be proved beyond a reasonable doubt." Leonard *v.* Territory, *supra*. In the Colorado case it was said by Helm, J., in giving the opinion of the court: "The metaphor used is inaccurate, and liable to misconstruction. It is incorrect to speak of a body of circumstantial evidence

conviction, should be left, like direct or positive evidence, to be considered by the jury, and to have such weight as they deem it entitled to, without caution or suggestion on the part of the court as to its value, or the necessity to scrutinize it closely." Under the criminal code of that State,[1] which makes it the duty of the court to "instruct the jury on the law applicable to the case," it is not incumbent on the court to give the jury any caution touching the inconclusive character of circumstantial evidence. It is a sufficient caution, where the case of the prosecution rests upon circumstantial evidence, to tell the jury that they are not to convict if, on all the evidence, they have a reasonable doubt whether the accused has been proved guilty. The court lay down the rule that the trial courts should confine their instructions, as closely as possible, to the essential facts necessary to make out the charge or defense, and leave the evidence offered to establish those facts to the jury without comment. Accordingly, it has been held no error, in such a case, to refuse the following instructions: 1. "The prisoner cannot be convicted on the evidence of mere circumstances, unless every one of the circumstances necessary to establish guilt is proven beyond a reasonable doubt, and also unless such circumstances are of such character and tendency as to exclude every rational theory of the case consistent with the prisoner's innocence. 2. The jury should not convict on circumstantial evidence alone, unless they are as much convinced by such evidence as if a single credible witness had proven directly and positively the facts necessary to convict him. 3. Before the prisoner can be convicted the jury must believe, to the exclusion of every reasonable doubt, that he has been proven guilty; they must be satisfied, beyond a reasonable doubt, of the truth of every fact in the chain of evidence necessary to establish his guilt." [2]

as a *chain*, and allude to the different circumstances as the links constituting such chain; for a chain cannot be stronger than its weakest link, and if one link fails, the chain is broken. This figure of speech may perhaps be correctly applied to the ultimate and essential facts necessary to conviction in criminal cases; since if one be omitted, or be not proven beyond a reasonable doubt, an acquittal must follow. It is not true, however, that each and every of the minor circumstances introduced to sustain these ultimate facts must be proven with the same degree of certainty. Some of these circumstances may fail of proof altogether, and be discarded from consideration by the jury, yet the ultimate fact, to establish which they were presented, may be shown beyond a reasonable doubt." Clair *v.* People, *supra*.

[1] Ky. Crim. Code, § 226.

[2] Brady *v.* Com., 11 Bush (Ky.), 282, 285.

§ 2516. Instances of Erroneous Instructions as to Reasonable Doubt. —This paragraph may be premised with the statement that, under the peculiar jurisprudence of Texas, while it will be error, in a case of *felony*, as already seen, for the court to omit to charge the law relating to circumstantial evidence, if such evidence is exclusively relied upon for a conviction, yet, if the court erroneously charges the law, so that its charge becomes a charge upon the weight of the evidence, the error will not require a reversal unless excepted to at the time, provided it is not manifest that the defendant was injured thereby;[1] otherwise it will.[2] Refining to an unnecessary extent in favor of the rights of accused persons, that court has held that the giving of the following truism is error, as being a charge upon the "strength, power or conclusiveness of the evidence:" "What is termed circumstantial evidence is legal evidence, and is often as conclusive and strong upon the understanding as that which is termed direct and positive." The defendant having excepted to this charge, the court regarded themselves as having no alternative but to reverse the judgment.[3] In a case in Tennessee, where the charge was larceny and the evidence entirely circum-

[1] Cunningham *v.* State, 20 Tex. App. 162, 168; Post *v.* State, 10 Tex. App. 580; Maddox *v.* State, 12 Tex. App. 429; White *v.* State, 19 Tex. App. 343; Walker *v.* State, 42 Tex. 373.

[2] Harrison *v.* State, 8 Tex. App. 183.

[3] Harrison *v.* State, 9 Tex. App. 407. In the view of the Texas court, the error of giving this instruction was not cured by the circumstance that, in another portion of his charge, the judge gave the following explicit caution touching the weight to be attached to such evidence: "When the State relies on circumstantial evidence to convict, the testimony must exclude to a moral certainty every other hypothesis but the one of guilt as charged in the indictment, or the jury should acquit. When the State relies upon circumstantial evidence to convict the defendant, each fact in the chain of facts from which the main fact in issue is to be inferred, must be proved by competent evidence and by the same weight and force of evidence as if each one were the main fact in issue; and all the facts proven must be consistent with each other and the main fact to be proven." *Ibid.* In another case, a charge which, after stating the rule of law in regard to the probative force of each fact in the chain of circumstances necessary to convict, as it is usually stated, continued: "Circumstantial evidence is often as cogent and conclusive upon the understanding as direct and positive evidence, and all the law exacts from the jury in such a case is that their minds should be satisfied beyond a reasonable doubt of the guilt of the prisoner." This proposition, although strictly the law, was condemned in the most unqualified terms, as an invasion of the province of the jury. Post *v.* State, 10 Tex. App. 580, 596. For the same reason, it was held error for the judge to say to the jury: "I charge

stantial, the refusal of the judge, upon the request of the accused, to charge that, before the jury could convict upon circumstantial evidence alone, the circumstances should be such as to exclude every other reasonable hypothesis than that of guilt, was held error, although the court gave the following instruction: "If the evidence is circumstantial, and is so strong and so well linked together as to generate in the mind a full belief of the guilt of the defendant, then it would be your duty to convict. But the facts and circumstances should be sufficiently strong, and so connected together and so point to the defendant's guilt, as to make it not merely probable that the defendant is guilty, for you cannot find upon mere probabilities; but they must convince the mind fairly and fully of the guilt of the defendant, or you should acquit." The reasoning of the reviewing court was, that the charge given did not cure the error of refusing the usual caution embraced in the charge requested; and the court concluded with this admonition: "It is always safer to lay down familiar rules of this character in language universally adopted and approved, than to undertake to give a new version in more doubtful language."[1] On the other hand, the judge is not bound to give an instruction, requested by the accused, which is so drawn as to disparage the character of circumstantial evidence. This was held of the following instruction: "Circumstantial evidence ought to be received with great caution, especially where an anxiety is naturally felt for the detection of great crimes. The jury, upon circumstantial evidence, and where such evidence is less conclusive than the positive and direct evidence of one witness who testifies to the fact, must acquit the defendant."[2]

§ 2517. Charge of Chief Justice Gibson in Harman's Case. — The writer could scarcely justify a dismissal of this subject without giving

you that circumstantial evidence is, or may be, as convincing in establishing guilt as direct or positive testimony;" but this instruction not having been excepted to, the giving of it was not regarded as sufficient ground for reversing a conviction. White *v.* State, 19 Tex. App. 343, 358. Less difficulty is found in agreeing with the Texas court that the rights of the accused were infringed in saying to the jury that "a man may steal in broad daylight, in the presence of all his neighbors, as much as in the night and in secret; but the manner of taking and using property may be considered by the jury in determining the intent of the defendant." Stuckey *v.* State, 7 Tex. App. 174, 179. This was likewise held a charge upon the weight of evidence and prejudicial to the defendant, especially as the spirit of the whole charge was equally prejudicial.

[1] Turner *v.* State, 68 Tenn. (4 Lea) 207, 208.

[2] Brown *v.* State, 23 Tex. 195, 200. Quoted with approval in Harrison *v.* State, 8 Tex. App. 183, 185.

an extract from a charge delivered by a judge of as great reputation as Chief Justice Gibson, of Pennsylvania, in a case of murder. It should be remembered that it was given under a system in which the judge sums up and comments on the evidence, as in the English and the Federal practice. He said: "The evidence is so simple and has been so thoroughly discussed, that a further attempt to analyze it or collate it, or pass it in review, would render you no assistance; and I therefore shall confine my remarks to the distinctive character and value of it. No witness has been produced who saw the act committed; and hence it is urged for the prisoner that the evidence is only circumstantial, and consequently entitled to a very inferior degree of credit, if to any credit at all. But that consequence does not necessarily follow. Circumstantial evidence is, in the abstract, nearly, though perhaps not altogether, as strong as positive evidence; in the concrete, it may be infinitely stronger. A fact positively sworn to by a single eye-witness of blemished character, is not so satisfactorily proved as is a fact which is the necessary consequence of a chain of other facts sworn to by many witnesses of undoubted credibility. Indeed, I scarcely know whether there is such a thing as evidence purely positive. You see a man discharge a gun at another, you see the flash, you hear the report, you see the person fall, a lifeless corpse; and you *infer* from all these circumstances that there was a ball discharged from the gun, which entered his body and caused his death, because such is the usual and natural cause of such an effect. But you did not see the ball leave the gun, pass through the air, and enter the body of the slain; and your testimony to the fact of killing is therefore only inferential — in other words, circumstantial. It is *possible* that no ball was in the gun; and we *infer* that there was, only because we cannot account for the death on any other supposition. In cases of death from the concussion of the brain, strong doubts have been raised by physicians, founded on appearance verified by *post mortem* examination, whether an accommodating apoplexy had not stepped in at the nick of time to prevent the prisoner from killing him after the skull had been broken into pieces. I remember to have heard it doubted in this court room, whether the death of a man whose brains oozed through a hole in his skull, was caused by the wound or a misapplication of the dressings. To some extent, however, the proof of the cause which produced the death rested on circumstantial evidence." [1]

[1] Com. *v.* Harman, 4. Pa. St. 269, 271.

§ 2518. CHIEF JUSTICE GIBSON'S CHARGE, CONTINUED. — "The only difference between positive and circumstantial evidence is, that the former is more immediate, and has fewer links in the chain of connection between the premises and conclusion; but there may be perjury in both. A man may as well swear falsely to an absolute knowledge of a fact, as to a number of facts from which, if true, the fact on which the question of innocence or guilt depends must inevitably follow. No human testimony is superior to doubt. The machinery of criminal justice, like every other production of man, is necessarily imperfect; but you are not therefore to stop its wheels. Because men have been scalded to death or torn to pieces by the bursting of boilers, or mangled by wheels on a railroad, you are not to lay aside the steam engine. Innocent men have doubtless been convicted and executed on circumstantial evidence; but innocent men have sometimes been convicted and executed on what is called positive proof. What then? Such convictions are accidents which must be encountered; and the innocent victims of them have perished for the common good, as much as soldiers who have perished in battle. All evidence is more or less circumstantial, the difference being only in the degree; and it is sufficient for the purpose when it excludes disbelief, — that is, actual, and not technical disbelief, for he who has to pass on the question, is not at liberty to disbelieve as a juror while he believes as a man. It is enough that his conscience is clear. Certain cases of circumstantial proof to be found in the books, in which innocent persons were convicted, have been pressed on your attention. These, however, are few in number, and they occurred in a period of some hundreds of years, in a country whose criminal code made a great variety of offenses capital. The wonder is, that there have not been more. They are constantly resorted to in capital trials, to frighten juries into a belief that there should be no conviction on merely circumstantial evidence. But the law exacts a conviction wherever there is *legal* evidence to show the prisoner's guilt beyond a reasonable doubt; and circumstantial evidence is legal evidence. If the evidence in this case convinces you that the prisoner killed her child, although there has been no eye-witness of the fact, you are bound to find her guilty. For her sake, I regret the tendency of these remarks; but it has been our duty to make them, and it will be your duty to attend to them." [1]

§ 2519. OTHER PRECEDENTS OF INSTRUCTIONS. — "The jury are instructed that they may, from circumstantial evidence alone, find the

[1] Com. *v.* Harman, 4 Pa. St. 269, 272.

defendant guilty, when the facts established are inconsistent with any other view than that of his guilt; but, in order to find the defendant guilty upon circumstantial evidence, the facts proved must be wholly inconsistent with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt." [1] - - - - "Circumstantial evidence is to be regarded by the jury in all cases. It is many times quite as conclusive in its convincing power as direct and positive evidence of eye-witnesses. When it is strong and satisfactory, the jury should so consider it, neither enlarging nor belittling its force. It should have its just and fair weight with the jury; and if, when it is all taken as a whole, and fairly and candidly weighed, it convinces the guarded judgment, the jury should act on such conviction. You are not to fancy situations or circumstances which do not appear in the evidence, but you are to make those just and reasonable inferences from circumstances proven which the guarded judgment of a reasonable man would ordinarily make under like circumstances." [2]

Article IV.—Certain Other Presumptions.

Section

2524. As to the Presumption of Sanity.
2525. How Juries Instructed as to the *Quantum* of Proof Necessary to establish this Defense.
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2530. [Continued.] Rule under Texas Statute where the Injury is Caused by Violence.
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2532. Instructions under this Head.
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2534. Presumption arising from Recent, Unexplained Possession of Stolen Goods.

[1] Approved in State *v.* Hill, 65 Mo. 87, 88. Precedents of instructions, approved on appeal, where this idea was amplified, will be found in Koerner *v.* State, 98 Ind. 7, 14, and in State *v.* Groning, 33 Kan. 22. See also, an instruction approved in State *v.* Hayden, 45 Iowa, 17, which does not meet the requirements of this principle.

[2] Approved in State *v.* Elsham, 31 N. W. Rep. 66, 68; *s. c.* 70 Ia. 531, 534.

SECTION
2535. Whether this is a Presumption of Law or of Fact.
2536. View that it is a Circumstance merely for the Consideration of the Jury.
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2538. This Presumption partly Rebutted by Evidence of Good Character.
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2541. Precedents of Instructions under the English Rule.
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§ 2524. As to the Presumption of Sanity. — In respect of the burden of proof, the defense of insanity possibly stands on a different footing from the defense of *alibi*. As every person is presumed to be sane until the contrary appear, the State, in order to establish the charge of crime against an accused person, is not bound to prove that he was sane at the time when he committed the act; but the burden of proof is upon him, if he sets up this defense, to establish it.[1] In respect of the quantum of proof which is necessary to establish this defense, the books disclose four ideas: 1. That it must be established *beyond a reasonable doubt*. There is so little judicial authority in support of this proposition, and so little sense in it, that it will be laid out of view without discussion. 2. That it must be established *by a preponderance of evidence*.[2] The meaning of this proposition is, that the quantum of evidence to establish it must be sufficient to outweigh the legal presumption of sanity. There is much force in this view, and much judicial authority in support of it. The objection to it is, that the phrase "preponderance of evidence" is a technical phrase, which is not apt to convey an exact idea to the minds of a bench of jurors.[3] 3. That it must be established *to the satisfaction, or to the reasonable satisfaction, of the jury*.[4] This proposition conveys a more definite concep-

[1] Webb *v.* State, 5 Tex. App. 596; Mendiola *v.* State, 18 Tex. App. 462.

[2] Jones *v.* State, 13 Tex. App. 1.

[3] *Ante*, § 2327.

[4] King *v.* State, 9 Tex. App. 515, 557; Johnson *v.* State, 10 Tex. App. 571, 578; Smith *v.* State, 19 Tex. App. 96, 111. See also, Com. *v.* Eddy, 7 Gray (Mass.), 583; State *v.* Felter, 32 Ia. 49; Ortwein *v.* Com., 76 Pa. St. 414; State *v.* Bruce, 48 Ia. 533, 534; Lynch *v.* Com., 77 Pa. St. 205; State *v.*

tion to the minds of jurors, and if it is sound as a legal proposition, it ought to be given in preference to the one next preceding. 4. But this proposition is disputed by several modern courts, on the cogent ground that, the defense of insanity being, if established, a complete defense, it is *sufficient if the evidence adduced to establish it raises a reasonable doubt* in the minds of the jurors *as to whether or not the accused was sane* at the time when he committed the act charged.[1] As the defense of insanity, from its very nature, confesses the commission of the act, but sets up, by way of avoidance, an infirmity of judgment or of will, which deprived the accused, at the time when he committed the act, of that criminal intent which is a necessary ingredient of the offense, — evidence which raises a reasonable doubt in the minds of the jurors as to his sanity at the time of committing the act, necessarily raises a reasonable doubt as to his being guilty of the crime, as charged in the indictment. Several modern courts are taking hold of this conception, and upholding it by unanswerable arguments.[2] Either this conception must come, or the whole doctrine of reasonable doubt must go.

§ 2525. How Juries Instructed as to the Quantum of Proof Necessary to Establish this Defense. — One court has held that an instruction which announces that, if the evidence shows that the insanity of the defendant was *probable*, it will not overcome the presumption of sanity, and that *more* evidence is required to satisfy the minds of the jury that the defendant was insane, is improperly given.[3] - - - -

Mewherter, 46 Ia. 88; Goodwin *v.* State, 96 Ind. 550, 562; State *v.* Martin, 3 Crim. Law Mag. 44; United States *v.* Guiteau, 3 Crim. Law Mag. 347; *s. c.* 10 Fed. Rep. 161; State *v.* McCoy, 34 Mo. 531; State *v.* Klinger, 43 Mo. 127; State *v.* Huting, 21 Mo. 464. For an instruction embodying this doctrine, see State *v.* Robinson, 20 W. Va. 727, 728. Compare Boswell's Case, 20 Gratt. (Va.) 860.

[1] Guetig *v.* State, 66 Ind. 94, 106, 108, where an instruction embodying this principle was held "so clearly right that we need not discuss it." State *v.* Mahn, 25 Kan. 186.

[2] See Guetig *v.* State, 66 Ind. 105, for an instruction drawn on this theory.

[3] State *v.* Jones, 64 Ia. 349, 356. Two of the five judges dissented. The idea of the majority seems to have been that, as the presumption of sanity counts for something, it cannot be said to be overcome by a bare preponderance of evidence. The majority, after appealing to the lexicographers for definitions of the word "probable," and finding that it is defined as,

Another court has held it proper to instruct the jury that, "to establish a defense on the ground of insanity, it must be clearly proved that at the time of committing the act, the party accused was laboring under such defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing."[1] - - - - The following instruction, given in a case in Indiana, was regarded on appeal as so clearly right that it was not necessary to discuss it: "The law pre-

"having more evidence than the contrary," or "having more evidence for than against," — proceeded to contradict this premise by saying: "We think it was sufficient if the evidence of insanity preponderated." Seevers, J., in his dissenting opinion, was unable to discriminate between a defense which is probable, and a defense which is made out by a preponderance of the evidence. It seemed to him that the reasoning of the majority was "refined, technical, and without substantial merit." It seems to have been "refined" and without "substantial merit," but it was not "technical." If it had been technical, it would have been good. Compare the instructions in State *v.* Stickley, 41 Iowa, 232. And see State *v.* Felter, 25 Iowa, 67.

[1] Clark *v.* State, 8 Tex. App. 350, 359; Smith *v.* State, 19 Tex. App. 96, 111. This is in accordance with the opinion of the majority of the same court in Webb *v.* State, 9 Tex. App. 490, 515, where it was said: "In a general view of the case, we think that, no matter upon whom the burden rests, or how the proof is adduced, the evidence of insanity, to warrant an acquittal, should be sufficiently clear to convince the minds and consciences of the jury, because the law (Tex. Code Cr. Proc., art. 722), requires that 'when the defendant is acquitted upon the ground of insanity the jury shall so state it their verdict.' In a subsequent case, the majority of the same court, reasoning in the same way, conclude that it is unnecessary to determine whether the defendant shall establish his insanity beyond a reasonable doubt, or by a preponderance of testimony; all that is required is, that he shall establish it to the satisfaction of the jury, who are the judges of the fact." King *v.* State, 9 Tex. App. 515, 557; re-affirmed in Johnson *v.* State, 10 Tex. App. 571. Hurt, J., dissented in both cases, being of opinion that, when the defendant has introduced substantial evidence tending to show that he was insane at the time of doing the act, sufficient to overcome the legal presumption of sanity, the burden shifts upon the state of proving, beyond a reasonable doubt, that he was sane. But this idea involves a misconception of the burden of proof, which never shifts so long as the evidence is directed to a single proposition of fact. *Ante*, § 1831. This doctrine is held not to impugn the rule declared in Jones *v.* State, 13 Tex. App. 1, which is that such substantive defenses as insanity must be established by the defendant by a preponderance of the evidence, this being no more than a declaration that a preponderance of the evidence may be sufficient to satisfy the minds and consciences of the jury. This doctrine was re-affirmed in Smith *v.* State, 19 Tex. App. 96, 111.

sumes that a man is of sound mind until there is some evidence to the contrary. In prosecutions for offenses against the criminal code, an accused is entitled to an acquittal, if the evidence engenders a reasonable doubt as to his mental capacity at the time the alleged offense is charged to have been committed. Evidence rebutting, or tending to rebut, the presumption of sanity, need not, to entitle the defendant to an acquittal, preponderate in favor of the accused. It will be sufficient if it raise in your minds a reasonable doubt."[1] - - - - Upon the same conception of the *quantum* of proof necessary to sustain this defense, the following instruction was approved: "The jury should be satisfied, beyond a reasonable doubt, before convicting a man of a crime, that he was of sound mind at the time of the commission of the offense. If not so satisfied beyond a reasonable doubt, he should be acquitted. The jury are further instructed that if, upon the whole evidence, they find that the defendant, at the time of committing the act, was not of sound mind, and was unconscious that he was committing a crime, they should acquit him. The fact of the soundness of mind at the time the act was committed, is as much an essential ingredient of the crime of murder as the fact of killing, or of malice, or of any other fact or ingredient of murder, and should be made out in the same way, by the same party, and by evidence of the same kind and degree and as conclusive in its character, as is required in making out any other fact, ingredient or element of murder. The jury are further instructed that the burden of proof in a criminal case is always upon the State, and never shifts from the State to the defendant; and the making out of a *prima facie* case against the defendant does not shift the burden of proof to the defendant. If a *prima facie* case is made out by the State against the defendant, in order to entitle the defendant to an acquittal, he is required only by evidence, to establish a reasonable doubt of his sanity. If the jury cannot say, beyond a reasonable doubt, that the defendant was sane at the time of the commission of the alleged act, or cannot say whether, at the time, he was sane or insane, they are bound to acquit him."[2] - - - - Indeed, the doctrine in Kansas seems to be that, where testimony is introduced tending to show insanity, the burden is thereby cast upon the State of proving beyond a reasonable doubt, that the defendant was sane at the time of the committing of the act. This will further appear from the following instruction, which was approved in that State: "Before the

[1] Guetig *v.* State, 66 Ind. 94 106, 108.

[2] Appoved in State *v.* Mahn, 25 Kan. 186.

jury could convict, they must find that the defendant was, at the time, a person of sound memory and discretion. The law presumes every man to be sane, and that he is responsible for what he does. If, however, in any case, testimony be introduced tending to show insanity, then the sanity of the accused must be shown by the State, as any other fact in the case, to the satisfaction of the jury. Each and every allegation going to make up the offenses I have described to you, must be proved to your satisfaction beyond a reasonable doubt; and the burden of proof is upon the State; and if you have a reasonable doubt of any such material fact, in either of the offenses named, you are bound to acquit the defendant of such offense."[1] - - - - In another case in the same State, an instruction was approved which expressed the same view in the following language: "In a criminal action, where the defense of insanity is set up, it does not devolve upon the defendant to prove that he is insane by a preponderance of the evidence; but if, upon the whole of the evidence introduced on the trial, together with all the legal presumptions applicable to the case, under the evidence, there should be a reasonable doubt as to whether the defendant is sane or insane he must be acquitted."[2] - - - - The same conception of the *quantum* of proof to establish this defense is found in the following instruction, likewise approved in a late case: "If you believe from the evidence, beyond a reasonable doubt, that, at the time of committing the alleged act, the defendant was able to distinguish right from wrong, then you cannot acquit him on the ground of insanity. If you believe, from the evidence, beyond a reasonable doubt, that the defendant committed the crime in manner and form as charged in the indictment, and, at the time of committing such act, was able to distinguish right from wrong, you should find him guilty. If, from all the evidence in the case, you believe, beyond a reasonable doubt, that the defendant committed the crime of which he is accused, in manner and form as charged in the indictment, and that, at the time of the commission of such crime, the defendant knew that it was wrong to commit such crime, and was mentally capable of choos-

[1] Approved in State *v.* Reddick, 7 Kan. 152.

[2] Approved in State *v.* Nixon, 32 Kan. 213. This instruction is not to be commended as a model, for the reason that it uses the expression, "together with all the legal presumptions applicable to the case under the evidence." Unless the judge, in other parts of his charge, carefully explains to the jury what these legal presumptions are, the use of such a phrase in an instruction will be tantamount to submitting to them a question of law, and will be erroneous.

ing either to do or not to do the act or acts constituting such crime, and of governing his conduct in accordance with such choice, then it is your duty, under the law, to find him guilty, even though you should believe from the evidence, that, at the time of the commission of the crime, he was not entirely and perfectly sane, or that he was greatly excited or enraged, or under the influence of intoxicating liquor." [1]

§ 2526. INSTRUCTIONS BASED ON THE CONCEPTION THAT THE EVIDENCE MUST SATISFY THE JURY. — Turning now to a class of instructions which are based on the conception that the *quantum* of evidence, to overthrow the presumption of sanity, must be such as satisfies the jury that the defendant was insane at the time of doing the act, and not such as merely raises a reasonable doubt of his sanity at such time, we find that the following has been approved: "The plea of insanity is a complete excuse for the crime charged, if from all the evidence, you believe the plea is sustained. The law presumes all men sane until insanity is established by competent evidence to the satisfaction of the jury. It is not necessary, in order to acquit, that the evidence on the subject of insanity should satisfy you beyond all reasonable doubt that the defendant was insane; it is sufficient if, upon consideration of all the evidence, you are reasonably satisfied that he was insane. If the weight or preponderance of the testimony shows the insanity of the defendant, it raises a reasonable doubt of guilt." [2] - - - - This principle was announced with still greater emphasis in the following instruction: "The law presumes every man, who has arrived at the years of discretion, to be sane, capable of committing crime, until the contrary is shown; so that the State, after proving the unlawful act, need offer no evidence whatever of the sanity of the defendant, but may rest upon the legal presumption of sanity until the defendant shows the contrary. This defense of insanity is emphatically one which the defendant must make out, and it must be made out to the satisfaction of your minds; for if the evidence merely shows a case of doubt, whether the defendant might not be insane, this is not sufficient to authorize an acquittal on that ground only. If the evidence shows merely that the defendant might have been insane at the time of the commission of the act, but does not show satisfactorily to your minds that the defendant was

[1] Approved in Dunn *v.* People, 109 Ill. 643; citing Hopps *v.* People, 31 Ill. 385, and Chase *v.* People, 40 Ill. 353.

[2] Approved in State *v.* Bruce, 48 Ia. 533, 534. Citing and relying on State *v.* Felter, 32 Ia. 49, and State *v.* Mewherter, 46 Ia. 88.

insane at the time, this is not sufficient to warrant an acquittal. The jury are instructed that the *onus* or burden of proof of defendant's insanity, at the immediate time of the killing, rests upon the defendant; and if the same be not established to the entire satisfaction of the jury, then they will find her guilty of murder in the first degree."[1] - - - - Whether an instruction which impresses this principle upon the minds of the jury with such emphasis would be approved in the same jurisdiction at the present time, is doubtful; but we find that the instruction given in the next section, drawn by an able and experienced criminal judge,[2] recently met with the fullest approval of the Supreme Court of that State.[3]

§ 2527. A General Charge on the Subject of Insanity in a Case of Murder. — "In this case insanity is interposed by defendant's counsel as an excuse for the charge set forth in the indictment. This defense, when established, is one which the law recognizes; and should insanity be proved by the evidence in this case, to the reasonable satisfaction of the jury, it would be the duty of the jury in that event, to acquit the defendant altogether. - - - - Insanity is a physical disease, located in the brain, which disease so perverts and deranges one or more of the mental and moral faculties as to render the person suffering from this affliction incapable of distinguishing right from wrong, in reference to the particular act charged against him, and incapable of understanding that the particular act in question was a violation of the laws of God and society. - - - - Wherefore, the court instructs the jury that if they believe and find from the evidence, that, at the time he did the killing charged in the indictment, the defendant was so perverted and deranged, in one or more of his mental and moral faculties, as to be incapable of understanding, at the moment he killed Samuel Kohn, that such killing was wrong, and that he, the defendant, at that time, was incapable of understanding that this act of killing was a violation

[1] Approved in State *v.* McCoy, 34 Mo. 534, 535, — the court saying: "He who undertakes to escape the penalty of the law by means of the plea of insanity, must rebut such presumption by proof entirely satisfactory to the jury."

[2] The Hon. J. C. Normile, Judge of the St. Louis Criminal Court.

[3] Instructions on the subject of insanity, which do not, however, touch the *quantum of proof*, may be found in the following cases: Leache *v.* State, 22 Tex. App. 279; *s. c.* 3 S. W. Rep. 539, 544; Walker *v.* State, 102 Ind. 502, 508 (approved, though not well drawn); Burkhard *v.* State, 18 Tex. App. 599, 622. See also, Thomas *v.* State, 40 Tex. 60; Webb *v.* State, 5 Tex. App. 596; Williams *v.* State, 7 Tex. App. 163; Clark *v.* State, 8 Tex. App. 350; King *v.* State, 9 Tex. App. 515; Webb *v.* State, 9 Tex. App. 490.

of the laws of God and society — if the jury find he was so insane, they should find him not guilty. - - - - Insanity is either partial or general. General alienation always excuses; partial insanity does not always excuse. One may be partially insane, and yet be responsible for his criminal acts. The law does not excuse unless the derangement is so great that it actually renders the person incapable, at the time of its commission, of distinguishing between right and wrong, in respect to the particular act charged and proved against him. - - - - The law presumes every person who has reached the years of discretion to be of sound mind, and this presumption continues until the contrary is shown. So that when, as in this case, insanity is pleaded as a defense to a criminal charge, the fact of the existence of such insanity, at the time of the commission of the act complained of, must, before you can acquit on that ground, be established by the evidence to your reasonable satisfaction; and the burden of proving this fact rests with the defendant. - - - - To establish the insanity of the defendant, positive and direct proof of it is not required. To entitle him to an acquittal by reason of his insanity, circumstantial evidence which reasonably satisfies your minds of its existence, is sufficient. - - - - The law presumes the defendant innocent, and the burden of proving him guilty rests with the State; and before you should convict him, his guilt must be established beyond a reasonable doubt. On the other hand, to entitle the defendant to a verdict of not guilty by reason of his insanity, the law requires him to prove it, not, however, beyond a reasonable doubt, but only to your reasonable satisfaction. - - - - From all this it follows that, although you may believe and find that the defendant did the killing alleged, yet if from the evidence you further find that at the time he did it, he was in such an insane condition of mind that he did not know he was doing wrong, and did not comprehend the nature and character of the act, then such killing was not in law malicious or felonious, and you ought to acquit him on the ground of insanity, and by your verdict so say. - - - - Whether the hypothetical case on which the opinions of the experts are based, corresponds to and coincides with the case of the defendant, the jury alone must determine in the light of the testimony presented on this trial. And whenever it supposes facts not given in evidence, it should be disregarded by the jury. - - - - The court instructs you that, if you find the defendant not guilty, on the ground that he was insane at the time of the commission of the homicide charged, you will so state in your verdict; and you will also state whether defendant has entirely and permanently recovered from such insanity. - - - - If, on the whole case, you entertain a reasonable doubt

of the guilt of the defendant, you should give him the benefit of it and acquit. But to justify an acquittal on the ground of doubt alone, it should be reasonable and substantial, and not a mere guess or conjecture of the possibility of innocence." [1]

§ 2528. As to the Presumption that the Defendant Intended the Natural and Probable Consequences of his Act. — "A person must be presumed," said Chief Justice Shaw, "to intend to do that which he voluntarily and willfully does in fact do, and he must intend all the natural, probable and usual consequences of his own acts." [2] There are two views concerning the nature and strength of this presumption. One ascribes to it the force of a presumption of law, and even authorizes the judge to describe it as such in instructing the jury.[3] Where this view obtains, instructions are upheld which state the principle to the jury in language as imperative as that employed by Chief Justice Shaw in the above quotation, — thus: "If the jury believe from the evidence that the defendant willfully, that is, intentionally, used upon said William Judy, at some vital part, a deadly weapon, as a loaded revolver or pistol, in the absence of qualifying facts, defendant must be presumed to know that the effect is likely to be deadly, and knowing this, must be presumed to intend death, which is the probable and ordinary consequence of such an act." [4] In like manner, an instruction has been approved

[1] Approved in State *v.* Pagels, 92 Mo. 300; *s. c.* 10 West Rep. 288. In giving the opinion of the reviewing court, Sherwood, J., said: "Of the instructions given the jury, it is unnecessary to say more than that they express, in an exceedingly apt and lucid manner, the well-established law of this court as shown by the instances from our own reports cited by counsel for the State." As is well known, there is a variety of opinion as to what constitutes such insanity as will afford a defense to a charge of crime. No attempt has been made to collect a full series of instructions on the subject. The reader is referred to State *v.* Stickley, 41 Iowa, 232, and Guetig *v.* State, 66 Ind. 105, for useful instructions on the subject. See Lawson on Insanity as a Defense to Crime.

[2] Com. *v.* Webster, 5 Cush. (Mass.) 305.

[3] People *v.* Langton, 67 Cal. 427.

[4] Approved in State *v.* Wisdom, 84 Mo. 177, 187. An instruction in substantially the same language was approved in State *v.* Dickson, 78 Mo. 438. See also State *v.* Thomas, 78 Mo. 336; State *v.* Alexander, 66 Mo. 148; State *v.* Wingo, 66 Mo. 181; State *v.* Curtis, 70 Mo. 594.

in Iowa, which informed the jury that "every man is presumed to intend the necessary consequences of his own acts, and that it is a maxim of the law that a presumption shall stand until the contrary is proved." [1] The other and better view is that such an inference is one which the jury may or may not draw, as the result of their reasoning upon the facts of the particular case; and accordingly, that it is error to give them an imperative instruction upon the subject. Such an inference, as Dr. Wharton justly says, "is not one of law, but of probable reasoning, as to which the court may lay down logical tests for the guidance of the jury, but can impose no positive binding rule." [2] "The law," said Landon, J., speaking of this subject, "compels nothing. It only advises the jury to reason with respect to such acts, in that natural manner which human experience assures us leads to correct conclusions; but it does not compel the acceptance of the conclusion, unless the mind is convinced." [3] It has accordingly been held proper, in a capital case, to give the jury the following instruction: "If you find, as matter of fact, that the instrument of the nature of this in question, was used by the prisoner upon the head of the deceased, and blow after blow was struck by him upon the head of the deceased, so that the skull was substantially crushed in from the use of that kind of instrument, under those circumstances and at that time, — the law will permit you to draw, as an inference, the fact that the man intended the natural and probable result of his act." [4] The following instruction on this subject, which, it will be observed, states the presumption as one of law which changes the burden of proof, barely passed muster in the Supreme Court of California: "Every person is presumed to intend what his acts indicate his intention to have been; and if the defendant fired a loaded pistol at the deceased and killed him, the law presumes that the defendant intended to kill the deceased; and unless the defendant can show that his intention was other than his act indi-

[1] State *v.* Shelledy, 8 Ia. 485, 490.

[2] Whart. Crim. Ev. (8th ed.), §§ 758, 761.

[3] People *v.* Willett, 36 Hun (N. Y.), 500, 506. See also Stover *v.* People, 56 N. Y. 315.

[4] People *v.* Willett, *supra*.

cated, the law will not hold him guiltless." The court were at first struck with the view that the last clause, "unless the defendant can show that his intention was other than his acts indicated, the law will not hold him guiltless," — was erroneous; but they finally concluded that it would be a strained interpretation of the language of the instruction to hold that the court intended the jury to understand that the evidence must come from the defendant, and that they could not consider the whole evidence in the case as showing circumstances of mitigation, or facts tending to reduce the degree of the crime, or even to justify the same.[1] In another jurisdiction the following has been approved: "The law presumes that every sane person contemplates the natural and ordinary consequences of his own voluntary acts, until the contrary appears; and when one man is found to have killed another by acts, the natural and ordinary consequences of which would be death, if the facts and circumstances of the homicide do not of themselves, or the evidence otherwise, show that it was not done purposely, or create a reasonable doubt thereof, it is to be presumed that the death of the deceased was designed by the slayer."[2]

§ 2529. [CONTINUED.] RULE UNDER TEXAS STATUTE. — It is provided by statute in Texas that "the intention to commit an offense is presumed whenever the means used is such as would ordinarily result in the commission of the forbidden act."[3] The insertion of such a section in a code of laws is perhaps a good illustration of the folly of attempting to codify those inferences of fact which juries are empowered to draw, and which they may refuse to draw, from other facts. It has been held improper, in a number of instances, to instruct the jury in the language

[1] People *v.* Langton, 67 Cal. 428.

[2] Approved in State *v.* Achey, 64 Ind. 59. Other instructions stating or applying this principle will be found in Cotton *v.* State, 32 Tex. 626; State *v.* Shelledy, 8 Iowa, 485; Jackson *v.* People, 18 Ill. 270. The presumption of malice from the use of a deadly weapon (*infra*, § 2531), is merely a branch of this presumption, and in some instructions it is so stated. It is scarcely necessary to add that it is a misapplication of this principle, and prejudicial error, to instruct the jury in a capital case, that the accused was aware of all the possible consequences of his act. People *v.* Munn, 65 Cal. 211.

[3] Tex. Penal Code, art. 50.

of this statute; the court reasoning that the presumption of innocence is stronger than the presumption of guilt arising merely from the means used to accomplish the supposed guilty purpose, and that the burden rests upon the State, in a criminal trial, to overcome the presumption of innocence, and to establish the guilt of the accused, by legal evidence, beyond a reasonable doubt.[1] Accordingly, it was held that an instruction in a case of burglary, which, after laying down an hypothesis of fact, proceeded to state that, "the law presumes, in the absence of evidence to explain the taking, that the entry was made with intent to steal such property, although defendant at the time of such entry, may not have known that such property was in such house," — was erroneous, for the reason that intent in criminal cases is a question of fact, the existence of which is not to be presumed by law, but is to be inferred from other facts in evidence.[2] So, in a trial for murder, the following instruction, given after the judge had defined the offense of murder and the distinction between murder in the first degree and murder in the second degree, was held erroneous: "The intention to commit an offense is presumed, whenever the means used is such as would necessarily result in the commission of the forbidden act; and on the trial of any criminal action, when the facts have been proved which constitute the offense, it then devolves upon the accused to establish the facts or circumstances upon which he relies to justify or excuse the prohibited act or omission." The court reasoned that, while it was almost in the exact language of the statute,[3] yet, for reasons above stated, the instruction was erroneous, as being a charge upon the facts of the particular case.[4]

§ 2530. [CONTINUED.] RULE UNDER TEXAS STATUTE WHERE THE INJURY IS CAUSED BY VIOLENCE. — The Penal Code of Texas contains the following provision: "When an injury is caused by violence to the person, the intent to injure is presumed, and it rests with the person inflicting the injury to show the accident or innocent intention. The injury intended may be either bodily pain, constraint, a sense of shame, or other disagreeable emotion of the mind." [5] In criminal prosecutions

[1] Black *v.* State, 18 Tex. App. 124, 129; Jones *v.* State, 13 Tex. App. 1; Thomas *v.* State, 14 Tex. App. 200; Brinkoeter *v.* State, 14 Tex. App. 67; Luera *v.* State, 12 Tex. App. 257; McCandless *v.* State, 21 Tex. App. 411; Lumbkin *v.* State, 12 Tex. App. 341.

[2] Black *v.* State, 18 Tex. App. 124, 129.

[3] Tex. Penal Code, arts. 50, 51.

[4] Luera *v.* State, 12 Tex. App. 257.

[5] Tex. Penal Code, art. 485.

for assault with intent to commit rape, it has been held error to give an instruction drawn in the language of the above statute; chiefly for the reason that such an instruction shifts the burden of proof from the State to the defendant, upon an issue the affirmative of which the State is bound to prove beyond a reasonable doubt.[1]

§ 2531. Malice Implied from an Unjustifiable Killing with a Deadly Weapon. — Where it is shown that a homicide was committed with a deadly weapon, and no circumstances of mitigation, justification or excuse appear, the law implies malice.[2] The malice thus implied is that malice *aforethought* which is necessary to sustain an indictment for murder.[3]

§ 2532. Instructions under this Head. — "In case of homicide, the law presumes malice from use of a deadly weapon, and casts on the defendant the *onus* of repelling the presumption, unless the evidence which proves the killing shows also that it was perpetrated without malice; and whenever malice is shown, and is unrebutted by the circumstances of the killing, or by other facts in evidence, there can be no conviction for any less degree of homicide than murder."[4] - - - - "If a deadly weapon is used, the law infers an intent to kill, or to do grievous bodily harm; and if the circumstances do not show excuse, justification, or immediate provocation, the presumption of malice is conclusively drawn; and a deadly weapon is not one from which a blow could ordinarily produce death, but one from which, as it was used in the particular case, death would probably result."[5] "Malice aforethought may be implied from the kind of weapon used, and the

[1] Thomas *v.* State, 16 Tex. App. 535; Burney *v.* State, 21 Tex. App. 572.

[2] Sweeney *v.* State, 35 Ark. 586; Murphy *v.* People, 37 Ill. 447; State *v.* Brown, 12 Minn. 538; Clarke *v.* State, 35 Ga. 75; State *v.* McDonnell, 32 Vt. 491; Hague *v.* State, 34 Miss. 616; State *v.* Gillick, 7 Iowa, 287; State *v.* Knight, 43 Me. 11; State *v.* Johnson, 3 Jones L. (N. C.) 266; Pennsylvania *v.* McFall, Add. (Pa.) 255. This is declared by statute in Arkansas. Gantt Dig. Ark., § 1252; Sylvester *v.* State, 71 Ala. 18, 25.

[3] State *v.* Zeibart, 40 Ia. 173; 1 Whart. Cr. L., § 944; Com. *v.* Drew, 4 Mass. 396; State *v.* Merrill, 2 Dev. L. (N. C.) 269; Beauchamp *v.* State, 6 Blackf. (Ind.) 299; Kilpatrick *v.* State, 13 Pa. St. 198; State *v.* Decklotts, 19 Ia. 449; Bivens *v.* State, 11 Ark. 455; 1 Greenl. on Ev., § 14; State *v.* Gillick, 7 Ia. 287.

[4] Approved in Jenkins *v.* State, 82 Ala. 25, 27; *s. c.* 2 South. Rep. 150.

[5] *Ibid.*

manner and circumstances attending its use, as the place where the wound was inflicted, the strength or severity of the blow given, and, if the weapon used was one which, taking into consideration the place where the blow was struck and its evident force, would produce a wound which would be likely to result in death, the blow would imply malice aforethought, and if death resulted, it would be murder.[1]

§ 2533. INSTRUCTIONS AS TO IMPLIED MALICE GENERALLY. — "If you find that the injury, if any, was inflicted by the defendant willfully and wantonly, and without any reasonable excuse being shown therefor, then the law will imply malice towards the owner."[2] - - - - "The law itself implies or presumes malice from the commission of any unlawful or cruel act, however suddenly done. Hence, when a homicide is committed without any or without considerable provocation, the law implies or infers malice. In like manner, if a homicide be committed under the immediate influence of sudden anger, rage, resentment, terror or excitement, rendering the mind incapable of cool reflection, the law will imply malice, in the absence of any adequate cause to reduce the offense to manslaughter, as hereinafter explained. Generally speaking, if the killing of a person grow out of a state of sudden mental agitation, produced by whatever cause, or is the sudden, rash condition of a mind incapable, from any cause, of deliberation or reflection, malice will be presumed or implied. So, also, when a human being is killed, and no circumstances are in proof to justify or extenuate, such killing, the law from such killing alone will imply or infer malice."[3]

§ 2534. Presumption Arising from the Recent, Unexplained Possession of Stolen Goods. — It is often said in books of the

[1] Approved in State *v.* Zeibart, 40 Iowa, 173 Other instructions conveying to the jury the same principle, will be found in State *v.* Talbott, 73 Mo. 351; in State *v.* Cain, 20 W. Va. 710 (citing Hill's Case, 2 Gratt. (Va.) 594). See also State *v.* Holme, 54 Mo. 153; State *v.* Hays, 23 Mo. 287; State *v.* Hollenscheit, 61 Mo. 302; State *v.* Starr, 38 Mo. 270; State *v.* Foster, 61 Mo. 549; State *v.* Underwood, 57 Mo. 40; State *v.* Lane, 64 Mo. 320.

[2] Approved in State *v.* Williamson, 68 Iowa, 352 (citing Iowa Code, sec. 3977); State *v.* Harris, 11 Iowa, 414.

[3] The whole change in this case was highly commended by the appellate court. Kemp *v.* State, 13 Tex. App. 562. The next paragraph of the instruction applies in a lucid manner the foregoing principle to the facts of the particular case. Other instructions on the subject of implied malice, will be found in State *v.* Shelledy, 8 Iowa, 483, 495; Cotton *v.* State, 32 Tex. 636; Williams *v.* State, 6 Neb. 335; State *v.* Jones, 78 Mo. 280.

law, that the recent, unexplained possession of stolen goods creates a presumption that the possessor is guilty of the theft.[1] The nature of this presumption is thus stated by Greenleaf: "Possession of the fruits of crime, recently after its commission, is *prima facie* evidence of guilty possession; and if unexplained, either by direct evidence or by the attending circumstances, or by the character and habits of life of the possessor, or otherwise, it is taken as conclusive."[2] This statement has been quoted as the correct expression of the law in many cases.[3]

§ 2535. **Whether this is a Presumption of Law or of Fact.**— The English books ascribe to this presumption the character of a presumption of law, and many American decisions[4] take the same view; which means that, if it is not rebutted by direct evidence, or by circumstances, it becomes conclusive against the prisoner, and that the court should so charge the jury. A more recent and better view ascribes to it the character of a presumption of fact, which means that it is a presumption which the jury are at liberty to draw or not, as they shall see fit, and which hence does not necessarily become conclusive when not rebutted.[5] The writer will not attempt to collect the judicial decisions in support of these opposing views. The rule seems to have had its origin in the days of special verdicts. When, in such a case, the jury would find that the larceny was committed on a given date; that, there-

[1] 2 East P. C. 656; Roscoe Cr. Ev. 18. For the varying terms in which this presumption is stated, see Belote *v.* State, 36 Miss. 97; Unger *v.* State, 42 Miss. 642; Smith *v.* People, 103 Ill. 82; Knickerbocker *v.* People, 43 N. Y. 177; State *v.* Robbins, 65 Mo. 443; State *v.* Bruin, 34 Mo. 537.

[2] 1 Greenl. Ev., § 34.

[3] See, for instance, State *v.* Robbins, 65 Mo. 443.

[4] State *v.* Kelly, 73 Mo. 608; reversing *s. c.* 9 Mo. App. 512. In this case, the three judges of the intermediate appellate court were unanimous in favor of the modern rule, and two of the five judges of the Supreme Court dissented; so that upon this question three appellate judges succeeded in reversing five. Other cases upholding the English rule are, State *v.* Robbins, 65 Mo. 443; State *v.* Butterfield, 75 Mo. 297, 305; State *v.* Crank, 75 Mo. 406. See Burrill Circ. Ev. 446; Best on Ev., § 211; Kelly *v.* Jackson, 6 Pet. (U. S.) 622; United States *v.* Wiggins, 14 Pet. (U. S.) 334; Com. *v.* McGorty, 114 Mass. 299.

[5] Lehman *v.* State, 18 Tex. App. 174.

after, on a given date, the defendant was found in possession of the stolen goods; and that, being so apprehended in the possession of them, he made no explanation of his possession, — the court had nothing to do but to apply the law to the facts; and in ascertaining what the law was which should be applied to the facts thus found, the judges formulated the above rule. Another view of the origin of the rule was thus stated in a case in New Hampshire: "When judges [in England], following the common practice of giving juries their opinions on the facts and the weight of evidence, had charged juries year after year, for a great length of time, that possession of stolen property was presumptive evidence of guilt, or raised a presumption of guilt, this form of judicial instruction finally came to be considered as the law of the land. Whether it was a matter of fact or a matter of law, was practically immaterial. * * * The uniform practice of the judge giving the jury his opinion on any matter of fact on which he saw fit to aid them in any way, was unquestioned."[1] "Here," said Lewis, P. J., "we find, doubtless, the origin of a formula altogether appropriate in the English practice, but totally at variance with our system, which so carefully guards the sovereignty of the jury over the domain of fact."[2]

§ 2536. View that it is a Circumstance merely, for the Consideration of the Jury. — This rule, it is perceived, is a branch of the law of *circumstantial evidence;* and the value of a rule which ascribes to a particular circumstance the character of conclusive evidence of guilt, unless rebutted or explained, may

[1] State *v.* Hodge, 50 N. H. 510, 520.

[2] State *v.* Kelley, 9 Mo. App. 512, 515. "We are constantly moving," said Mr. Justice Doe, "against a great current of authority, towards a trial by jury in which the jury shall be the judges of the fact as fully and completely as the court are judges of the law. The decision in State *v.* Bartlett, 43 N. H. 224, struck out of our books a vast number of ancient and modern authorities, and submitted to the jury, as a question of fact, a subject which had long been studied as a question of law. If, by virtue of that precedent, the law should be still more simplified, and sound constitutional principle still further advanced, the profession would be relieved and justice promoted." State *v.* Hodge, 50 N. H. 510, 526. Where the possession is not *exclusive*, the question whether it establishes guilt is a question for the jury. People *v.* McCallam, 103 N. Y. 587, 596.

well be questioned under a system of trial which commits to the jury in every criminal case the conclusive power of judging of the existence of the criminal intent. The sounder view is, that it is better that twelve men, sitting in the jury box, should apply their collective experience in the affairs of every-day life to such a circumstance, in view of its surroundings, as shown by the evidence, and say whether a conclusion of guilt is to be drawn from it or not. If this view is correct, it must follow that a peremptory instruction, laying down the rule in the language in which it is formulated in the books, must have the effect of depriving them of that independent judgment of the facts, which the law, under our modern system of trial by jury, intends to give them. The sound view is that, whether the recent, unexplained possession of stolen goods is conclusive evidence that the possessor committed the larceny, is a question of fact exclusively for the jury; that such recent, unexplained possession does not create a conclusive presumption of law, which, in the absence of countervailing or explanatory evidence given at the trial, the jury are bound to follow and apply, but that it is an *evidentiary circumstance* merely, which, like other evidentiary circumstances, is to be weighed in the scales of their judgment, and to receive such value as they may think proper to give it. The modern and correct view is accordingly this: "The recent, actual, unexplained possession of stolen goods is a fact from which the jury may infer the complicity of the defendant in the larceny. Whether it is sufficient evidence of guilt is a question for their determination. There may be cases in which it would stand alone, unconnected with any other criminating fact, and from it the jury would not probably infer guilt. Whether the inference is just and reasonable — whether the fact satisfies the minds of the jury as reasonable men, beyond all reasonable doubt, of the guilt of the accused — the court cannot determine." [1]

§ 2537. **Elements which must Concur to Create this Presumption.** — The rule has been formulated thus: "If a party

[1] Underwood *v.* State, 72 Ala. 220, 222; Lehman *v.* State, 18 Tex. App. 174, 178.

in whose exclusive possession goods recently stolen are found, fails reasonably to account for his possession, when called upon to explain, or when the facts are such as to require an explanation from him, the presumption of guilt arising from recent loss and possession, will warrant a conviction, without the necessity of further proof." [1] All decisions, it is assumed, unite in formulating this proposition of law, because it ascribes nothing more to the fact than the character of an *evidentiary circumstance*, of such strength that, if the jury choose to regard it as a sufficient foundation for a conviction, the court would not interfere and set the conviction aside. This, it is perceived, is a very different thing from a statement of the rule which concludes that the presumption becomes conclusive, unless rebutted. If it becomes conclusive, then the jury are bound, as a matter of law, to follow and apply it. In order to support this presumption, three things must concur: 1. The possession must be *personal* and *exclusive*.[2] 2. The possession must be *recent*.[3] 3. The possession must be *unexplained*.[4]

§ 2538. This Presumption partly Rebutted by Evidence of Good Character. — In some jurisdictions it is held that this presumption is not necessarily conclusive where there is evidence of good character, and that an instruction which does not call the attention of the jury to the evidence of good character, in stating to them the effect of the presumption, is too narrow, and will afford ground for reversing a conviction.[5] According to the cases just cited, evidence of good character has a very important bearing in rebutting the presumption.

[1] Lehman *v.* State, 18 Tex. App. 174, 177.

[2] Burrill Circ. Ev. 450; People *v.* Hurley, 60 Cal. 74.

[3] Gablich *v.* People, 40 Mich. 292; Whart Crim. Ev., §§ 759, 760. No length of time can be designated, within which this presumption will arise as a conclusion of law. Engleman *v.* State, 2 Ind. 92, 96.

[4] Thomas *v.* State, 43 Tex. 658; McNair *v.* State, 14 Tex. App. 83; Schindler *v.* State, 15 Tex. App. 394; York *v.* State, 17 Tex. App. 441.

[5] State *v.* Crank, 75 Mo. 406; State *v.* Kennedy, 88 Mo. 341 (affirming *s. c.* 16 Mo. App. 287); State *v.* Kelley, 57 Ia. 646; State *v.* Sidney, 74 Mo. 390; State *v.* Bruin, 34 Mo. 537.

§ 2539. Necessity of Instructing the Jury Concerning the Defendant's Explanation. — It is ruled in Texas, that the statement made by the defendant, when stolen property is first found in his possession, explanatory of his possession of it, if reasonable, probable, and consistent with innocence, casts the burden upon the State of showing that such explanation was false.[1] The rule has been thus formulated: "Any explanation which the party, in whose possession the property is found, may give, as to the nature and extent of his possession, and how he came by it, is admissible in evidence, either for or against him. And if the explanation, when testified to before the jury, seems to them to be reasonable, and is not shown to be false, the presumption against the accused, from his possession, is rebutted, and the jury is not justified in convicting without further evidence against him."[2] Moreover, it is a rule in Texas that, in prosecutions for larceny, denominated "theft" in the statute, where the State relies solely upon such a circumstance as a ground of conviction, the court is bound to state this rule of law in charging the jury, whether requested to do so or not.[3]

§ 2540. Precedents of Instructions under the Modern View. — The following may be regarded as a good model of an instruction under this head, since it was held error to refuse it: "If you find from the evidence that the defendant took the animal mentioned in the indictment, and if you further find that, the first time the defendant's right to the animal was called in question, he gave an explanation of such possession, and that such explanation was reasonable, then you are instructed that it devolves upon the State to prove such explanation false,

[1] Garcia *v.* State, 26 Tex. 209; Galloway *v.* State, 41 Tex. 289; McCoy *v.* State, 44 Tex. 616; Johnson *v.* State, 12 Tex. App. 385; Sitterlee *v.* State, 13 Tex. App. 587; Ross *v.* State, 16 Tex. App. 554; Perry *v.* State, 41 Tex. 483; Miller *v.* State, 18 Tex. App. 34, 38.

[2] Perry *v.* State, 41 Tex. 483, 486; Hannah *v.* State, 1 Tex. App. 579. See also, on the general doctrine, Thompson *v.* State, 43 Tex. 268; Reg. *v.* Exall, 4 Fost. & F. 922; Reg. *v.* Crowhurst, 1 Carr. & K. 370; State *v.* Williams, 2 Jones L. (N. C.) 194; Sartorious *v.* State, 24 Miss. 602; Graves *v.* State, 12 Wis. 591; Hall *v.* State, 8 Ind. 439; People *v.* Kelley, 28 Cal. 423; Knickerbocker *v.* People, 43 N. Y. 177.

[3] Miller *v.* State, 18 Tex. App. 34, 38; Sullivan *v.* State, 18 Tex. App. 623; Schultz *v.* State, 20 Tex. App. 308; Windham *v.* State, 19 Tex. App. 413.

and a failure to do so will entitle the defendant to an acquittal." [1] - - - - "The court instructs the jury that they are not bound to believe all the statements made by the defendant in explanation of his possession of recently stolen property, if you find he was in possession of property which had been recently stolen; but you are to weigh the evidence of the defendant as you weigh all other evidence in the case, and give credit only to such evidence as commends itself to your judgment." [2] - - - - "If the jury believe, from the evidence, that the defendant was in possession of the orders of the Townly's or any part of them, as charged in the indictment, within a period of four or five months after the time they are alleged to have been stolen, and that they were stolen on or about the time alleged, and the defendant has failed to show how he came by them, he having it in his power to explain his possession if it was an honest one, such possession is a circumstance from which the jury are authorized to raise a presumption, in connection with other circumstances in the case, to weigh against the defendant." [3]

§ 2541. PRECEDENTS OF INSTRUCTIONS UNDER THE ENGLISH RULE. — Under the English rule, which ascribes to such a circumstance the effect of a conclusive presumption of guilt unless rebutted, the following instruction has, after much consideration, been approved: "Where property has been stolen, and recently thereafter the same property, or any part thereof, is found in the possession of another, such person is presumed to be the thief, and if he fails to account for his possession of such property, in a manner consistent with his innocence, this presumption becomes conclusive against him." [4] - - - - In another case in the same State, an instruction was approved which simply told the jury that "the recent possession of stolen property, unless satisfactorily explained, is *prima facie* evidence of guilt." [5] In like manner, the following instruction was approved in Iowa: "It is a rule of law that, when property has been recently stolen and is shortly thereafter found in the

[1] Windham *v.* State, 19 Tex. App. 413, 422.

[2] Approved in State *v.* Groning, 33 Kan. 21.

[3] Approved in Engleman *v.* State, 2 Ind. 92, 96; and again in Hall *v.* State, 8 Ind. 439, 442. In the last case, it was ruled that an instruction ought not to be so framed as to advise the jury that they *should* draw the presumption from the circumstance of recent unexplained possession.

[4] State *v.* Kelly, 73 Mo. 608; reversing *s. c.* 9 Mo. App. 512; overruling State *v.* Sidney, 10 Mo. App. 579. For another instruction of a similar character, where the presumption was called a "presumption of law," see State *v.* Hill, 65 Mo. 85.

[5] State *v.* Butterfield, 75 Mo. 301.

exclusive possession of a party, such fact is *prima facie* evidence of the guilt of such party so found in possession, of the felonious taking of said property, unless to the jury such possession is satisfactorily explained. If, therefore, you find from the evidence," etc., the court proceeding to apply to the facts in evidence the principle thus announced.[1] In discussing this instruction, the court say: "The law holds that the presumption in question, unless overcome, will authorize a conviction. It is a presumption recognized by the law, and may, therefore, be termed a presumption of law. The term presumption of fact implies that, from certain facts, the law will raise a presumption. Either of these terms, presumption of law or presumption of fact, may be used to express the same thought, for they are identical in meaning."[2] The following instruction, approved in Kansas, would probably be held proper even under the modern rule, since it allows the jury to infer guilt from the circumstance or not; but it would be more in conformity with the modern rule, if it distinctly admonished them that they were not bound to draw such an inference, but that the circumstance was merely evidence for their consideration, from which they might come to such conclusion, or not, as they should see fit: "The possession of property, proven to have been recently stolen, is evidence from which the jury may infer that the person in whose possession such property is found is guilty of the theft, provided that such possession is not explained; and so, when a certain amount of property is proven to have been stolen at the same time, and soon thereafter a portion of such stolen property is found in possession of the defendant, such possession, if unexplained, is evidence from which the jury may infer that the defendant is guilty of the larceny of the entire amount of the property then proven to have been stolen."[3]

§ 2542. Instance of such an Instruction where the Defense was an Alibi. — The following, from a recent case in Nebraska, seems

[1] State *v.* Kelley, 57 Ia. 645.

[2] *Ibid.* 646. The court cite State *v.* Richart, 57 Ia. 245; State *v.* Hessians, 50 Ia. 135; State *v.* Taylor, 25 Ia. 273, 275.

[3] Approved in State *v.* Henry, 24 Kan. 460. For instances of instructions which have been disapproved, see Payne *v.* State, 21 Tex. App. 184; Gonzales *v.* State, 18 Tex. App. 449 (where the instruction seems to have been a perfectly good one, even under the Texas rule). For instructions applying this rule to the recent, unexplained possession of goods which have been *burglariously* stolen, see State *v.* Tilton, 63 Ia. 118; State *v.* Rivers, 68 Ia. 616; with which compare State *v.* Shaffer, 59 Ia. 290; State *v.* Golden, 49 Ia. 49.

to be a good model of an instruction conforming to the modern rule above stated: "It is a rule of evidence in trials for the larceny of goods, that the finding of the stolen goods in the exclusive possession of the accused, very recently after the larceny was committed, is presumptive evidence that he stole them; and in this case, if the goods mentioned in the indictment were stolen, and, shortly after the larceny, they, or a portion of them, were found in the exclusive possession of the accused, the presumption arising from such possession is that the defendant stole them. But the defendant having introduced evidence to show that he, at the time of the larceny was at another place, and could not have perpetrated the crime, the burden still rests upon the prosecution to prove that the defendant did commit said larceny and is guilty, beyond a reasonable doubt." [1]

§ 2543. As to the Presumption of Guilt from the Flight of the Accused. — It is often inaccurately said that the flight of the accused creates a presumption of his guilt, and this presumption is sometimes inadvertently dealt with as though it were a presumption of law. But it belongs to that class of presumptions which are generally classified as presumptions of fact. If it were a presumption of law, the jury would be bound to draw it in every case of flight, and the court might so instruct them; whereas, it is merely a *circumstance* tending to increase the probability of the defendant being the guilty person, which, on sound principle, is to be weighed by the jury like any other evidentiary circumstance. In cases where the evidence renders it proper, the judge is at liberty to give the jury advice touching the nature of this presumption. The following, approved in a recent case, will, with some corrections of phraseology, be a good model: "The flight of a person immediately after the commission of a crime, or after a crime is committed with which he is charged, is a circumstance in establishing his guilt, not sufficient of itself to establish his guilt, but a circumstance which the jury may consider in determining the probabilities for or against him, — the probability of his guilt or innocence. The weight to which that circumstance is entitled is a matter for the jury to determine, in connection with all the facts called out in the case." [2] The fol-

[1] McLain *v.* State, 18 Neb. 154, 158.

[2] People *v.* Forsythe, 65 Cal. 102.

lowing, from another recent case, is more concise and perhaps better: "Evidence has been introduced as to an attempted escape from jail, by the defendant, while in the custody of the sheriff of this county on this charge. If you find from the evidence that defendant did thus attempt to escape from custody, this is a circumstance to be considered by you in connection with all the other evidence, to aid you in determining the question of his guilt or innocence."[1] Often in Missouri, where the English idea concerning presumptions in criminal cases generally prevails, the following form of instruction upon this subject is used, — ending, it is perceived, in submitting the fact as a circumstance to the consideration of the jury: "The court instructs the jury that flight raises the presumption of guilt, and if you believe from the evidence that the defendant, after having shot and killed Minnick, as charged in the indictment, fled the country and tried to avoid arrest and trial, you may take that fact into consideration in determining his guilt or innocence."[2]

[1] Approved in Anderson *v.* State, 104 Ind. 467, 472.

[2] Approved in State *v.* Gee, 85 Mo. 647. A similar instruction was given in State *v.* Brooks, 92 Mo. 542, 556, and the prisoner was hanged.

TITLE VII.

CUSTODY AND CONDUCT OF THE JURY.

CHAPTER LXX. — OF THE CONDUCT OF THE JURY.
CHAPTER LXXI. — OF BOOKS AND PAPERS IN THE JURY ROOM.
CHAPTER LXXII. — OF IMPROPER METHODS OF ARRIVING AT THE VERDICT.
CHAPTER LXXIII. — OF THE MISCONDUCT OF JURIES AS GROUND OF NEW TRIAL.

CHAPTER LXX.

OF THE CONDUCT OF THE JURY.

SECTION

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§ 2548. Custody of the Jury Pending the Trial. — If the trial last more than a day it is usual in civil cases,[1] in cases of misdemeanor,[2] and in some jurisdictions in cases of non-capital felony even,[3] for the court to permit the jury to separate for needed rest and refreshment, and even to retire to their homes over night, after admonishing them to hold no communication with any one touching the case on trial;[4] and this the court has power to do in the exercise of a sound *discretion*.[5] Although some States have extended this rule to cases of felony,[6] even

[1] Stancell *v.* Kenan, 33 Ga. 56; Downer *v.* Baxter, 30 Vt. 467, 474; Brandin *v.* Grannis, 1 Conn. 402, note; Wilson *v.* Abrahams, 1 Hill (N. Y.), 207.

[2] Rex *v.* Woolf, 1 Chit. R. 401; Goode *v.* State, 2 Tex. App. 520; Cannon *v.* State, 3 Tex. 32; Rex *v.* Kinnear, 2 Barn. & Ald. 462; Bebee *v.* People, 5 Hill (N. Y.), 32.

[3] Evans *v.* State, 7 Ind. 271; Caw *v.* People, 3 Neb. 357, 371; State *v.* Hornsby, 8 Rob. (La.) 554; State *v.* Desmond, 5 La. Ann. 399; State *v.* Frank, 23 La. Ann. 213; State *v.* Evans, 21 La. Ann. 321.

[4] The record need not show that the judge so *admonished* them, but it will be presumed that he did his duty. Evans *v.* State, 7 Ind. 271; Caw *v.* People, 3 Neb. 357. But the contrary has been held, even in civil cases, where the trial was before justices of the peace. Van Doren *v.* Walker, 2 Caines (N. Y.), 373; Beekman *v.* Wright, 11 Johns. (N. Y.) 442. It has been held in Illinois (McKinney *v.* People, 7 Ill. 540, 553), in Virginia (Bennett *v.* Com., 8 Leigh (Va.), 745, 751), and denied in Indiana (Jones *v.* State, 2 Blackf. (Ind.) 475, 479), that the record need not disclose the fact that the jury were kept together, or even that they were placed in charge of a sworn officer. But see Anderson *v.* State, 28 Ind. 22, 25. And compare Dias *v.* State, 7 Blackf. (Ind.) 20. Where the jury do not retire, it is not necessary that the record should show that an officer was *sworn* to attend them. Fink *v.* Hall, 8 Johns. (N. Y.) 437; Hatch *v.* Mann, 9 Wend. (N. Y.) 262; Meyer *v.* Foster, 16 Wis. 294. Taking the jury to the country for recreation, when no ground of new trial: State *v.* Perry, Busbee (N. C.), 330.

[5] Cases *supra*.

[6] Berry *v.* State, 10 Ga. 511; McCreary *v.* Com., 29 Pa. St. 323, 327; State *v.* Williamson, 42 Conn. 261; State *v.* Gillick, 10 Iowa, 98. Compare State *v.* Wart, 51 Iowa, 587.

where the punishment was death,[1] yet the better opinion, sanctioned by the prevailing practice, is that, upon such trials, the jury must, during the recesses of the court, be kept together in charge of a disinterested[2] officer,[3] who is generally

[1] State *v.* Anderson, 2 Bailey (S. C.), 565; Bilansky *v.* State, 3 Minn 427; State *v.* Babcock, 1 Conn. 401; People *v.* Montgomery, 13 Abb. Pr. (N. s.) 208; Sargent *v.* State, 11 Ohio, 472; Davis *v.* State, 15 Ohio, 72, 83; State *v.* Dougherty, 1 West. L. J. 271; State *v.* Wallahan, Tappan (Oh.), 52; State *v.* Engles, 13 Ohio, 490; Parker *v.* State, 18 Oh. St. 88; Cantwell *v.* State, 18 Oh. St. 477; Thomp. & M. Jur., § 318, sub-sec. 8. For the rule in Texas, see Thomp. & M. Jur., § 318, sub-sec. 9; Tex. Code Crim. Proc. 1879, art. 687; Goode *v.* State, 2 Tex. App. 520; Wakefield *v.* State, 41 Tex. 556; Nelson *v.* State, 32 Tex. 71; Jenkins *v.* State, 41 Tex. 128; Brown *v.* State, 38 Tex. 482; Early *v.* State, 1 Tex. App. 248, 273; Warren *v.* State, 9 Tex. App. 619, 631; Soria *v.* State, 2 Tex. App. 297; Cox *v.* State, 7 Tex. App. 1; Marnoch *v.* State, 7 Tex. App. 269, 272; Gilleland *v.* State, 44 Tex. 356; Davis *v.* State, 3 Tex. App. 91, 101 (modifying Jones *v.* State, 13 Tex. 168, which was based upon Hines *v.* State, 8 Humph. (Tenn.) 597). The rule in New York seems to be unsettled. See Thomp. & M. Jur., § 318, sub-sec. 7; Stephens *v.* People, 19 N. Y. 549 (affirming *s. c.* 4 Park. Cr. (N. Y.) 396, 495; People *v.* Douglass, 4 Cow. (N. Y.) 26; People *v.* Ransom, 7 Wend. (N. Y.) 423; Eastwood *v.* People, 3 Park. Cr. (N. Y.) 25; New York Code of Crim. Proc. 1881, § 414. In Wisconsin, it is settled that convictions in capital cases cannot be sustained, where the jury has been permitted to separate during the trial, "unless it appears that the separation of the jurors was not followed by improper conduct on their part, nor by any circumstances calculated to exert an improper influence on the verdict." State *v.* Dolling, 37 Wis. 396; Rowan *v.* State, 30 Wis. 129; Keenan *v.* State, 8 Wis. 132. Compare Crockett *v.* State, 52 Wis. 211; *s. c.* 12 Cent. L. J. 479. For the rule in Missouri, see Thomp. & M. Jur., § 318, sub-sec. 6; State *v.* Bell, 70 Mo. 633; State *v.* Brannon, 45 Mo. 329; State *v.* Harlow, 21 Mo. 446; State *v.* Igo, 21 Mo. 459; State *v.* Barton, 19 Mo. 227; State *v.* Mix, 15 Mo. 153; Whitney *v.* State, 8 Mo. 165; 1 Rev. Stat. Mo. 1879, § 1966. As to the rule in Illinois, see Thomp. & M. Jur., § 318, sub-sec. 2; Russell *v.* People, 44 Ill. 508; Jumpertz *v.* People, 21 Ill. 411; McKinney *v.* People, 7 Ill. 540, 553; Adams *v.* People, 47 Ill. 381; Reins *v.* People, 30 Ill. 256; Pate *v.* People, 8 Ill. 644. Compare State *v.* M'Elmurray, 3 Strobh. L. (S. C.) 33; State *v.* Parrant, 16 Minn. 178, 181; State *v.* Wart, 51 Ia. 587.

[2] An officer who has a suit pending, at the same term of court should not be selected. State *v.* Judge, 11 La. Ann. 79; Harbour *v.* Scott, 12 La. Ann. 152.

[3] Usually the sheriff or his deputy, though the court may select and swear a constable for that purpose in a civil proceeding before a justice of the peace (Smith *v.* Williamson, 11 N. J. L. 313), or may appoint a special officer where the sheriff is interested and there is no coroner (Harbour *v.* Scott,

sworn,[1] in conformity with the formula prescribed by Lord Kenyon in an old case,[2] "well and truly to keep the jury, and neither to speak to them himself, nor to suffer any other person to speak to them, touching any matter relating to this trial."[3] The importance

12 La. Ann. 152), and the appointment of a minor would not be ground for a new trial, but he would be an officer *de facto*. McCann *v.* People, 88 Ill. 103. And it has been held no ground for a new trial, that the judge himself assumed the personal custody of a juror, who had separated from his fellows for a short time during a recess of the court. Phillips *v.* Com., 19 Gratt. (Va.) 485, 535 (citing Barrett *v.* State, 1 Wis. 175).

[1] It is error, in cases of felony, to permit them to retire in charge of an unsworn officer. But in Tennessee, where the jury retired unaccompanied by an officer, it was held not to be sufficient ground for a new trial. Jarnagin *v.* State, 10 Yerg. (Tenn.) 529; Gibbons *v.* People, 23 Ill. 518; McIntyre *v.* People, 38 Ill. 514; Lewis *v.* People, 44 Ill. 452; McCann *v.* State, 9 Smed. & M. (Miss.) 465; Hare *v.* State, 4 How. (Miss.) 187; Jones *v.* State, 2 Blackf. (Ind.) 475, 478; Com. *v.* Shields, 2 Bush (Ky.), 81; Brucker *v.* State, 16 Wis. 333. See 1 Chit. Cr. L. 628. The rule was applied in a civil case in Staley *v.* Barhite, 2 Caines (N. Y.), 221. It was held in Texas in 1878 that, although the party who had charge of the jury during a capital trial was neither a sworn officer of the county nor specially sworn for the occasion, but was related to the person for whose murder the accused was on trial, there was no ground for a new trial, no prejudice appearing. Baker *v.* State, 4 Tex. App. 223; citing Slaughter *v.* State, 24 Tex. 410. The sheriff, being once sworn in the particular case, need not be again sworn for every adjournment or recess of the court. Com. *v.* Shields, 2 Bush (Ky.), 81. Nor is it indispensably necessary that a sworn officer of the law, as a sheriff (Bennett *v.* Com., 8 Leigh (Va.), 745), or a constable (Davis *v.* State, 15 Ohio, 72, 83), should be specially sworn. Unless it affirmatively appear that the jury left the court room to consult upon their verdict, it will be no ground of error that it does not appear that an officer was sworn to attend them. Fink *v.* Hall, 8 Johns. (N. Y.) 437; Hatch *v.* Mann, 9 Wend. (N. Y.) 262; Meyer *v.* Foster, 16 Wis. 294. Compare Smith *v.* State, 63 Ga. 169. One view is that the record must affirmatively show, in a capital case, that the jury were sworn according to law, and that when the record undertakes to recite the oath and recites a different oath from that prescribed by the statute, a new trial will be granted. Spain *v.* State, 64 Tenn. (8 Baxt.) 514; *ante*, § 108. It is sufficient that the officer is sworn to take charge of the jury and return them from time to time under the orders of the court, during the continuance of the trial. It is not necessary that the record should show that the same officer was sworn anew every time the jury retired, provided it show that, whenever they retired, they did so under the charge, "of their said sworn officer." Johnson *v.* State, 64 Tenn. (8 Baxt.) 450.

[2] Rex *v.* Stone, 6 T. R. 527.

[3] This is the formula prescribed by statute in Missouri. 1 Rev. Stat. Mo. 1879, § 1910. See further as to the form of the oath, Thomp. & M

of this rule in cases of felony, is seen in the fact that a discharge and consequent dispersion of the jury without imperious necessity operates as an acquittal and prevents another trial before another jury,[1] unless done without the authority of the court;[2] while, as hereafter seen, their separation without being discharged from the case, even with the consent of the defendant,[3] unless in charge of an officer to prevent communications with them, may be ground of new trial,[4] except in civil cases.[5] And where they are permitted to separate pending the trial, it is usual to *admonish* them to hold communication with no one touching the case, and in some jurisdictions this is enjoined by statute;[6]

Jur., § 326; 1 Bish. Cr. Proc., § 991; Gude's Crown Prac. 584; 1 Chit. Cr. L. 632; Starr & Curtis's Rev. Stat. Ill. 1887, § 495.

[1] Com. *v.* Cook, 6 Serg. & R. (Pa.) 577; McCorkle *v.* State, 14 Ind. 40. Compare Hardy's Case (1794), 24 How. St. Tr. 414.

[2] Williams *v.* State, 45 Ala. 57; Wyatt *v.* State, 1 Blackf. (Ind.) 257. Compare People *v.* Reagle, 60 Barb. (N. Y.) 527, 544; State *v.* Carrigues, 1 Hayw. (N. C.) 241; Kinloch's Case, Foster, 16; Com. *v.* Cook, 6 Serg. & R. (Pa.) 577.

[3] Brown *v.* State, 38 Tex. 482; Porter *v.* State, 1 Tex. App. 394. So, of his failure to object. State *v.* Parrant, 16 Minn. 178, 181. In some States the rule is relaxed, either by statute or judicial decision, even in cases of felonies, so that the prisoner's consent to the separation is a waiver of the irregularity. Evans *v.* State, 7 Ind. 271; McCorkle *v.* State, 14 Ind. 41, per Perkins, J.; State *v.* Mix, 15 Mo. 153, 157; Quinn *v.* State, 14 Ind. 589; Anderson *v.* State, 28 Ind. 22, 25. Compare People *v.* Kelly, 46 Cal. 357. In others, it has been held cured by the fact that the prisoner requested the indulgence (Bebee *v.* People, 5 Hill (N. Y.), 32), or tendered his consent without solicitation. Stephens *v.* People, 19 N. Y. 549, 563. In Texas, under a statute (Pasch. Dig., art. 3070; Tex. Code Cr. Proc. 1879, § 687), the prisoner himself may consent to the separation, but his counsel cannot. Brown *v.* State, 38 Tex. 482. In Illinois, it has been held that the prisoner's consent may be presumed. Pate *v.* People, 8 Ill. 644. In Georgia, where a separation of the jury is known to the defendant in a criminal trial, but he does not bring the fact to the attention of the trial court until after verdict, it is no ground for a new trial. Carter *v.* State, 56 Ga. 463.

[4] Rex *v.* Kinnear, 2 Barn. & Ald. 462, 464; Hardy's Case, 24 How. St. Tr. 414, 418; Wiley *v.* State, 1 Swan (Tenn.), 256; Wesley *v.* State, 11 Humph. (Tenn.) 502; Peiffer *v.* Com., 15 Pa. St. 468; State *v.* Populus, 12 La. Ann. 710; People *v.* Shafer, 1 Utah Ter. 260; Berry *v.* State, 10 Ga. 511, 524; State *v.* Hornsby, 32 La. Ann. 1268 (capital cases).

[5] Riggins *v.* Brown, 12 Ga. 272; Adkins *v.* Williams, 23 Ga. 222; Stix *v.* Pump, 37 Ga. 332; McIntosh *v.* Smith, 2 La. Ann. 756.

[6] 1 Rev. Stat. Ohio 1880, § 5193.

though it is not necessary to repeat this admonition at each subsequent separation.[1]

§ 2549. Separation of the Jury, when Ground for New Trial and when Not. — From the foregoing, it follows that the mere fact of the separation of the jury pending a civil trial,[2] or the trial of a misdemeanor,[3] in some jurisdictions without reference to the nature of the case,[4] especially where the separation consists of the temporary absence of a single juror,[5] unless there

[1] Stewart *v.* Randolph, 2 Cin. Sup. 132.

[2] Smith *v.* Thompson, 1 Cow. (N. Y.) 221; Brandin *v.* Grannis, 1 Conn. 402, note; Downer *v.* Baxter, 30 Vt. 467; Evans *v.* Foss, 49 N. H. 490; Anthony *v.* Smith, 4 Bosw. (N. Y.) 503; Polaski *v.* Ward, 2 Rich. L. (S. C.) 119; Morrow *v.* Comrs., 21 Kan. 484, 516; Eich *v.* Taylor, 20 Minn. 378; Wright *v.* Burchfield, 3 Ohio, 54; Armleder *v.* Lieberman, 33 Ohio St. 77; Carter *v.* Plate Glass Co., 85 Ind. 180, 189. That objection to a separation of the jurors cannot be taken by a motion in *arrest of judgment*, see Franklin *v.* State, 29 Ala. 14.

[3] Rex *v.* Kinnear, 2 Barn. & Ald. 462.

[4] Rex *v.* Kinnear, 2 Barn. & Ald. 462; Rex *v.* Woolf, 1 Chit. Rep. 401; Ragland *v.* Wills, 6 Leigh (Va.), 1; Burns *v.* Paine, 8 Tex. 159; Brandin *v.* Grannis, 1 Conn. 402; State *v.* O'Brien, 7 R. I. 331; Berry *v.* State, 10 Ga. 511, 524; Nelson *v.* State, 32 Tex. 71; State *v.* Lytle, 5 Ired. L. 58, 62; Wakefield *v.* State, 41 Tex. 556; Jack *v.* State, 26 Tex. 1; State *v.* Turner, 25 La. Ann. 573; State *v.* Madoil, 12 Fla. 151; State *v.* Fox, Ga. Dec., pt. 1, p. 35; Heiser *v.* Van Dyke, 27 Iowa, 359; Cook *v.* Walters, 4 Iowa, 72; Miller *v.* Mabon, 6 Iowa, 456; Smith *v.* Thompson, 1 Cow. (N. Y.) 221; Stutsman *v.* Barringer, 16 Ind. 363; Porter *v.* State, 2 Ind. 435; Edrington *v.* Kiger, 4 Tex. 89; State *v.* Igo, 21 Mo. 459; Whitney *v.* State, 8 Mo. 165; State *v.* Harlow, 21 Mo. 446; State *v.* Mix, 15 Mo. 153; Crane *v.* Sayre, 6 N. J. L. 110. But see Rev. Stats. Mo. 1879, § 1966. The rule has been laid down in the following cases, chiefly capital: Adams *v.* People, 47 Ill. 376; Reins *v.* People, 30 Ill. 256, 273; Pratt *v.* State, 56 Ind. 179; Barlow *v.* State, 2 Blackf. (Ind.) 114; Creek *v.* State, 24 Ind. 151; State *v.* Tighlman, 11 Ired. L. (N. C.) 513; People *v.* Douglass, 4 Cow. (N. Y) 26, 38; State *v.* Babcock, 1 Conn. 401; Coker *v.* State, 20 Ark. 53; Bilansky *v.* State, 3 Minn. 427, 431; State *v.* Miller, 1 Dev. & B. (N. C.) 500, 509; People *v.* Bonney, 19 Cal. 426; State *v.* Brannon, 45 Mo. 329; State *v.* Barton, 19 Mo. 227; Caw *v.* People, 3 Nev. 357; State *v.* Harris, 12 Nev. 414.

[5] Milo *v.* Gardiner, 41 Me. 549; Perkins *v.* Ermel, 2 Kan. 325; Burrill *v.* Phillips, 1 Gall. (U. S.) 360; Alexander *v.* Dunn, 5 Ind. 122, 125; Graves *v.* Monet, 7 Smed. & M. (Miss.) 45; Oram *v.* Bishop, 12 N. J. L. 153; Ex parte Hill, 3 Cow. (N. Y.) 355; Edwinton *v.* Kiger, 4 Tex. 89. *Contra*, Offit *v.* Vick, Walker (Miss.), 99; Howle *v.* Dunn, 1 Leigh (Va.), 455.

are other circumstances of misconduct or abuse,[1] will be no ground for a new trial. But in other jurisdictions, the opposing rule, applied for the most part in capital cases, obtains, that such a separation creates a *presumption against the integrity of the verdict*, and will be ground for a new trial, unless it affirmatively appear that the jurors were not thereby subjected to any improper influence.[2] The state fails to do this, when it does not account for all the period of his separation from his fellows, if it was at a time and place where he *might* have been improperly approached.[3] The difference between these two rules, when analyzed, appears to consist in the measure or degree of proof required to overthrow the verdict.[4] Under the former rule, the *burden* is on the party claiming the new trial to

[1] Shepherd *v.* Baylor, 5 N. J. L. 827; Short *v.* West, 30 Ind. 367. Compare Davis *v.* State, 35 Ind. 496.

[2] McCann *v.* State, 9 Smed. & M. (Miss.) 465; Woods *v.* State, 43 Miss. 364; Cornelius *v.* State, 12 Ark. 782, 809; Coker *v.* State, 20 Ark. 53, 60; Commonwealth *v.* McCaul, 1 Va. Cas. 271, 301; Overbee *v.* Commonwealth, 1 Rob. (Va.) 756; Westmoreland *v.* State, 45 Ga. 225, 282; State *v.* Sherbourne, Dudley (Ga.), 28; McLain *v.* State, 10 Yerg. (Tenn.) 241; Stone *v.* State, 4 Humph. (Tenn.) 27, 38; Cochran *v.* State, 7 Humph. (Tenn.) 544; Hines *v.* State, 8 Humph. (Tenn.) 597; Maher *v.* State, 3 Minn. 444, 447; Phillips *v.* Commonwealth, 19 Gratt. (Va.) 485; People *v.* Backus, 5 Cal. 275 (overruled in People *v.* Bonney, 19 Cal. 426); Russell *v.* People, 44 Ill. 508; Jumpertz *v.* People, 21 Ill. 411; McKinney *v.* People, 7 Ill. 540, 553; McLean *v.* State, 8 Mo. 153; Eastwood *v.* People, 3 Park. Cr. (N. Y.) 25, 48 (overruled in Stephens *v.* People, 19 N. Y. 549); State *v.* Frank, 23 La. Ann. 213; People *v.* Shafer, 1 Utah Ter. 260; Com. *v.* Shields, 2 Bush. (Ky.), 81; State *v.* Dolling, 37 Wis. 396; Rowan *v.* State, 30 Wis. 129; Keenan *v.* State, 8 Wis. 132; Madden *v.* State, 1 Kan. 341; Wood *v.* State, 34 Ark. 341; Obear *v.* Gray, 68 Ga. 182, 186; Westley *v.* State, 11 Humph. (Tenn.) 502; Stone *v.* State, 4 Humph. (Tenn.) 38; Love *v.* State, 62 Tenn. (6 Baxt.) 154. Compare Griffee *v.* State, 65 Tenn. (1 Lea) 41; Sam *v.* State, 1 Swan (Tenn.), 61. When, therefore, the officer had the jury seated on the side of a street separated into squads of three or more, with persons standing around and passing by, and he at a distance from them turned his back to them, and during that time a drunken bystander spoke to a juryman, but did not mention the case, the court strained the rule so far as to grant a new trial. Love *v.* State, 62 Tenn. (6 Baxt.) 154.

[3] Durr *v.* State, 53 Miss. 425.

[4] Phillips *v.* Commonwealth, 19 Gratt. (Va.) 485, 540; Keenan *v.* State, 8 Wis. 132, 138; State *v.* Prescott, 7 N. H. 287, 292; Jumpertz *v.* People, 21 Ill. 375, 413; Eastwood *v.* People, 3 Park. Cr. (N. Y.) 48; McCann *v.* State, 9 Smed. & M. (Miss.) 465.

show that prejudice resulted from the separation; but under the latter rule, the burden is on the opposite party to show that no prejudice resulted from it.[1] Under either of these rules, there is no distinction in principle between the case where the separation takes place with the permission of the court, and where it takes place without such permission; in either case it is the fact of separation and the circumstances surrounding it which must form the subject of the inquiry.[2] The fact that, under the latter rule, the separating juror was attended by the proper officer may, under circumstances, rebut the presumption of prejudice and prevent a new trial.[3] But, under either view, the separation of a juror from his fellows which will be ground for a new trial, refers to *improper separations*, and not to a retirement rendered necessary by habits of decency, expressly authorized by the court and guarded by a sworn officer. For one of the jurors to retire, with leave of the court and guarded by a bailiff, to attend a *call of nature*, his fellows remaining in the box, and he being absent no longer than necessary, it is not an illegal or irregular separation, even in the trial of a capital felony, and furnishes no ground for new trial.[4] Nor will such a separation, while the jury are deliberating, be ground of new trial, if the separating juror was accompanied by a deputy sheriff, and spoke to no one while he was out.[5] Some courts have taken a distinction in this

[1] State *v.* Cucuel, 31 N. J. L. 249, 260; Keenan *v.* State, 8 Wis. 132, 138; Jumpertz *v.* People, 21 Ill. 375, 413. And in one case it has been held that this must be shown in a criminal case beyond a reasonable doubt (State *v.* Prescott, 7 N. H. 287, 292), though this conclusion is doubtful.

[2] Parsons *v.* Huff, 38 Me. 137; State *v.* Dolling, 37 Wis. 396.

[3] Thomas *v.* Com., 2 Va. Cas. 479. See also Com. *v.* McCaul, 1 Va. Cas. 271, 302.

[4] Neal *v.* State, 64 Ga. 272.

[5] State *v.* Johnson, 30 La. Ann. 921. See also State *v.* Tucker, 10 La. Ann. 501. It has been held no abuse of discretion for a trial court to refuse a motion for a new trial in a capital case, on the ground that the jury, before and after the final submission of the cause, were permitted to sleep at night in separate rooms, unlocked and unguarded, and that one of them, a colored man, was permitted to take his meals with other colored men, in a separate room from the other jurors, when it was shown that there was an open door between the two rooms, and that the colored juror was under the observation of the sheriff, and was not approached or talked to on the subject of the trial. Wright *v.* State, 35 Ark. 640. Compare Wilder *v.* State, 29 Ark.

regard between *capital* and *non-capital* felonies, applying the second rule to the former, and the first rule to the latter.[1]

§ 2550. Separation before being Sworn and Charged. — Another distinction relates to the stage of the trial at which the separation of the jurors will have a vitiating effect, — most of the courts agreeing that such a separation, before the jurors are sworn and charged with the case, will not be ground for a new trial;[2] and, while the jury are being impaneled, it is consequently no error to allow those who have been selected and sworn to separate without being in charge of an officer.[3]

294. Where testimony was given while one of the jurors was absent, and, on the attention of the court being called to the matter, the same testimony was repeated in the hearing of the twelve jurors, and it further appeared that the testimony was not in itself material, it was held that the irregularity was no ground for a new trial. State *v.* Parson, 7 Nev. 57.

[1] State *v.* Madoil, 12 Fla. 151, 159. In Louisiana, this distinction is admitted to the extent that, in capital cases, a separation without the consent of the prisoner will be fatal without more, after the jury have been sworn (State *v.* Hornsby, 8 Rob. (La.) 554; State *v.* Desmond, 5 La. Ann. 399; State *v.* Frank, 23 La. Ann. 213; State *v.* Evans, 21 La. Ann. 321; State *v.* Hornsby, 32 La. Ann. 1268); though in non-capital cases the court may, in its discretion, permit a separation at any time before the jury have received the charge of the court (State *v.* Crosby, 4 La. Ann. 434); while in all criminal cases, capital or otherwise, no separation, after the jury have received the charge of the court, is tolerated. State *v.* Populus, 12 La. Ann. 710. Compare State *v.* Hunt, 4 La. Ann. 438; State *v.* Tucker, 10 La. Ann. 501; State *v.* Brette, 6. La. Ann. 652, 657.

[2] State *v.* Burns, 33 Mo. 483; Epes' Case, 5 Gratt. (Va.) 676, 681; Tool *v.* Com., 11 Leigh (Va.), 714.

[3] Marshall, C. J., in Burr's Case, 1 Burr Tr. 382; Martin *v.* Com., 2 Leigh (Va.), 745; State *v.* Burns, 33 Mo. 483. It has even been held, in a trial for a non-capital felony, that a momentary separation of a juror before any evidence had been adduced, is no ground for new trial; and the court said that no case had been found in which a separation of the jury before any evidence had been introduced had been held sufficient to set aside the verdict. Martin *v.* Com., 2 Leigh (Va.), 745. In Hardy's Case, 24 How. St. Tr. 199, it is said by Chief Justice Eyre: "It is no doubt a general rule that there is to be no adjournment and no separation of the jury after the evidence is entered upon, until the jury have given their verdict. In Mississippi the stringent rule obtains, in capital cases, that a separation vitiates as soon as the jurors are selected and sworn; since, as soon as it is known that a person is to be a juror in the case, he is just as liable to be tampered with before the trial commences as afterwards. McQuillen *v.* State, 8 Smed. & M. (Miss.) 587, 596.

§ **2551. Separation after the Jury have Retired to Consider of their Verdict.** — The general rule, applicable in all cases, civil and criminal, is that, after the jury retire from the bar of the court to consider of their verdict, they are not to be permitted to separate until their verdict has been agreed upon and delivered in court;[1] and the cases already spoken of, in which the jurors are permitted to separate pending the trial, all relate to a period of time before they retire to deliberate upon their verdict. On like grounds, which will be presently stated, a separation of the jury will not necessarily vitiate their verdict after they have agreed upon and sealed it up, or before they have delivered it in court, though if this takes place without the permission of the court it will subject the jurors to punishment.[2]

§ **2552. Returning Sealed Verdicts and then Separating.** — From what will be hereafter stated,[3] it follows that the court may, *in civil cases*, permit the jury to disperse after they have agreed upon their verdict, sealed it up and delivered it to the clerk of the court.[4] And while some courts have admitted this

[1] Morrow *v.* Commissioners, 21 Kan. 484, 516; Leste *v.* Stanley, 3 Day (Conn.), 287. It is old law that a separation of the jury after they have been charged with the case and while they are deliberating upon it, without permission of the court, is ground for a new trial. Goodman *v.* Cotherington, Sid. 235. But, as elsewhere seen, the modern rule is that prejudice must appear.

[2] Sartor *v.* McJunkin, 8 Rich. L. (S. C.) 451; Evans *v.* Foss, 49 N. H. 490, 497; Brown *v.* McConnel, 1 Bibb (Ky.), 265; Horton *v.* Horton, 2 Cow. (N. Y.) 589; Sanders *v.* State, 2 Iowa, 230; Cook *v.* Walters, 4 Iowa, 72; Heiser *v.* Van Dyke, 27 Iowa, 359; Ragland *v.* Wills, 6 Leigh (Va.), 1; Sutliff *v.* Gilbert, 8 Ohio, 405; Smith *v.* Harrow, 3 Bibb (Ky.), 446; James *v.* State, 55 Miss. 57; Bainbridge *v.* State, 30 Oh. St. 265, 275. Especially if no objection is made at the time. High *v.* Johnson, 28 Wis. 72; Douglass *v.* Tousey, 2 Wend. (N. Y.) 352.

[3] *Post*, § 2632, *et seq.*

[4] Welch *v.* Welch, 9 Rich. L. (S. C.) 133; Harter *v.* Seaman, 3 Blackf. (Ind.) 27; Bellows, C. J., in Evans *v.* Foss, 49 N. H. 490, 497; Crocker *v.* Hoffman, 48 Ind. 207. Especially if no objection is made at the time. Bosley *v.* Farquar, 2 Blackf. (Ind.) 61. Or if it do not appear that the jury actually separated before the verdict was brought in. *Ibid.*; Lucas *v.* Marine, 40 Ind. 289. When the assent of counsel to such a direction will be inferred: Parmlee *v.* Sloan, 37 Ind. 469. In Indiana, where the jury return into court during the absence

practice *in criminal* cases,[1] yet the better opinion, supported by what Lord Coke states to have been the ancient law,[2] is that such conduct on the part of the jury will vitiate every verdict in such a case.[3] If the jury make up and deposit with the clerk a *feigned verdict*, merely to get the liberty of separating, which the court has granted to them upon so delivering a sealed verdict, they will not be allowed to deliberate further upon the case, but will be discharged and punished.[4] Nor will they be allowed to make up a sealed verdict and separate to meet subsequently, renew their deliberations on the main issue, and change it;[5] but if it be so *informal* that it will not support a judgment, a new trial will be granted.[6] But it is competent for them to retire and *amend* their verdict, in any matter not relating to the main question in controversy;[7] and one court has held it proper

of counsel with their verdict, the court may either receive the verdict then, or return the jury to their room until morning, or permit the jury to seal it up, communicate it to no one, and return it into court the next day. Leas *v.* Cool, 68 Ind. 166. See also, Bosley *v.* Farquar, 2 Blackf. (Ind.) 61; Hatter *v.* Seaman, 3 Blackf. (Ind.) 27; Drummond *v.* Leslie, 5 Blackf. (Ind.) 453; Haynes *v.* Thomas, 7 Ind. 38; McCorkle *v.* State, 14 Ind. 39; Parmlee *v.* Sloan, 37 Ind. 469; Crocker *v.* Hoffman, 48 Ind. 207; Rush *v.* Peddigo, 63 Ind. 479; Blacketer *v.* House, 67 Ind. 414. In Iowa, if, for any reason, they are afterwards sent out, and, being so out, fail to agree, the party in whose favor the sealed verdict was rendered will be entitled to judgment thereon, provided it is sufficiently certain. Miller *v.* Mabon, 6 Iowa, 456.

[1] Sanders *v.* State, 2 Iowa, 230, 278; State *v.* Engles, 13 Ohio, 490. See also Willing *v.* Swasey, 1 Browne (Pa.), 123; Sutliff *v.* Gilbert, 8 Ohio, 405. In Louisiana, they cannot do this in *capital cases*, even by consent. State *v.* Hornsby, 32 La. Ann. 1268. In Indiana, this may be done in cases *not capital*, the foreman writing his name across the seal. Jarrell *v.* State, 58 Ind. 293, 298. In California, it seems that the mere irregularity of allowing the jury to deposit with the sheriff a sealed verdict and then separate, may be cured by *consent* in criminal cases. People *v.* Kelly, 46 Cal. 357.

[2] Co. Litt. 227.*b*.

[3] Com. *v.* Dorus, 108 Mass. 488.

[4] White *v.* Martin, 3 Ill. 69.

[5] Sutliff *v.* Gilbert, 8 Ohio, 405, 408.

[6] Sage *v.* Brown, 34 Ind. 464; Sargent *v.* State, 11 Ohio, 472. Compare Vater *v.* Lewis, 36 Ind. 288. See Thomp. & M. Jur., n. 3.

[7] Pritchard *v.* Hennessey, 1 Gray (Mass.), 294, 296; Winslow *v.* Draper, 8 Pick. (Mass.) 170; Nininger *v.* Knox, 8 Minn. 140, 150; Crocker *v.* Hoffman, 48 Ind. 207; Reg. *v.* Ballivos, 1 P. Will. 212; State *v.* Arrington, 3 Murph. (N. C.) 571; Walters *v.* Junkins, 16 Serg. & R. (Pa.) 415; Goodwin *v.* Appleton, 22 Me.

to do this where a sealed verdict, so delivered, failed to find the damages, on the artificial reasoning that it was merely *void*, — no verdict at all.[1] Another court more broadly holds that, where they return an imperfect verdict, it is in general lawful and proper for the court to send them back to their room to perfect their work and discharge fully the duty for which they were impaneled.[2]

§ 2353. Communications between Jurors and Third Parties. — Whether the mere fact that communications have taken place between the members of the jury and persons not of the jury, pending the trial or after they have retired to consider of their verdict, will be ground for a new trial, must depend, when the nature of the communication is disclosed, upon the question whether its tendency was apparently harmful. The mere fact that such communications have been held will not vitiate the verdict, unless they were of such a nature as manifestly to corrupt or prejudice the mind of the juror with whom they were had, or otherwise to interfere with the deliberations of the jury, or produce substantial prejudice to the losing party.[3]

453; Martin *v.* Morelock, 32 Ill. 487; Nims *v.* Bigelow, 44 N. H. 376; Blake *v.* Blossom, 15 Me. 394; High *v.* Johnson, 28 Wis. 72, 80; Sutliff *v.* Gilbert, 8 Ohio, 405. It has been held in *New York* that, where a verdict is returned in this way, the jury having separated after dispositing it with the clerk, and, on being assembled in court when the verdict is opened and published, one of them *dissents* from it, they may be again sent out to deliberate, as though no verdict had been returned. Bunn *v.* Hoyt, 3 Johns. (N. Y.) 255; Douglass *v.* Tousey, 2 Wend. (N. Y.) 352; Warner *v.* New York &c. R. Co., 52 N. Y. 437. Construction of a statute prohibiting the court from sending out the jury a third time: Emery *v.* Estes, 31 Me. 155. Not error, after the jury have returned a sealed verdict and separated, and assembled in the court to have it announced, to send them out again for the purpose of answering special interrogatories: Rush *v.* Peddigo, 63 Ind. 479.

[1] Maclin *v.* Bloom, 54 Miss. 365, 368.

[2] Bradley *v.* Bradley, 45 Ind. 67; Reeves *v.* Plough, 41 Ind. 204; Rush *v.* Peddigo, 63 Ind. 479, 483.

[3] Barlow *v.* State, 2 Blackf. (Ind.) 114; State *v.* Cucuel, 31 N. J. L. 249, 262; March *v.* State, 44 Tex. 64, 82; People *v.* Boggs, 20 Cal. 432; Epps *v.* State, 19 Ga. 102, 122; Cohron *v.* State, 20 Ga. 752, 759; Barbour *v.* Archer, 3 Bibb (Ky.), 8; Hager *v.* Hager, 38 Barb. (N. Y.) 92, 100; Martin *v.* People, 54 Ill. 225; McKenzie *v.* State, 26 Ark. 334; Barlow *v.* State, 2 Blackf.

Casual communications between jurors and strangers to the suit, if explained by affidavit and made to appear harmless, will not have this effect.[1] In civil cases,[2] and no doubt in cases of misdemeanor,[3] the rule is that casual remarks between the jurors and third persons, even about the suit on trial, not touching its merits,[4] will not be ground for new trial, though the result will be otherwise where the merits of the case are freely canvassed.[5] In cases of felony, the rule is believed to be much the same as that touching the separation of jurors,[6] and for the same reasons: a communication explained and apparently harmless and innocent, will not vitiate the verdict,[7] but an unexplained communication, possibly prejudicial, will avoid it. But *evidential statements* by third parties to jurors, touching the facts in controversy, not made on the witness stand, will be good ground of new trial, especially where the evidence is conflicting, and where

(Ind.) 114; State *v.* Fruge, 28 La. Ann. 657; Ellis *v.* Ponton, 32 Tex. 434, 439; Armleder *v.* Lieberman, 33 Ohio St. 77; Flanegan *v.* State, 64 Ga. 53; Hill *v.* State, 64 Ga. 452 (between a juror and his wife, and not in reference to the case); Poole *v.* Chicago &c. R. Co., 2 McCrary (U. S.), 251; Catterlin *v.* City of Frankfort, 87 Ind. 46; De Priest *v.* State, 68 Ind. 569; March *v.* State, 44 Tex. 65, 83 (construing a statute). Or as one court has held, unless they have a manifest tendency to prejudice the juror in the interest of the prevailing party, or show an *unfitness in the juror* to discharge his duties. Dower *v.* Church, 21 W. Va. 24, 55.

[1] Barbour *v.* Archer, 3 Bibb (Ky.), 8; Westmoreland *v.* State, 45 Ga. 225, 281; Burtine *v.* State, 18 Ga. 534, 538; Caw *v.* People, 3 Neb. 357; Ned *v.* State, 33 Miss. 365; Luster *v.* State, 11 Humph. (Tenn.) 169; State *v.* Degonia, 69 Mo. 485, 490. *Contra*, Com. *v.* Wormley, 8 Gratt. (Va.) 712. In Connecticut the inquiry is whether the successful party was benefited, or the unsuccessful party injured, by the communication. Hamilton *v.* Pease, 38 Conn. 115; Bennett *v.* Howard, 3 Day (Conn.), 219; Pettibone *v.* Phelps, 13 Conn. 445. See also Barbour *v.* Archer, 3 Bibb (Ky.), 8; Luster *v.* State, 11 Humph. (Tenn.) 169; State *v.* Degonia, 69 Mo. 485, 490; Willing *v.* Swasey, 1 Browne (Pa.), 123; March *v.* State, 44 Tex. 64, 82 (construing 1 Pasc. Dig. Tex. Stats., art. 3137; Code Cr. Proc. 1879, art. 777, sub-sec. 7).

[2] Armleder *v.* Lieberman, 33 Ohio St. 77.

[3] United States *v.* Gibert, 2 Sumn. (U. S.) 19, 81, 82.

[4] Hager *v.* Hager, 38 Barb. (N. Y.) 92, 100, 102.

[5] Bennett *v.* Howard, 3 Day (Conn.), 219.

[6] *Ante*, § 2349.

[7] Martin *v.* People, 54 Ill. 225; McKenzie *v.* State, 26 Ark. 334, 343.

such officious statements attack the credibility of the witnesses of the unsuccessful party.[1]

§ 2554. **Between Jurors and Witnesses.** — Communications *between witnesses* in the case *and jurors* will obviously be scanned more closely,[2] and will work a new trial if prejudicial,[3] though not if innocent and harmless,[4] or, though improper, not obviously prejudicial,[5] — as where the witness, on being recalled, made the same statement on oath which he had made to the jurors,[6] or where the communication did not involve any effort at tampering with the jury, and the verdict was clearly right.[7] But, for obvious reasons, if the jury presume to *receive evidence* after being sent out to consider of their verdict, as by calling the witnesses before them,[8] or by visiting the *locus in quo*,[9] a new trial will be granted.

§ 2555. **Between Jurors and the Judge.** — Communications between the judge and the jury, made privately and in the absence of counsel, stand on no better footing than communications between jurors and third persons.[10] The judge is not at liberty to go to the jury room where they are deliberating,[11] even for the

[1] Nesmith *v.* Clinton Fire Ins. Co., 8 Abb. Pr. (N. Y.) 141. In a very old case a *venire facias de novo* was awarded, because one of the witnesses had *restated his evidence* to the jury, after they were charged to consider of their verdict. Metcalfe *v.* Deane, Cro. Eliz. 189.

[2] Woolsey *v.* White, 7 Bradw. (Ill.) 277.

[3] Vanmeter *v.* Kitzmiller, 5 W. Va. 381; Mench *v.* Bolback, 4 Phila. (Pa.) 68; Erwin *v.* Bulla, 29 Ind. 95.

[4] McIlvaine *v.* Wilkins, 12 N. H. 374; Tiernan *v.* Trewick, 2 Utah, 393.

[5] State *v.* Ayer, 23 N. H. 301, 320; Jackson *v.* Jackson, 32 Ga. 325, 335.

[6] Thrift *v.* Redman, 13 Iowa, 25.

[7] Jones *v.* Vail, 30 N. J. L. 135.

[8] *Ante*, § 904; Hudson *v.* State, 9 Yerg. (Tenn.) 408, 410; Booby *v.* State, 4 Yerg. (Tenn.) 111; Luttrell *v.* Maysville &c. R. Co., 18 B. Mon. (Ky.) 291; State *v.* Brazil, 2 Ga. Dec. 107; Smith *v.* Graves, 1 Brev. (S. C.) 16; Deacon *v.* Shreve, 22 N. J. L. 176; See also Offit *v.* Vick, Walk. (Miss.) 99.

[9] Deacon *v.* Shreve, 22 N. J. L. 176.

[10] Sargent *v.* Roberts, 1 Pick. (Mass.) 337; Hoberg *v.* State, 3 Minn. 272; Watertown Bank *v.* Mix, 51 N. Y. 558; Plunkett *v.* Appleton, 9 Jones & Sp. (N. Y.) 159; *s. c.* 51 How. Pr. (N. Y.) 469. See Davis *v.* Fish, 1 G. Greene (Iowa), 406; Read *v.* Cambridge, 124 Mass. 567; State *v.* Patterson, 45 Vt. 308.

[11] Crabtree *v.* Hagenbaugh, 23 Ill. 349.

purpose of giving them additional instructions,[1] or of withdrawing erroneous instructions from them,[2] or answering questions,[3] or explaining his charge,[4] or of informing them of his readiness to give them further instructions on questions of law.[5] Nor may he allow a juror to quit the room and communicate with him in the court room;[6] nor write a letter to the jury after they have retired;[7] nor send a written instruction to them by the bailiff;[8] nor reply to a request for information as to how a witness has testified,[9] or as to what evidence was given on a certain point;[10] nor permit the short-hand reporter of the court to send such information in response to a request sent to the judge;[11] nor send any other material paper to them.[12] It will even be a ground for a new trial if he pass through the jury room and suffer them to put questions to him without answering them,[13] or to request additional instructions of him, although he decline to give them.[14] In all such cases the reviewing court, upon the fact of the communication being shown, will order a new trial. And, while this stringent rule is not adhered to in all jurisdictions,[15] yet it would seem that the rule which prohibits communications with the jury in their retirement during their deliberations, is applied

[1] Fish *v.* Smith, 12 Ind. 563; Sargent *v.* Roberts, 1 Pick. (Mass.) 337; Taylor *v.* Betsford, 13 Johns. (N. Y.) 487; Moody *v.* Pomeroy, 4 Denio (N. Y.), 115.

[2] Hall *v.* State, 8 Ind. 439, 444.

[3] Kirk *v.* State, 14 Ohio, 511.

[4] Hoberg *v.* State, 3 Minn. 262.

[5] Benson *v.* Clark, 1 Cow. (N. Y.) 258.

[6] Fisher *v.* People, 23 Ill. 283, 285.

[7] State *v.* Patterson, 45 Vt. 308; Watertown Bank *v.* Mix, 51 N. Y. 558; Plunkett *v.* Appleton, 9 Jones & Sp. (N. Y.) 159; *s. c.* 51 How. Pr. (N. Y.) 469.

[8] O'Connor *v.* Guthrie, 11 Iowa, 80.

[9] Watertown *v.* Mix, 51 N. Y. 558.

[10] Bunn *v.* Croul, 10 Johns. (N. Y.) 239.

[11] Watertown Bank *v.* Mix, *supra*.

[12] Benson *v.* Clark, 1 Cow. 258.

[13] Benson *v.* Clark, 1 Cow. 258.

[14] Crabtree *v.* Hagenbaugh, 23 Ill. 349.

[15] School District No. 1 *v.* Bragdon, 23 N. H. 507, 517; Shapley *v.* White, 6 N. H. 172; Allen *v.* Aldrich, 29 N. H. 63, 74; Bassett *v.* Salisbury Man. Co., 28 N. H. 438, 457; Goldsmith *v.* Solomons, 2 Strobh. L. (S. C.) 296, 300. In other jurisdictions, communications between the judge and the jury, by a committee of their body or otherwise, if it take place publicly in open court, is not deemed harmful. Dent *v.* King, 1 Ga. 200, 204; Gage *v.* Wilson, 17 Me. 378; Spencer *v.* Trafford, 42 Md. 1, 21. Compare State *v.* Garrand, 5 Ore. 216; Thayer *v.* Van Vleet, 5 Johns. (N. Y.) 111; Bunn *v.* Croul, 10 Johns. (N. Y.) 239.

with even greater strictness where the communication is with the judge than where it is with some other disinterested third person.[1] But it was held otherwise, where a written communication was sent to the jury openly and in the presence of counsel.[2] And where, in a civil case, the jury required further instruction, and the judge, after calling upon the counsel for the defendant to go with him, who refused, and, after seeking the defendant himself, who could not be found, went into the jury room and gave them the information which they required, it was held no error; though it would have been otherwise, if the judge had gone there to hold private converse with them.[3] More recently it has been held, in a criminal case, that evidence, submitted in the form of affidavits, showing that the jury, on the trial of the action, after retiring to their room, sent a written communication to the presiding judge, and that he answered the same in writing, in the absence of proof as to the nature of the communication, would not require the granting of a new trial."[4] And, while the jurors should not examine the judge's minutes of the evidence without the direction or consent of the court, as held in Wisconsin, yet where this was done, and it appeared that the verdict had not been affected thereby in favor of the party complaining, it was held no ground for granting a new trial.[5] And where a justice of the peace, in response to a request of the jury, went to their room and gave a correct answer;[6] and in another case, at their request permitted a witness, previously sworn, to go to their room in order that they might ask him some questions, the justice stand-

[1] As to the rule of public policy that requires the trial of an action at law to be conducted publicly and in open court and which affords the parties at every stage of it the opportunity of being represented by counsel, see State *v.* Smith, 6 R. I. 33. In a case in New York, it was held not error for the judge to refuse to receive a request for an instruction after the jury had *started to retire*, although all of them were in the room. Tinkham *v.* Thomas, 2 Jones & Sp. (N. Y.) 236. Jury returning into court to re-examine a witness: Com. *v.* Zimmerman, 1 Cranch C. C. (U. S.) 47.

[2] Gage *v.* Wilson, 17 Me. 378.

[3] Cook *v.* Green, 6 N. J. L. 109.

[4] People *v.* Kelly, 94 N. Y. 526, 531. As to the manner of presenting such a question for appellate review, see this case, and also Maurer *v.* People, 43 N. Y. 1.

[5] Graves *v.* Gans, 25 Wis. 41.

[6] Thayer *v.* Van Vleet, 5 Johns. (N. Y.) 111.

ing in the door while the witness was examined, and retiring with him, and giving the complaining party an opportunity to be present, which he refused,[1] — the irregularity was not deemed sufficient to set aside the verdict.

§ 2556. Between Jurors and Officers of the Court. — Communications between the jury and the *clerk*, where they are obviously harmless,[2] or in open court and not objected to,[3] will afford no ground for a new trial. Communications between the jurors and the *officer having them in charge*, rest on much the same ground as communications with strangers, though possibly viewed with greater jealousy. Such communications will not afford ground for a new trial, where it is obvious that no prejudice resulted.[4] Otherwise where prejudice *may* have resulted,[5] as where the bailiff attends the deliberations of the jury, talks garrulously and acts as a partisan of the successful party;[6] or, seeing that they are unable to agree, expresses his opinion to them that the court will keep them out a week or compel them to agree.[7] But where the officer told them that unless they agreed they would be detained until the next day at noon, this, though improper, was held not sufficient to avoid the verdict, since it

[1] Henlow *v.* Leonard, 7 Johns. (N. Y.) 200.

[2] Dennison *v.* Powers, 35 Vt. 39.

[3] Allen *v.* Blunt, 2 Woodb. & M. 121, 147.

[4] Daniel *v.* Frost, 62 Ga. 697; State *v.* Summers, 4 La. Ann. 26; State *v.* Wart, 51 Iowa, 587; State *v.* Stark, 72 Mo. 37, 40; Taylor *v.* Everett, 2 How. Pr. (N. Y.) 23; Leach *v.* Wilbur, 9 Allen (Mass.), 212; Pope *v.* State, 36 Miss. 121, 134; Price *v.* Lambert, 3 N. J. L. 401. For illustrations, see Thomp. & M. Jur. 429, sub-sec. 2. Compare Cole *v.* Swan, 4 G. Greene (Iowa), 32; McGuire *v.* State, 10 Tex. App. 125.

[5] State *v.* Lantz, 23 Kan. 728; State *v.* Brown, 22 Kan. 222; Dansby *v.* State, 34 Tex. 392. *Contra*, Baker *v.* Simmons, 29 Barb. (N. Y.) 198 (a case which cannot be supported); Cholston *v.* Cholston, 31 Ga. 625, 639; Nelms *v.* State, 13 Smed. & M. (Miss.) 500, 508; Cole *v.* Swan, 4 G. Greene (Iowa), 32; State *v.* Brown, 22 Kan. 222; Thomas *v.* Chapman, 45 Barb. (N. Y.) 98, *per* Sutherland, J.; People *v.* Hartung, 4 Park. Cr. (N. Y.) 256, 314. Compare Baker *v.* Simmons, 29 Barb. (N. Y.) 198; Taylor *v.* Everett, 2 How. Pr. (N. Y.) 23; People *v.* Carnal, 1 Park. Cr. (N. Y.) 256. For illustrations see Thomp. & M. Jur. 430, sub-sec. 3.

[6] Barnett *v.* Eaton, 62 Miss. 768.

[7] Obear *v.* Gray, 68 Ga. 182.

did not amount to an illegal restraint of the jury.[1] In another case, after the officer had communicated to the jury an order of court discharging them, they remained in their room, agreed upon a verdict, upon which judgment was entered, and a new trial was refused.[2] It would seem to follow that the mere fact that the bailiff in charge of the jury has been *present in their room* during their deliberations, is not ground for a new trial, and so it has been held;[3] though another opinion seems to be that such an intrusion upon the privacy of the jury defeats the purpose for which they are sent out, and ought therefore to work a new trial.[4] The correct view seems to be that the *unexplained and unnecessary presence* of the bailiff of the jury in their room, during their deliberations, is good cause for a new trial, on the ground of misconduct of the jury; but that, where it is shown by counter affidavits, and where the trial court decides that the presence of the bailiff in the jury-room was necessary to the proper discharge of his duties as bailiff, and did not harm the complaining party, the reviewing court will not disturb the decision on the weight of the evidence.[5] *Affidavits of jurors* will be heard to show such misconduct on the part of the officer,[6] though not to show such misconduct on the part of themselves,[7] or the effect which the communication had upon their minds,[8] unless made admissible by statute.[9]

[1] Wiggins *v.* Downer, 67 How. Pr. (N. Y.) 65.

[2] Gamsby *v.* Columbia, 58 N. H. 60 (citing Nims *v.* Bigelow, 44 N. H. 376, 380).

[3] Slaughter *v.* State, 24 Tex. 410; Martin *v.* State, 9 Tex. App. 293; Gainey *v.* People, 97 Ill. 270; State *v.* Summers, 4 La. Ann. 27; State *v.* Caulfield, 23 La. Ann. 148.

[4] People *v.* Knapp, 42 Mich. 267; Rickard *v.* State, 74 Ind. 275; McClary *v.* State, 75 Ind. 260. So it is held that if the bailiff is a *witness* in the case (State *v.* Snyder, 20 Kan. 306), unless upon an unimportant collateral point (Gainey *v.* People, 97 Ill. 270), his unexplained presence in the jury room will avoid the verdict. See State *v.* Hopper, 71 Mo. 425.

[5] Fitzgerald *v.* Goff, 99 Ind. 28, 44; Doles *v.* State, 97 Ind. 555. Duty of the officer to report misconduct of the jurors: March *v.* State, 44 Tex. 64, 84.

[6] Reins *v.* People, 30 Ill. 256; Wilson *v.* People, 4 Park. Cr. (N. Y.) 619, 632.

[7] Nelms *v.* State, 13 Smed. & M. (Miss.) 500, 508. See *post*, § 2618.

[8] Taylor *v.* Everett, 2 How. Pr. (N. Y.) 23.

[9] Cole *v.* Swan, 4 G. Greene (Iowa), 32.

§ 2557. **Among the Jurors Themselves.** — Communications from jurors to their fellows, in the form of prejudicial statements of matters evidential in their nature, are highly reprehensible, and the court should, in a criminal trial, admonish the jurors against making them;[1] though a failure to do so, even where there is a statute which requires it, has been held not sufficient ground for a new trial.[2] And while it has been held that such statements will work a new trial,[3] unless made after the verdict has been agreed upon,[4] if shown otherwise than by the affidavits,[5] or declarations of the jurors themselves;[6] yet the weight of judicial opinion, founded on a view of the impolicy of attempting to invade the secrets of the jury room, or of listening to the affidavits or declarations of jurors impeaching their own verdict, is otherwise.[7] It has been held that this rule does not apply to statements made as to the character of witnesses; since the jury must, in some degree, act on their own knowledge of the parties and their witnesses.[8] A new trial has been granted on account of expressions made by a juror to his fellows, showing such prejudice against the accused as unfitted him for the office of a juror,[9] though not where there were affidavits showing such expressions were fully met and repelled by contrary affidavits.[10] The fact that, in a civil case, after the evidence is all in, some of the jurors

[1] Morton *v.* State, 1 Lea (65 Tenn.), 498.

[2] Thompson *v.* State, 26 Ark. 323.

[3] Simpson *v.* Kent, 9 Phila. (Pa.) 30; Darrance *v.* Preston, 18 Iowa, 396; Booby *v.* State, 4 Yerg. (Tenn.) 111; Sam *v.* State, 1 Swan (Tenn.), 61.

[4] Wise *v.* Bosley, 32 Iowa, 34. Compare Cherry *v.* Sweeny, 1 Cranch C. C. (U. S.) 530.

[5] In Booby *v.* State, 4 Yerg. (Tenn.) 111, such affidavits were received under the exceptional rule in Tennessee.

[6] Nolan *v.* State, 2 Head (Tenn.), 520.

[7] *Post*, § 2618. See State *v.* Woodson, 41 Iowa, 425 (where by statute such affidavits are admissible); Taylor *v.* State, 52 Miss. 85; Austin *v.* State, 42 Tex. 355; Nolan *v.* State, 2 Head (Tenn.), 520, 522.

[8] McKain *v.* Love, 2 Hill (S. C.), 506.

[9] Martin *v.* State, 25 Ga. 494.

[10] People *v.* Frost, 5 Park. Cr. (N. Y.) 53. In a civil case in Georgia, a new trial was denied on the ground of evidential statements of one of the jurors to his fellows after they had retired for deliberation, because a "brief of the testimony" had not been filed, as required by a rule of court in that State, in all cases on a motion for new trial. Davis *v.* Lowman, 9 Ga. 504.

discuss it in the absence of others, is no ground for a new trial, in the absence of any appearance of prejudice.[1]

§ 2558. **By the Jurors to Third Persons.** — Communications by the jurors to third persons, not of the jury, are material only so far as they disclose misconduct on the part of the juror making them, or a disregard of the improprieties of his position, or an unfitness to discharge its duties,[2] and consequently, as a general rule, afford no ground for a new trial,[3] especially if brought to the attention of the counsel for the unsuccessful party and not by him objected to at the time,[4] unless of such a character as to lead to an unavoidable inference of passion, prejudice or want of appreciation of a juror's duties and responsibilities.[5] It has been reasoned that, for a juror to discuss, outside of the jury room, a case pending and undecided before him, is the clearest evidence that he is not an unbiased and impartial juror, notwithstanding his disclaimer of the influence of such discussion upon his mind.[6] And it is no doubt a sound view that a new trial will be granted

[1] Paramore *v.* Lindsey, 63 Mo. 63.

[2] McCarty *v.* Kitchen, 59 Ind. 500; Jewsbury *v.* Sperry, 85 Ill. 56.

[3] Lee *v.* McLeod, 15 Nev. 158; Eich *v.* Taylor, 20 Minn. 378; Yancey *v.* Downer, 5 Litt. (Ky.) 8, 11; State *v.* Fruge, 28 La. Ann. 657; Fash *v.* Byrnes, 14 Abb. Pr. (N. Y.) 12; Stockwell *v.* Railroad Co., 43 Iowa, 470; Chalmers *v.* Whittemore, 22 Minn. 305; McAllister *v.* Sibley, 25 Me. 474, 488; Jackson *v.* Smith, 21 Wis. 26; Taylor *v.* California Stage Co., 6 Cal. 228; Foster *v.* Brooks, 6 Ga. 287, 297; Harrison *v.* Price, 22 Ind. 165, 168. For a juror to *disclose the verdict* before it has been regularly delivered in court, has been held ground for a new trial (Orcutt *v.* Carpenter, 1 Tyler (Vt.) 250); but the better opinion is to the contrary, since the cause of a successful party ought not to be defeated by misconduct on the part of a juror which could have had no influence upon his finding. Ingersoll *v.* Truebody, 40 Cal. 603, 612; Bushee *v.* Wright, 1 Pinn. (Wis.) 104, 107. The same has been held of an attempt to do so (Fash *v.* Byrnes, 14 Abb. Pr. 12), and of the mere disclosure of the fact that the jury had agreed (Nichols *v.* Bronson, 2 Day (Conn.), 211).

[4] Martin *v.* Tidwell, 36 Ga. 332, 345.

[5] Poole *v.* Chicago &c. R. Co., 6 Fed. Rep. 844; *s. c.* 11 Reporter, 828; 12 Cent. L. J. 492; Blalock *v.* Phillips, 38 Ga. 216, 221. In the following cases rather strong expressions by jurors were held no ground for a new trial. Taylor *v.* Cal. Stage Co., 6 Cal. 228; Foster *v.* Brooks, 6 Ga. 287, 297; Harrison *v.* Price, 22 Ind. 165, 168.

[6] Poole *v.* Chicago &c. R. Co., 2 McCrary (U. S.), 251.

for misconduct on the part of a juror not prejudicial to the successful party, where it is so gross that *public policy* would require the setting aside of the verdict, as in cases of *embracery*.[1] But notwithstanding this rule, a new trial was refused in a civil case, where, during the progress of the trial, which had lasted several days, one of the jurors, on his way home, in response to an inquiry as to how the case was coming out, replied, "Clement is going to beat;" since, though the conduct of the juror was highly censurable, the parties were without fault.[2] It is not a prejudicial disobedience of the admonition of the court not to talk about the merits of the case, for a juror to state, at the conclusion of the charge of the court, that there is a misunderstanding among the jury as to the testimony of a witness, and ask to have it restated.[3]

§ 2559. Between Jurors and the Successful Party. — But, on obvious grounds, *unexplained communications* between a juror and the successful party to the suit, his friends, counsel or agents, will lead to such an inference of tampering as will avoid the verdict,[4] and for stronger reasons, this result will follow where the communication involves a plain effort in behalf of the successful party to influence the verdict of the jury by improper means.[5] While conversation, especially familiar intercourse,

[1] Carlisle *v.* Sheldon, 38 Vt. 440; McDaniels *v.* McDaniels, 40 Vt. 363; Peacham *v.* Carter, 21 Vt. 515; Winslow *v.* Campbell, 46 Vt. 746; *ante*, § 2549.

[2] Clement *v.* Spear, 56 Vt. 401.

[3] People *v.* West, 73 Cal. 345; *s. c.* 14 Pac Rep. 848.

[4] Com. *v.* Roby, 12 Pick. (Mass.) 496, 520; Hamilton *v.* Pease, 38 Conn. 115; Martin *v.* Morelock, 32 Ill. 485. See Pope *v.* State, 36 Miss. 121; Ned *v.* State, 33 Miss. 364; Organ *v.* State, 26 Miss. 83; Hare *v.* State, 4 How. (Miss.) 187; McCann *v.* State, 9 Smed. & M. (Miss.) 465, 469.

[5] *Post*, § 2560. Cottle *v.* Cottle, 6 Me. 140; Walker *v.* Walker, 11 Ga. 206; Vaughn *v.* Dotson, 3 Swan (Tenn.), 348; Sexton *v.* Lelievre, 4 Coldw. (Tenn.), 11; Tucker *v.* South Kingston, 5 R. I. 558, 561; Hicks *v.* Drury, 5 Pick. (Mass.) 296; McIntire *v.* Hussey, 57 Me. 493; Cilley *v.* Bartlett, 19 N. H. 312, 324; State *v.* Hascall, 6 N. H. 352, 360; McIlvaine *v.* Wilkins, 12 N. H. 474, 476; Perkins *v.* Knight, 2 N. H. 474; Martin *v.* Morelock, 32 Ill. 485; Knight *v.* Freeport, 13 Mass. 213; Heffron *v.* Gallupe, 55 Me. 563, 569; Coster *v.* Merest, 3 Brod. & Bing. 272; Schaff *v.* Gray, 2 Yeates (Pa.), 273; Sloan *v.* Harrison, 1 N. J. L. (Coxe) 123; Ritchie *v.* Holbrooke, 7 Serg. & R.

between interested parties and jurors, while a suit is under advisement, should be avoided, as tending to impair confidence in the administration of justice, — yet it frequently happens that, in civil cases, during the recesses of the court, parties and jurors are casually thrown together, at hotels, on the highway, and in other public places, and converse upon different topics without a thought of impropriety in doing so. These conversations, it is said, have never been considered as sufficient of themselves to set aside a verdict.[1] "Where an unauthorized communication is made to a juror, in a cause on trial, which *may* have influenced his mind in favor of the successful party, a new trial will be granted for that reason; but if it is apparent that the communication *could not* have had such influence, it is no ground for a new trial."[2] Therefore a communication by the successful party to the jurors pending the trial, if *casually made*, without any intent to influence the verdict, and if the court can clearly see that it could not have had any effect on the minds of the jurors, it is not ground for a new trial.[3]

§ 2560. Tampering with Jurors: Embracery. — Embracery, which consists of a corrupt attempt to influence the verdict of a jury by other means than evidence and argument in open court,[4] is not only indictable at common law,[5] and under statutes,[6]

(Pa.) 458; Hawkins *v.* New Orleans Printing Co., 29 La. Ann. 134; Bradbury *v.* Cony, 62 Me. 223; Smith *v.* Willingham, 44 Ga. 200; McCarver *v.* Pipen, 12 Heisk. (Tenn.) 657; Hamilton *v.* Pease, 38 Conn. 115; Reynolds *v.* Champlain Trans. Co., 9 How. Pr. (N. Y.) 7; Mench *v.* Bolbach, 4 Phila. (Pa.) 68; Simpson *v.* Kent, 9 Phila. (Pa.) 30. But see Nesmith *v.* Clinton Fire Ins. Co., 8 Abb. Pr. (N. Y.) 141.

[1] Borland *v.* Barrett, 76 Va. 128, 137.

[2] Chalmers *v.* Whittemore, 22 Minn. 305.

[3] Oswald *v.* Minneapolis &c. R. Co., 20 Minn. 5. These decisions modify the original rule stated in the early case of Hoberg *v.* State, 3 Minn. 262.

[4] Co. Litt. 369.*a*; 1 Hawk. P. C. (Curwood's ed.) 466, § 1; 4 Bla. Com. 140; 2 Bish. Cr. L., § 384; Com. *v.* Kauffman, 1 Phila. (Pa.) 534. See State *v.* Sales, 2 Nev. 268; Gibbs *v.* Dewey, 5 Cow. (N. Y.) 503; Grannis *v.* Brandon, 5 Day (Conn.), 260, 273.

[5] Thomp. & M. Jur., 436, and authorities cited.

[6] *Ibid.* 437, and statutes cited.

but is punishable as a *contempt* of court;[1] is ground of a civil action for damages,[2] and, on grounds of public policy, is always ground for a new trial, without reference to the merits of the case, and whether successful or not.[3] The law is so sensitive upon this subject, that affidavits, not explained away, casting *suspicion* of such misconduct on the prevailing party, will avoid the verdict.[4] The rule is applied with almost equal stringency whether such attempts proceed from the *prevailing party* himself,[5] from *his friends*,[6] or even from *officious third persons*.[7] It is upon this principle, as elsewhere seen,[8] that *unexplained communications* between the jury and the prevailing party, his counsel or friends, create such a presumption against the integrity of the verdict that it will not be allowed to stand;[9] though, where the nature of the communication is disclosed, on grounds elsewhere appearing,[10] a new trial will not be granted, unless there was an apparent object improperly to influence the jury.[11] The

[1] *Ante*, § 135; Re May, 1 Fed. Rep. 737, 742. See, as to the liability of jurors for contempt, United States *v.* DeVaughan, 3 Cranch C. C. (U. S.) 84; State *v.* Doty, 32 N. J. L. 403; Houston *v.* Potts, 65 N. C. 41.

[2] Co. Litt. 369.*a*.

[3] Tomlin *v.* Cox, 19 N. J. L. 76; Knight *v.* Freeport, 13 Mass. 218; Mench *v.* Bolbach, 4 Phila. (Pa.) 68; Simpson *v.* Kent, 9 Phila. (Pa.) 30; Sheaff *v.* Gray, 2 Yeates (Pa.) 273; Heffron *v.* Gallupe, 55 Me. 563; Ritchie *v.* Holbrooke, 7 Serg. & R. (Pa.) 458 (bribery); Hawkins *v.* New Orleans Printing Co., 29 La. Ann. 134 (bribery); Allen *v.* Aldrich, 29 N. H. 63, 75; State *v.* Hascall, 6 N. H. 352; McIllvaine *v.* Wilkins, 12 N. H. 474; Hilton *v.* Southwick, 17 Me. 303; Cohen *v.* Robert, 2 Strobh L. (S. C.) 410, 416.

[4] Huston *v.* Vail, 51 Ind. 299. But see United States *v.* Chaffee, 2 Bond (U. S.), 147; Spencely *v.* DeWillott, 3 Smith (K. B.), 322.

[5] The prosecuting witness in a criminal case is a party within the meaning of this rule. State *v.* Hascall, 6 N. H. 352, 360, 363.

[6] McDaniels *v.* McDaniels, 40 Vt. 363; Bradbury *v.* Cony, 62 Me. 223; Nesmith *v.* Clinton Fire Ins. Co., 8 Abb. Pr. (N. Y.) 141. See, also, Hamilton *v.* Pease, 38 Conn. 115; McIntire *v.* Hussey, 57 Me. 493; Cilley *v.* Bartlett, 19 N. H. 312, 324; Heffron *v.* Gallupe, 55 Me. 563, 568–70.

[7] Hamilton *v.* Pease, 38 Conn. 115. Unless it clearly appears that the jurors were not thereby influenced. Nesmith *v.* Clinton Fire Ins. Co., 8 Abb. Pr. (N. Y.) 141.

[8] *Ante*, § 2559.

[9] Martin *v.* Morelock, 32 Ill. 485; Tomlin *v.* Cox, 19 N. J. L. 76; Davidson *v.* Manlove, 2 Coldw. (Tenn.) 346.

[10] *Ante*, § 2549.

[11] Wise *v.* Bosley, 32 Iowa, 34; State *v.* Cucuel, 31 N. J. L. 249, 262; Brake *v.* State, 4 Baxt. (Tenn.) 361; Shea *v.* Lawrence, 1 Allen (Mass.),

principles of *public policy* which require the court to set aside a verdict because of such tampering, irrespective of the merits, prevent it from doing it when the unsuccessful party himself has made the like attempt and stands before the court with unclean hands.[1] It is scarcely necessary to add, that the *affidavits of jurors* are always received to show attempts so dangerous to justice,[2] though not to disclose the effect which such attempts have had upon their own minds or those of their fellows.[3]

§ 2561. Reading the Newspapers. — The mere fact that the jurors are permitted, during the progress of the trial, to read the current newspapers, has not generally been regarded as ground for a new trial,[4] and the court may properly grant this indulgence to jurors, down to the time when they retire to consider their verdict,[5] unless the newspapers contain reports of the trial,[6] or other prejudicial matter in the form of editorial comments or otherwise[7] — especially where such matter gets accidentally into the jury room in civil trials,[8] and is not read by any of

167; Smith *v.* Lovejoy, 62 Ga. 372. See also Cohron *v.* State, 20 Ga. 753. But if the opposite party have *notice*, during the progress of the trial, of such a communication, and do not complain, he thereby *waives* the right to make it the ground for a motion for a new trial. Fessenden *v.* Sager, 53 Me. 531, 536.

[1] Hutchinson *v.* Consumers' Coal Co., 36 N. J. L. 24, 29.

[2] Ritchie *v.* Holbrooke, 7 Serg. & R. (Pa.) 458; Hawkins *v.* New Orleans Printing Co., 29 La. Ann. 134; Taylor *v.* Everett, 2 How. Pr. (N. Y.) 23; Thomas *v.* Chapman, 45 Barb. 98.

[3] Taylor *v.* Everett, *supra;* Thomas *v.* Chapman, *supra.*

[4] State *v.* Anderson, 4 Nev. 266, 278; Hunter *v.* State, 43 Ga. 484, 524 (where the newspaper contained a diatribe against one of the prisoner's counsel); United States *v.* McKee, 3 Cent. L. J. 258, 259.

[5] United States *v.* Gibert, 2 Sumn. (U. S.) 19, 81, 82.

[6] Palmore *v.* State, 29 Ark. 248; Walker *v.* State, 37 Tex. 366, 389; Com. *v.* Landis, 12 Phila. (Pa.) 576.

[7] Palmore *v.* State, 29 Ark. 248; Walker *v.* State, 37 Tex. 366, 389; Com. *v.* Landis, 12 Phila. (Pa.) 576; United States *v.* Reid, 12 How. (U. S.) 361, 366; *s. c.* 3 Hughes (U. S.) 509; State *v.* Cucuel, 31 N. J. L. 249, 263; People *v.* Gaffney, 14 Abb. Pr. (N. S.) (N. Y.) 36. Compare Flanegan *v.* State, 64 Ga. 52; People *v.* Williams, 24 Cal. 31, 38. Affidavits of jurors, will, it seems, be heard for the purpose of showing that they are not so prejudiced. United States *v.* Reid, *supra;* State *v.* Cucuel, *supra;* United States *v.* McKee, 3 Cent. L. J. 258; Chicago *v.* Dermody, 61 Ill. 431.

[8] Thrall *v.* Smiley, 9 Cal. 529.

the jurors.[1] But where, in a capital case, the charge of the court was not reduced to writing, but the jury, during their deliberations, read and made use of a newspaper report of a material portion of it, it was held, on grounds plainly untenable, that the verdict must be set aside, although the trial judge had recognized the report as correct.[2]

§ **2562. Juries Allowed Refreshments in Modern Trials.** — By the ancient common law, as is well known, juries were to be kept together, while deliberating upon their verdict without food, drink, fire or candle, until they were agreed.[3] In modern times this rule has been relaxed; but the practice is still kept up, in some jurisdictions, of requiring an application for refreshments for the jurors to be made to the court;[4] which application the court will always grant, in the exercise of a sound *discretion*, by allowing them such seasonable refreshments, medicine, and other necessaries as can be furnished without exposing them to outside influence; and such exercises of discretion cannot be assigned for error.[5]

§ **2563. What if Procured without the Knowledge of the Court.** — The mere fact that jurors send out, during their deliberations, by their bailiff, and procure refreshments, without the permission of the court, will not, in the absence of any suspicion of improper influence, be ground for setting aside their verdict, although such conduct is censurable, and perhaps punish-

[1] Chicago *v.* Dermody, *supra*.

[2] Farrar *v.* State, 2 Ohio St. 54, 79, (Bartley, C. J., dissenting). Where, in a capital trial, the prisoner's counsel observed a juror reading a newspaper containing statements unfavorable to the prisoner, and without privately calling the attention of the judge to it, concluded that it was best to have no public notice taken of it, the irregularity was thereby *waived* and the prisoner precluded from insisting upon it as ground for a new trial. Bulliner *v.* People, 95 Ill. 394.

[3] Co. Litt. 227 *b*.

[4] Purinton *v.* Humphreys, 6 Me. 379; O'Barr *v.* Alexander, 37 Ga. 195.

[5] O'Shields *v.* State, 55 Ga. 696; Reg. *v.* Newton, 3 Car. & K. 85; *s. c.* 13 Q. B. 716; 3 Cox C. C. 489; 13 Jur. 606; 18 L. J. (M. C.) 201, where the judge allowed a sick juror brandy, but refused him beef tea. See also in support of the text, State *v.* Town, Wright (Ohio), 75; Templeton *v.* State, 5 Tex. App. 399.

able.[1] Indeed, it is a settled rule of law, dating back to a very early period, that the mere fact that the jury eat and drink at their own cost, or otherwise than at the cost or by the procurement or favor of the successful party, while deliberating on their verdict, though an irregularity, will not be ground for a new trial.[2] So,

[1] Purinton *v.* Humphreys, 6 Me. 379; O'Barr *v.* Alexander, 37 Ga. 195; State *v.* Degonia, 69 Mo. 485.

[2] State *v.* Sparrow, 3 Murph. (N. C.) 487; Harrison *v.* Rowan, 4 Wash. C. C. (U. S.) 32; Austen *v.* Baker, 12 Mod. 250. "If they eat and drink at their own costs, by assent of their keepers, it being offered by their keepers, it shall not avoid the verdict. Said to be so adjudged in divers times." 21 Vin. Abr. 448, tit. Trial, G. g. In Co. Litt. 227. b., it is said that if a juror eat and drink at his own expense before the jury have agreed, he is liable to be fined, but the verdict is good. In Duke of Richmond *v.* Wise, 1 Ventr. 125, the jury had wine, but it did not appear to be at the expense of either party. It was held no ground for a new trial. The leading American case in support of the text is Com. *v.* Roby, 12 Pick. 496, 516, where the subject is discussed by Chief Justice Shaw, with his usual ability, and many authorities examined. See also Thompson *v.* Com., 8 Gratt. 637, 657; Wilson *v.* Abrahams, 1 Hill (N. Y.), 207. Although the question in this last case was whether the use of intoxicating liquors by a juror, pending the trial, is of itself sufficient to vitiate the verdict, yet the general subject of the effect of jurors taking refreshments without the order of the court was considered on authority. In an old case it was resolved that "if the jury eat and drink at the charge of the party for whom the verdict is found, it avoids it; and if at their own charge, they are only finable." Rex *v.* Burdett, 12 Mod. 111; *s. c.* 1 Ld. Raym. 148. In another case it was moved in arrest of judgment that the jurors had taken meat and drink before their verdict was given. This was certified on the *postea*, but not examined at whose charge. The court said: "That would make a great difference; for if it were at the cost of the party for whom they gave their verdict, it would make the verdict void; but if it were at their own costs, it is only finable, and the verdict good. Harebottle *v.* Placock, Cro. Jac. 21. In Co. Litt. 227. b., the law is thus stated: "If the jurie, after their evidence given unto them at the barre, doe, at their own charges eate or drinke, either before or after they be agreed on their verdict, it is finable, but it should not avoid the verdict; but if before they be agreed on their verdict, they eate or drinke at the charge of the plaintife, if the verdict be given for him it shall avoid the verdict: but if it be given for the defendant, it shall not avoid it; and *sic e converso*. But if, after they be agreed on their verdict, they eate or drinke at the charge of him for whom they doe passe, it shall not avoid the verdict." This doctrine has more recently been held to apply only to cases where all that remains for the jury is to deliberate and give their verdict, and even then to cases where the whole jury, and not one or more of them, have been treated or entertained. Morris *v.* Vivian, 10 Mees. & W. 137.

where a trial is protracted for several days, it is decent and necessary, and therefore proper, for the sheriff who has charge of the jury to send and receive for them messages in regard to changes of clothing, and to send for and bring such changes of clothing to them.[1]

§ 2564. Or at the Expense of the Successful Party. — Where a juror has been treated, fed or entertained by the successful party, or his counsel, or at the expense of either, a new trial will, in nearly all cases, be granted.[2] This rule is, by most courts, deemed indispensably necessary to preserve the integrity of juries. It being, as already stated,[3] a rule of public policy, it will be enforced without reference to the question whether or not the verdict was right. But the mere fact that the jury in a criminal case, were kept and took their meals at the house of one who aided the prosecutor in impaneling the jury, was held no ground for a new trial.[4] Nor is it ground for new trial that the jurors partook of refreshments at the expense of *unsuccessful party;* since he cannot complain of his own wrong.[5]

[1] State *v.* Caulfield, 23 La. Ann. 148. In a case in Nevada, in which much of the learning on the subject is gone over, this limitation is denied, and it is held that the rule that a verdict in favor of a party who treats or entertains the jury, will be set aside, applies to any treating of any of the jury at any time after they are sworn and before they agree on their verdict; whether once or several times; by design or inadvertence; in the presence of the officer, or in his absence; and whether it might be called for or uncalled for by the proprieties of life. Sacramento &c. Mining Co. *v.* Showers, 6 Nev. 291.

[2] Ensign *v.* Harney, 15 Neb. 330; *s. c.* 43 Am. Rep. 344 (horse and buggy borrowed of counsel); Pelham *v.* Page, 6 Ark. 535, 538, per Oldham, J.; Studley *v.* Hall, 22 Me. 198; Walker *v.* Walker, 11 Ga. 203, 206; Walker *v.* Hunter, 17 Ga. 364, 414; Sacramento &c. Mining Co. *v.* Showers, 6 Nev. 291; Springer *v.* State, 34 Ga. 379 (horses of jurymen provided for by counsel); Drake *v.* Newton, 23 N. J. L. 111; Pittsburgh &c. R. Co. *v.* Porter, 32 Ohio St. 328; Mynatt *v.* Hubbs, 6 Heisk. (Tenn.) 320; Lyons *v.* Lawrence, 12 Bradw. (Ill.) 531 (refreshments offered to the jury in the presence of the court during argument.) "Every one ought to know that for any, even the least, intermeddling with jurors, the verdict will always be set aside." Knight *v.* Freeport, 13 Mass. 218.

[3] *Ante*, § 2560.

[4] Wilson *v.* State, 6 Baxt. (Tenn.) 206. Compare Odle *v.* State, 6 Baxt. (Tenn.) 159.

[5] State *v.* Sparrow, 2 Murph. (N. C.) 487; 2 Hale P. C. 306; 21 Vin. Abr. tit. Trial, G. g.; *ante*, § 2560.

§ **2565. View that the Rule does not Extend to Customary Hospitality and Civility.** — Most of the cases first cited in the last preceding section uphold the rule with severity, as a rule of public policy; but other courts tend towards the opinion that neither the rule of the common law in question, nor statutes declaratory of it, such as exist in some of the States, are to be so applied as to put parties to suits under the restraint of denying to jurors the usual and customary offices of hospitality and civility. Where jurors drank on a hot day at the house of the defendant, in executing a writ of *ad quod damnum*, which they had there assembled to execute;[1] where jurors, assembled at the house of the petitioner to assess damages on account of the laying out of a road, had drunk moderately of cider belonging to him and furnished them by the officer, without his knowledge;[2] where a jury went to view the *locus in quo*, and while there ate dinner at the house of the successful party in charge of their bailiff, there being no other place to obtain dinner, the bailiff ordering the same and paying for it without the solicitation of the party, and he having no conversation with the jury on the subject of the case;[3] where the ratable inhabitants of the town had entertained at their houses members of a jury impaneled to try a case in which the town was defendant;[4] where the nominal defendant, who had no substantial interest in the suit, entertained at his house every night a member of the jury while the trial was in progress, and before the judge had summed up and sent the jury out to consider their verdict — it appearing that it was customary for country gentlemen so to entertain jurors;[5] where an employé of the defendant, a corporation, went with a friend into an oyster saloon, and while there, casually met two jurors, and the four ate oysters, and the employé paid for all that the four had eaten without the knowledge of the jurors;[6] where the prevailing party, without having sought a juror for that purpose,

[1] Coleman *v.* Moody, 4 Hen. & M. (Va.) 1.

[2] Tripp *v.* Commissioners, 2 Allen (Mass.), 556.

[3] Johnson *v.* Greim, 17 Neb. 447.

[4] Carlisle *v.* Sheldon, 38 Vt. 440.

[5] Morris *v.* Vivian, 10 Mees. & W. 137.

[6] Eakin *v.* Morris Canal Co., 24 N. J. L. 538.

conveyed him to his home in his wagon, a distance of several miles, but without conversing with him about the case — the court having adjourned over Saturday night till Monday morning;[1] in these and other like cases,[2] it appearing that the jurors had not been subjected to any improper influence other than that complained of, the courts have refused to set aside verdicts on the ground of tampering. But *unusual civilities and attentions* practiced by the successful party, his counsel or partisans, such as excite a suspicion as to the motive of the party, will, upon grounds already stated,[3] under either view of this question, require the granting of a new trial.[4]

§ 2566. Use of Intoxicating Liquors by the Jurors. — Some courts have held that the use of such liquors in quantities however small, without leave of the court, will be good ground for setting aside the verdict, without inquiry as to what effect it had upon the jurors who drank it;[5] and this rule has been applied in civil as well as criminal cases.[6] But the courts generally have adopted the more reasonable rule, that the fact that member of a jury did, during the trial of a cause, or while deliberating on

[1] Hilton *v.* Southwick, 17 Me. 303. Compare Cottle *v.* Cottle, cited in the next section.

[2] Koester *v.* Ottumwa, 34 Iowa, 41. And see Ford *v.* Holmes, 61 Ga. 419.

[3] *Ante*, § 2560.

[4] Phillipsburg Bank *v.* Fulmer, 31 N. J. L. 53, 57; Cottle *v.* Cottle, 6 Me. 140; Sexton *v.* Lelievre, 4 Coldw. (Tenn.) 11 (distinguishing Vaughan *v.* Dotson, 2 Swan (Tenn.), 348); *ante*, § 2559.

[5] People *v.* Douglass, 4 Cow. (N. Y.) 26, 36; Jones *v.* State, 13 Tex. 168, 179; State *v.* Baldy, 17 Iowa, 39; State *v.* Bullard, 16 N. H. 139, 145. *Contra*, Gilmanton *v.* Ham, 38 N. H. 108, 114.

[6] Leighton *v.* Sargent, 31 N. H. 120, 137; Gregg *v.* McDaniel, 4 Harr. (Del.) 367; Briant *v.* Fowler, 7 Cow. (N. Y.) 562 (overruled in Wilson *v.* Abrahams, 1 Hill (N. Y.), 207); Ryan *v.* Harrow, 27 Iowa, 494. *Contra*, Williamson *v.* Reddish, 45 Iowa, 550; Van Buskirk *v.* Daugherty, 44 Iowa, 42. The rule which exacts, on the part of jurors, entire abstinence from intoxicating liquors, is founded principally on the reason that such a rule is a rule of *absolute safety*, and that any departure from it is attended with danger. The arguments in its favor have been well expressed by Beck, J., in the leading case on the subject, in Iowa (Ryan *v.* Harrow, *supra*), though subsequently the same court regarded this case as going as far as the rule could be extended. Van Buskirk *v.* Daugherty, *supra*.

their verdict, drink intoxicating liquors, will not be ground for a new trial, unless there is some reason to suppose that such liquors were drunk at such time,[1] or in such quantities as to unfit them for the performance of their duties; or unless they were furnished by the party in whose favor the verdict was afterwards rendered;[2] or at least, unless the circumstances were such as to create a reasonable suspicion that the drinking may have improperly influenced the verdict.[3] The courts vary in the strictness with which they apply the rule. In one court it is held that, while the introduction of intoxicating liquors as a beverage into the jury room is censurable and should be the subject of exemplary punishment, it will not vitiate the verdict if it can be *affirmatively shown* that it did not injuriously affect the deliberations of the jury;[4] in other words, like an unauthorized separation, it creates a *presumption* against the integrity of the verdict, which must be *removed* by evidence, or the verdict will be set aside. Another court has said that a "judge at *nisi prius* should never hesitate to set aside a verdict in a criminal case, where there is even a *suspicion* that any juror was in the least affected by intoxicating liquor during

[1] See Fairchild *v.* Snyder, 43 Iowa, 23 (where the liquors were drank by a juror *at night* pending the trial).

[2] Com. *v.* Roby, 12 Pick. (Mass.) 496, 517; Wilson *v.* Abrahams, 1 Hill (N. Y.), 207; Pelham *v.* Page, 6 Ark. 535, 539; State *v.* Upton, 20 Mo. 397; Coleman *v.* Moody, 4 Hen. & M. (Va.) 1; Redmond *v.* Royal Ins. Co., 7 Phila. (Pa.) 167; Tripp *v.* County Commissioners, 2 Allen (Mass.), 556; Russell *v.* State, 53 Miss. 367, 382; Pope *v.* State, 36 Miss. 121, 136; Roman *v.* State, 41 Wis. 312, 316; Kee *v.* State, 28 Ark. 155, 165; Perry *v.* Bailey, 12 Kan. 539, 546; Larimer *v.* Kelly, 13 Kan. 78; Westmoreland *v.* State, 45 Ga. 225, 282; State *v.* Sparrow, 3 Murph. (N. C.) 487; Davis *v.* People, 19 Ill. 74, 77; Purinton *v.* Humphreys, 6 Me. 379; State *v.* Jones, 7 Nev. 408, 414; Richardson *v.* Jones, 1 Nev. 405; State *v.* Caulfield, 23 La. Ann. 148; Stone *v.* State, 4 Humph. (Tenn.) 27; Rowe *v.* State, 11 Humph. (Tenn.) 491; Thompson *v.* Com., 8 Gratt. (Va.) 639, 649; Vaughan *v.* Dotson, 2 Swan (Tenn.), 348. (Compare Sexton *v.* Lelievre, 4 Coldw. (Tenn.) 11); McCarty *v.* McCarty, 4 Rich. L. (N. C.) 594; Palmore *v.* State, 29 Ark. 248; State *v.* West, 69 Mo. 401; Gilmanton *v.* Ham, 38 N. H. 108, 114.

[3] Wood *v.* State, 34 Ark. 341; Roman *v.* State, 41 Wis. 312, 316; Pittsburgh &c. R. Co. *v.* Porter, 32 Ohio St. 328; Tuttle *v.* State, 6 Tex. App. 556; Webb *v.* State, 5 Tex. App. 596; Pratt *v.* State, 56 Ind. 179; Russell *v.* State, 53 Miss. 369, 382.

[4] Russell *v.* State, 53 Miss. 369.

the progress of the trial, or the deliberation upon the verdict."[1] If a bottle is passed around and the jurors drink of it *while sitting in court* as such, a new trial, will be granted,[2] though not necessarily so where it is done during a *recess* of the court.[3] And it is conceded that circumstances may arise (though rarely) making it proper for the judge, even without consent of the parties, to permit jurors to partake of intoxicating liquor during the progress of the trial, for *medical purposes*.[4] But where the drinking of ardent spirits by a juror is *attended with other circumstances* of *misconduct*, as where a juror separates from his fellows to drink in a bar room,[5] or where, on being interrogated touching his qualifications as a juror, he has concealed a bias

[1] Lewis, C. J., in State *v.* Jones, 7 Nev. 408,414. Old and quaint cases going to the effect that the jurors would be fined for drinking intoxicating liquors, though it would not set aside their verdict. Anon., 1 Dyer, 37 b. pl. 45; Duke of Richmond *v.* Wise, 1 Vent. 124. In the trial of the Seven Bishops, after the charge to the jury, the following colloquy took place: The Lord Chief Justice: "Gentlemen of the jury, have you a mind to drink before you go?" Jury: "Yes, my Lord, if you please." Accordingly, wine was sent for, for the jury. See 12 How. St. Tr. 429. In Texas, the court, in an early case (Jones *v.* State, 13 Tex. 168), fell into the extreme view, by following People *v.* Douglass, 4 Cow. (N. Y.) 26, that any use of intoxicating liquors, in quantities however small, will require the granting of a new trial. This rule was thereafter repealed by the following statute, enumerating the causes for which a new trial might be granted: "Or where any juror at any time during the trial, or after retiring, may have become so intoxicated as to render it probable his verdict was influenced thereby; but the mere drinking of liquor by a juror shall not be sufficient ground for granting a new trial." Pasch. Dig. Tex. Stat., art. 3137; Code 1879, § 777, sub-sec. 7. Under this statute, the Supreme Court of Texas, without endeavoring to lay down any precise rule, has held that the *excessive use* of intoxicating liquor by the jury, in a criminal trial, requires the granting of a new trial; and where, in a case of felony, four or five bottles of whisky were introduced into the jury room, and drunk by the jurors to such excess as to produce "*hilarity*," it was held that the court erred in refusing to grant a new trial. March *v.* State, 44 Tex. 65.

[2] Pelham *v.* Page, 6 Ark. 535, 538; Rose *v.* Davis, 4 Cow. (N. Y.) 17, Kellogg *v.* Wilder, 15 Johns. (N. Y.) 455.

[3] Dennison *v.* Collins, 1 Cow. (N. Y.) 111.

[4] See, for instance, United States *v.* Gibert, 2 Sumn. (U. S.) 19, 81.

[5] Creek *v.* State, 24 Ind. 151; Davis *v.* State, 35 Ind. 496, 499; State *v.* Prescott, 7 N. H. 287, 296; Jackson *v.* Jackson, 40 Ga. 150.

which he entertained against the opposite party,[1] or separating from his fellows, and while drinking makes remarks showing bias against the unsuccessful party,[2] — in all such cases the verdict will be set aside.[3] And, recurring to what has already been said, if the intoxicating liquor is furnished *at the cost of the prevailing party* or his attorney, this circumstance will turn the scale against the verdict,[4] unless it is shown that it was not intended to influence his action in the cause, and had no such influence on his mind.[5] But if it is furnished *at the cost of the unsuccessful party*, he, of course, cannot complain of it.[6]

§ 2567. Doctrine Restated and Correct Rule Suggested. — Any rule under this head ought to adjust itself to the habits of the particular community and of the particular jurors. A rule that would prohibit the reasonable use by a juror of wine or beer, in most countries of Europe, would be injurious to justice, and moreover, would be thought absurd. One who habitually takes intoxicants, though moderately, would fall into a state of mental depression or irritation, if deprived of his customary stimulant during a protracted trial;[7] while one not addicted to such stimulants would, if furnished with them, be correspondingly elated and unbalanced. The tendency of the one would be to hang the guiltless, and of the other to acquit the guilty. At the time of the present writing a popular spasm against the use of intoxicating liquors is passing over the country. Judges are likely to be more or less affected by it and to be correspondingly unbalanced, when dealing with the question in its relation to jurors and verdicts. The following rules, sustained by authority, are suggested as the proper guides for decision where verdicts are

[1] *Ante*, § 116, p. 121, note.

[2] Jackson *v.* Jackson, 40 Ga. 150.

[3] See also State *v.* Parrant, 16 Minn. 178, 181.

[4] Sacramento &c. Mining Co. *v.* Showers, 6 Nev. 291.

[5] Pittsburg &c. R. Co. *v.* Porter, 32 Oh. St. 328. Construction of statutes against "giving by way of treat:" Carlisle *v.* Sheldon, 38 Vt. 440, 445. Tripp *v.* Commissioners, 2 Allen (Mass.), 556.

[6] *Ante*, § 2564.

[7] See Hogshead *v.* State, 6 Humph. (Tenn.) 59 (where a new trial was granted because a juror for want of liquor was threatened with *delirium tremens*).

challenged on this ground: 1. The mere fact that a jury, pending the trial, or while deliberating on the verdict, drink intoxicating liquor, without more, will not be sufficient ground for a new trial.[1] 2. It is no ground for a new trial that a juror drank a small quantity of liquor for medicinal purposes while suffering from real sickness, the quantity consumed not being sufficient to produce intoxication.[2] 3. Where the drinking of ardent spirits by a juror is attended with other improper conduct, as where a juror separates from his fellows to drink in a bar room, or where ardent spirits are conveyed to him by one of the parties, a new trial will be granted.[3] 4. A new trial will generally be granted where a juror eats or drinks at the expense of the successful party.[4] 5. The jealousy of the courts that juries should not be subjected to any improper influences is such that, if it appear that intoxicating liquors have been introduced into the jury room, in a manner, or in quantities, which the affidavits leave *unexplained*, there is a *presumption* that the jury were improperly influenced thereby, and a new trial will be granted.[5] 6. *Consent* of counsel, or of the party, as elsewhere shown, will generally estop a party in a civil case from urging as ground for a new trial, that the jurors indulged in ardent spirits, unless abuse is shown to have resulted from such indulgence;[6] but not, it would seem, in cases of felony.[7]

§ 2568. Receiving Gratuities: Fees of a Juror who is also a Witness. — "A juror may always be a witness for either party and still retain his seat as a juror; and a witness may be a legal juror."[8] Under peculiar circumstances, the mere fact that a person, who had been summoned as a witness for the successful party, had afterwards served as juror, and had received witness

[1] See the preceding section.

[2] Williamson *v.* Reddish, 45 Iowa, 550; Pope *v.* State, 36 Miss. 121.

[3] Studley *v.* Hall, 22 Me. 198.

[4] Pelham *v.* Page, 6 Ark. 535, 538, per Oldham, J.; Studley *v.* Hall, 22 Me. 198; and other cases in the preceding section.

[5] Pope *v.* State, 36 Miss. 121.

[6] *Ante*, § 2566; Salter *v.* Glenn, 42 Ga. 64.

[7] Palmore *v.* State, 20 Ark. 248.

[8] Fellows' Case, 5 Me. 333. But see *ante*, § 77.

fees, including some portion of the time he sat as juror, was held no ground for a new trial; nor was it receiving a gratuity within the meaning of the criminal statute.[1]

2569. Bailiff Administering Medicine and calling in Physician. — Applying the rule of that State that motions for new trial are addressed to the discretion of the presiding judge,[2] and that his determination of the matters of fact is not open to revision, nor is his decision overruling the motion, unless, as matter of law, he was required, upon the facts found, to set aside the verdict,[3] the Supreme Judicial Court of Massachusetts have held that the following state of facts did not require them, as matter of law, to grant a new trial: — During the deliberations of the jury in a civil case, and in the absence of the presiding judge from the court, the officer in charge of the jury, upon being informed by the foreman that a juror was ill and required some brandy, saw the juror that was ill and sent for and gave to the foreman two ounces of brandy. Afterwards another juror fell upon the floor in a fit, and the officer allowed a physician to administer to the juror, who recovered. The jury subsequently agreed upon a verdict. The presiding judge found that the officer acted in entire good faith, and that the party against whom the verdict was given was in no way prejudiced by his acts.[4]

[1] Handly *v.* McCall, 30 Me. 9, 16.

[2] Boston *v.* Robbins, 116 Mass. 313; Woodward *v.* Leavitt, 107 Mass. 453, 460.

[3] Brady *v.* American Print Works, 119 Mass. 98, and cases cited.

[4] Nichols *v.* Nichols, 136 Mass 256; distinguishing People *v.* Knapp, 42 Mich. 267, 269, and citing People *v.* Ransom, 7 Wend. N. Y.) 417, 424.

CHAPTER LXXI.

BOOKS AND PAPERS IN THE JURY ROOM.

SECTION

2574. View that Sealed Instruments may be Taken out and Unsealed not.
2575. Modern Rule as to Writings which have been Received in Evidence.
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2577. Records containing Irrelevant Matters.
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2581. Distinction between Papers which show the Extent of a Party's Claim and Papers which have been put in Evidence.
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2591. Duty of Counsel to Object at the Time.
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2593. Manner of Presenting such Irregularities for Review.
2594. Recalling the Jury and Delivering Papers to them.
2595. Rules under Particular American Statutes in Civil Cases.
2596. [Continued.] In Criminal Cases.
2597. View that it is Discretionary with the Trial Court.

§ 2574. View that Sealed Instruments may be Taken out and Unsealed not. — With respect to papers which might be taken to the jury room, the old law, it seems, made a difference between exemplifications of papers under seal and sworn copies. The former were of so much higher authority as evidence than the latter, that the former were permitted to be taken out by the jury, while the latter were not. The reason [1] was, that the seals of

[1] Given at length by Chief Baron Gilbert in his work on evidence: 1 Gilb. Ev. (Lofft's ed. 1791), p. 20.

courts, of public officers, of corporations, and of individuals, were generally known and would hence be recognized by the jurors, while unsealed instruments would not. The rule accordingly was, that "exemplifications and instruments *quæ sibi ipsa faciant fidem*" were to be delivered to the jury to take out with them, while in the case of instruments of lesser dignity, this was not so. The rule was thoroughly settled in the early English practice, and is expressed in a great number of old books and cases.[1] It raised a distinction between writings which had been *given*, and writings which had been *delivered* in evidence. Nothing could be delivered in evidence, that is, taken out by the jury when they retired to consider of their verdict, save that which was of record or under seal, except by consent.[2] With the decay of the use of private seals, the reasons on which this distinction rested gradually ceased; and the fallacy of the distinction itself, and of the rule which prevented the jurors from taking on their retirement instruments of evidence, was pointed out in vigorous language by Tilghman, CJ., and Yates, J., in an early Pennsylvania case.[3] Nevertheless, as we shall presently see, this foolish rule

[1] Buller N. P. (7th ed.) 308; citing 2 Rol. Abr. 686, pl. 2; Vicary *v.* Farthing, M. 1695, Cro. Eliz. 411; Tomlinson *v.* Crooke, E. 10 Jac. 1; 2 Rol. Abr. 687, pl. 3; Co. Litt. 411; Graves *v.* Short, M. 1598; Cro. Eliz. 616; citing Co. Litt. 277; 21 Vin. Abr. 449, pl. 7; 21 Vin. Abr. 372, pl. 10; Olive *v.* Guin, 2 Siderfin, 145; Lord Peter *v.* Heneage, 12 Mod. 520; Trials per Pais, 297; 2 Hale P. C. 306, 307; 21 Vin. Abr. 448, pl. 6; Farmers' &c. Bank *v.* Whinfield, 24 Wend. (N. Y.) 419, 428. Another ancient distinction was that if a paper was taken out by the jury, which was evidence *on one side only*, the verdict would be set aside. Lady Joy's Case, cited by Lord Raymond in Rex *v.* Burdett, 1 Ld. Raym. 148. Whereas, if it were evidence *on both sides*, the verdict would stand, though the act of taking the paper out was irregular. Rex *v.* Burdett, 1 Ld. Raym. 148; *s. c.* 2 Salk. 645, pl. 9; 12 Mod. 111. If this rule was intended to take a distinction between an evidentiary instrument submitted by one party, and an evidentiary instrument submitted by both parties, there is little sense in it; for when an instrument is put in evidence it should be regarded as in evidence *for the purposes of justice*, and not for the purposes of a party; and I do not find any mention of this rule in modern cases.

[2] Olive *v.* Guin, 2 Siderfin, 145.

[3] Alexander *v.* Jameson, 5 Binn. (Pa.) 238, 241, 243. Other parts of the same case, particularly the argument of Crawford and Duncan, of counsel, and also the opinion of Breckenridge, J., deserve attention.

still inheres to a great extent in our judicial procedure; and while a lawyer would be thought crazy who would suggest the idea of withholding from the *judge*, sitting as a trier of the facts, or from a *referee*, the inspection of all the instruments of writing which had been offered in evidence, the bench and bar in many jurisdictions readily acquiesce in the idea that, to send these instruments out with the jury has some dangerous and vitiating effect, — forgetting that such a conception involves an entire impeachment of the capacity of the jurors to discharge the functions of their office, and with it a gross accusation of the system of trial by jury.

§ 2575. Modern Rule as to Writings which have been Received in Evidence. — The modern practice is believed to be to send to the jury-room all documents and papers, *other than depositions*, which have been received in evidence.[1] In the absence of prohibitory legislation, it is certainly in the discretion of the judge to permit such papers to be taken out by the jury;[2] in some States it is provided by statute that it may be done;[3] and ordinarily a verdict will not be set aside because it has been done, unless prejudice appears to have resulted from it. Thus, the fact that the instrument sued on was allowed to be taken out by the jury was held no ground for a new trial where there was no defensive evidence in the case.[4] But, in other American jurisdictions, while, in this connection, the common-law distinction between sealed and unsealed instruments is disregarded, it remains the rule that it is error to permit, against the objection of a party, items of documentary evidence to be taken to their consultation room by the jury.[5] The absurdity of this rule culmi-

[1] Alexander *v.* Jameson, 5 Binn. (Pa.) 238; Hovey *v.* Thompson, 37 Ill. 538; Hanger *v.* Imboden, 12 Mo. 85; State *v.* Tompkins, 71 Mo. 613; Schappner *v.* Second Ave. R. Co., 55 Barb. (N. Y.) 497; Shomo *v.* Zeigler, 10 Phila. (Pa.) 611; Mullen *v.* Morris, 2 Pa. St. 85; Seibert *v.* Price, 5 Watts & S. (Pa.) 438; Sholly *v.* Diller, 2 Rawle (Pa.), 177.

[2] Sanderson *v.* Bowen, 4 Thomp. & C. (N. Y.) 675; Porter *v.* Mount, 45 Barb. (N. Y.) 422, 428.

[3] Humphries *v.* McCraw, 5 Ark. 61; Atkins *v.* State, 16 Ark. 590.

[4] Collins *v.* Frost, 54 Ind. 242.

[5] Nichols *v.* State, 65 Ind. 512, 521. See also Lotz *v.* Briggs, 50 Ind. 346; Williams *v.* Thomas, 78 N. C. 47 (citing and following Outlaw *v.* Hurdle, 1

nates in a modern holding that where evidentiary papers (or papers which have been offered in evidence and excluded) have been taken out by the jury, it will be *presumed* in favor of right acting, that the jury *did not read them*, and hence it will be no ground for setting aside their verdict.[1] While in one jurisdiction it is conceded that *circumstances may arise* in which justice would require that evidentiary papers should be sent out with the jury,[2] in many others the subject is regarded as yielding to the *discretion* of the trial court to such an extent that error can not be predicated on a refusal to do so;[3] though, where it is the practice to send such instruments out, the trial judge may, in his discretion, make the withholding of them a ground of new trial.[4] If application is made to send out all the written evidence taken in the case, and some of it is of a nature which ought not to go to the jury under the prevailing rules of practice, such as depositions, it will not be held error to refuse the application, although some of it, such as deeds, might properly have been sent out.[5] And if, in a criminal case, the jury are permitted to take out some of the written evidence, and the request of the prisoner to have them take the rest is refused, this will be deemed unfair to the prisoner, and the conviction will be reversed, on the conception that the jury should be allowed to *take out all of the*

Jones (N. C.), 150; Watson *v.* Davis, 7 Jones L. (N. C.) 178; Burton *v.* Wilkes, 66 N. C. 604).

[1] Phœnix Ins. Co. *v.* Underwood, 12 Heisk. (Tenn.) 424.

[2] Kalamazoo Novelty Mfg. Co. *v.* McAllister, 36 Mich. 327.

[3] State *v.* Pike, 20 N. H. 346; Sholly *v.* Diller, 2 Rawle (Pa.), 177; Spence *v.* Spence, 4 Watts (Pa.), 165, 168; Hamilton *v.* Glenn, 1 Pa. St. 340; O'Hara *v.* Richardson, 46 Pa. St. 385, 389; McCully *v.* Barr, 17 Serg. & R. (Pa.) 445, 452. Compare Hendel *v.* Berks &c. Tp. Road, 16 Serg. & R. (Pa.) 92; Riddlesburg Iron & Coal Co. *v.* Rogers, 65 Pa. St. 416; Post *v.* Gazlay, 1 Cin. Sup. Ct. (Oh.) 105; Stites *v.* McKibben, 2 Ohio St. 588.

[4] A new trial was granted by Sharswood, P. J., for this reason, in Carson *v.* Watson, 4 Phila. (Pa.) 88. In Little Schuylkill Nav. Co. *v.* Richards, 57 Pa. St. 142, it was said that as a general rule the sending out of papers with the jury (meaning papers other than depositions), is regulated by the sound direction of the court.

[5] Negro Jerry *v.* Townshend, 9 Md. 145, 159. In Riddlesburg &c. Co. *v.* Rogers, 65 Pa. St. 416, it is said that all title deeds and papers used in evidence must be sent out with the jury, unless there is some very special reason why it should not be done.

evidence, or none.[1] The conception in North Carolina likewise seems to be that documentary evidence in the jury room will have some dreadful vitiating effect. It is, therefore, error in that State to allow the jurors to take to their room papers which have been received in evidence;[2] and where the judge, with the view of aiding the jury in reading the amount of their verdict in an action for money due on an account, after charging them, handed them a slip of paper in the following form, —

Plaintiff claims balance	$ 57.77
Wood and coal	560.39
Interest (left with jury)	64.90
Claims and interest	683.06, —

it was held error.[3]

§ 2576. Rules as to Particular Evidential Writings. — Where this exclusionary rule exists, the *record in another action* cannot, of course, be taken out by the jury, although introduced in evidence;[4] but where the rule does not exist, such a record, or the record in a suit founded upon the same subject-matter as the suit at bar, which had been read in evidence, may be taken out, although it contains, in a bill of exceptions, the testimony of witnesses.[5] The mere fact that the *verdict in a former trial* gets accidentally into the hands of the jury with the papers, has been held no ground for a new trial,[6] though a new trial has been granted where a juror procured from the successful party a *printed copy of evidence adduced at a former trial*, and formed conclusions thereon unfavorable to the other party.[7] If *papers which have been underscored* are taken out by the jury, without the knowledge or against the objection of the unsuccessful party, it will be ground of new trial; otherwise, of course, where it is done with his knowledge and without objection.[8] The same in-

[1] Rainforth *v.* State, 61 Ill. 365.

[2] Outlaw *v.* Hurdle, 1 Jones L. (N. C.) 150; Watson *v.* Davis, 7 Jones L. (N. C.) 178.

[3] Burton *v.* Wilkes, 66 N. C. 604.

[4] Lotz *v.* Briggs, 50 Ind. 346, 348.

[5] O'Neall *v.* Calhoun, 67 Ill. 219 (distinguishing Rawson *v.* Curtiss, 19 Ill. 456).

[6] Harriman *v.* Wilkins, 20 Me. 93.

[7] Heffron *v.* Gallupe, 55 Me. 563.

[8] Watson *v.* Walker, 23 N. H. 472, 497.

consistency in the holdings is found on the question whether a *writing which has been used for the purpose of proving handwriting by comparison*[1] may be taken out by the jury. It has been held that this ought not to be done; for the reason that, where the comparison is made in open court, the counsel and court have the opportunity to point out any resemblance or want of resemblance between the two writings, and of calling the attention of the jury to such facts with regard to the writings as bear upon the question of the genuineness of the paper in dispute.[2] Another court has held that such papers ought to be taken out;[3] others that it is not error to refuse such permission;[4] and still others, that it is error to grant it.[5] But to allow the jury to take out a *mechanical instrument* which has been offered in evidence, for inspection, will have no vitiating effect on their verdict, unless the instrument is shown to have been *altered* between the time when it was offered in evidence and when it was taken out.[6]

§ 2577. **Records containing Irrelevant Matters.** — As elsewhere seen,[7] a party cannot be permitted to put in evidence portions of a document, if his adversary requires the whole to be put in.[8] So, where one paper refers to another for complement, the latter, unless in the possession of the opposite party, or its absence is otherwise accounted for must be offered in evidence,

[1] On a question as to the genuineness of handwriting, the jury may compare the document with authenticated writings of the person to whom it is ascribed, if such writings are in evidence for other purposes of the cause; but not otherwise. Perry *v.* Newton, 5 Ad. & El. 514; Griffiths *v.* Ivery, 11 Ad. & El. 322; Van Wyck *v.* McIntosh, 14 N. Y. 439; Vinton *v.* Peck, 14 Mich. 287; State *v.* Clinton, 67 Mo. 380; State *v.* Scott, 45 Mo. 302; State *v.* Tompkins, 71 Mo. 613; Howell *v.* Hartford Ins. Co., 6 Biss. (U. S.) 163.

[2] Howell *v.* Hartford Ins. Co., 6 Biss. (U. S.) 163.

[3] Hardy *v.* Norton, 66 Barb. (N. Y.) 527, 536.

[4] Cox *v.* Straisser, 62 Ill. 383; Means *v.* Means, 7 Rich. L. (S. C.) 533.

[5] Chance *v.* Indianapolis &c. R. Co., 32 Ind. 472; Re Foster's Will, 34 Mich. 21. But see Jessup *v.* Eldridge, 1 N. J. L. 401.

[6] People *v.* Page, 1 Idaho, 114.

[7] *Ante*, § 835.

[8] Whart. Ev., § 619; 2 *Ibid.*, § 1103, *et seq.*

in order to entitle the former to admission.[1] This rule has been held to apply to the admission of a judicial record, so that a *part* of such record cannot be admitted; unless the certificate show that it is an entire and complete record, it will be excluded.[2] When, therefore, the entire record is produced and offered in evidence, under this rule, the *whole* will be allowed to go to the jury-room, it has been held, although portions of it may be manifestly irrelevant. So, though, by a rule of the court, depositions are not allowed to go to the jury-room, yet such a record will go to their room although it contain depositions which relate to an immaterial matter.[3]

§ 2578. Depositions which have been Read in Evidence. — The ancient exclusionary rule already spoken of, will exclude from the jury-room depositions which have been read in evidence where a party objects to their being taken out, and in one modern jurisdiction it is so held;[4] but the American courts, for the most part, seem so far to have relaxed the rule as to permit depositions which have been read in evidence to be taken out by the jury on retiring to deliberate, *where all the evidence is in writing* and so taken out.[5] But where some of the testimony is read to the jury from depositions, and some of it is delivered to them orally by witnesses examined at the trial, it is not allowed, in some jurisdictions, that the depositions be taken to the jury-room; and the reason is, that the witnesses who have been examined at the bar speak to the jury but once, whereas, the witnesses whose testimony is embodied in the depositions, if the latter are allowed to be taken to the jury-room and there read

[1] *Ibid.*, § 619.

[2] Christine *v.* Whitehill, 16 Serg. & R. (Pa.) 98; Hampton *v.* Speckenagle, 9 Serg. & R. (Pa.) 212, 221. Compare Edmiston *v.* Schwartz, 13 Serg. & R. (Pa.) 135; Voris *v.* Smith, 13 Serg. & R. (Pa.) 334; Harper *v.* Farmers' &c. Bank, 7 Watts & S. (Pa.) 204, 211; McCormick *v.* Irwin, 35 Pa. St. 111; Schuylkill &c. R. Co. *v.* McCreary, 58 Pa. St. 304.

[3] Shomo *v.* Zeigler, 10 Phila. (Pa.) 611.

[4] Welch *v.* Ins. Co., 23 W. Va. 289, 308.

[5] Hairgrove *v.* Millington, 8 Kan. 480.

and re-read by the jury, speak to the jury more than once.[1] By this means testimony embodied in the depositions is likely to acquire undue weight in the minds of the jury; the party who is able thus to produce his testimony, acquires an advantage over the party whose witnesses attend at the trial; and a principle of public policy which favors the production of witnesses at the trial, where they must confront each other, the parties, the counsel, the court, the jury, and the public, instead of allowing them to give their testimony in the privacy of a notary's office, is defeated.[2] As hereafter seen,[3] this rule is affirmed by statute in some American jurisdictions; and a statute providing that "papers read in evidence, though not under seal, may be carried from the bar by the jury," has been held not to refer to depositions, but to documentary evidence merely.[4] The rule which thus excludes depositions from the jury room is not an absolute one; it yields in most opinions to the *discretion* of the trial court, and consequently new trials are generally refused on this ground,[5] even where the deposition is procured by the jury without the authority of the court,[6] and certainly where it does not appear that it got into their hands against the objection, or without the knowledge of the complaining party.[7] Again, the fact that such a deposition was taken out creates no presumption against the

[1] Hendel *v.* Berks &c. Turnp. Rd., 16 Serg. & R. (Pa.) 92; White *v.* Bisbing, 1 Yeates (Pa.), 400; Alexander *v.* Jameson, 5 Binn. (Pa.) 238; Negro Jerry *v.* Townshend, 9 Md. 145, 159; Shields *v.* Guffey, 9 Iowa, 322, 324. *Contra*, Hurley *v.* State, 29 Ark. 17.

[2] Rawson *v.* Curtiss, 19 Ill. 456, 480. A paper purporting to be the will of a person, proved as such before the register according to the practice in Pennsylvania, with the register's certificate of probate indorsed thereon, is not so far assimilated to a deposition that it is not permitted to go out with the jury under the rule before stated. Sholly *v.* Diller, 2 Rawle (Pa.), 177. Compare Ottinger *v.* Ottinger, 17 Serg. & R. (Pa.) 142.

[3] *Post*, § 2595.

[4] State *v.* Cain, 20 W. Va. 707; Welch *v.* Insurance Co., 23 W. Va. 289, 303.

[5] Whithead *v.* Keys, 3 Allen (Mass.), 495; *s. c.* 1 Am. L. Reg. (N. S.) 471; Spence *v.* Spence, 4 Watts (Pa.), 165; Hairgrove *v.* Millington, 8 Kan. 480; Howland *v.* Willetts, 9 N. Y. 170, 175 (denying the *dictum* of Cowen, J., in Farmers' &c. Bank *v.* Whinfield, 24 Wend. (N. Y.) 419).

[6] Andrews *v.* Tinsley, 19 Ga. 303.

[7] Shields *v.* Guffey, 9 Iowa, 322; Stites *v.* McKibben, 2 Ohio St. 588; Post *v.* Gazlay, 1 Cin. Sup. Ct. 105.

verdict, as is the case in many jurisdictions where unexplained communications are had with the jurors;[1] but the court must affirmatively see that it was of such a nature that the reading of it would lead them to lay undue stress upon the facts therein stated.[2]

§ 2579. Rule where Parts of the Deposition have been Excluded. — But where the deposition contains portions which were excluded, the same presumption arises as in other cases where incompetent testimony has been admitted, namely, that it influenced the verdict improperly; and unless this presumption is repelled by what elsewhere appears in the record, an appellate court will reverse the judgment.[3] But it is the duty of counsel to see that only the proper papers are taken by the jury when they retire, and, in the absence of fraud or artifice, a verdict will not be disturbed because incompetent evidence may, through the neglect of counsel whose duty it was to prevent it, have fallen into the hands of the jury.[4]

§ 2580. Papers which have not been Read in Evidence. — The general rule is that, if depositions or other papers which have not been admitted in evidence are taken out by the jury, when they retire to consider of their verdict, a new trial will be granted; since it would be idle to rule out incompetent documentary evidence, if the jury were allowed to take it to their room and consider it while making up their verdict.[5] But this rule can, with

[1] *Ante*, § 2559.

[2] Shields *v.* Guffy, 9 Ia. 322.

[3] Wood *v.* Stewart, 7 Vt. 149; Hopkinson's Admr. *v.* Steele, 12 Vt. 582; Warden *v.* Warden, 22 Vt. 563; Kent *v.* Tyson, 20 N. H. 121, 127; Foster *v.* McO'Blenis, 18 Mo. 88, 91; Rawson *v.* Curtiss, 19 Ill. 456, 481. Some cases seem to indicate a view that in such cases prejudice will be conclusively presumed (Shepherd *v.* Thompson, 4 N. H. 213); but the better view is that stated in the text. *Ante*, § 2560.

[4] Gardner *v.* Kimball, 58 N. H. 202.

[5] Com. *v.* Edgerly, 10 Allen (Mass.), 184; Alger *v.* Thompson, 1 Allen (Mass.), 453; Sheaff *v.* Gray, 2 Yeates (Pa.), 273; Munde *v.* Lambie, 125 Mass. 367; State *v.* Bradley, 6 La. Ann. 560, 564; Clark *v.* Whittaker, 18 Conn. 543; Ruckersville Bank *v.* Hemphill, 7 Ga. 396; Stewart *v.* Burlington &c. R. Co., 11 Ia. 62; State *v.* Lantz, 23 Kan. 728; Lawless *v.* Reese, 3 Bibb (Ky.), 486; Heffron *v.* Gallupe, 55 Me 563; Neil *v.* Able, 24 Wend. (N. Y.) 185; O'Brien *v.* Merchants' Fire Ins.

propriety, be applied only in cases where the paper was of a nature injurious or prejudicial to the party complaining; for it would be nonsense to grant a new trial on account of an irregularity which did him no injury. If, therefore, the paper is wholly immaterial, a new trial will not be granted, in the absence of fault on the part of the successful party,[1] by analogy to the principle that the admission of evidence which is merely immaterial, and not in its nature prejudicial to the party complaining, is no ground of new trial,[2] and also by analogy to the principle that the giving of instructions upon abstract hypotheses is no ground of new trial, in the absence of some appearance of prejudice.[3] But it seems that the court must see that the paper was immaterial, the *presumption* being that it influenced the jury improperly.[4] In cases of felony, if the character of the paper was such that it *may* have prejudiced the accused, the burden is said to be on the State to show that it did not have this effect; and, in the absence of such a showing on the part of the State, a new trial will be granted.[5] If the *chances* that it prejudiced the losing party are *equal*, it has been held that a new trial ought to be granted where the question arose on a bill of exceptions, though it was said that it would be matter of discretion if decided upon a case.[6] On the contrary, it has been said that, where such

Co., 6 Jones & Sp. (N. Y.) 482; Mitchell *v.* Carter, 14 Hun (N. Y.), 448; Nolan *v.* Vosberg, 3 Bradw. (Ill.) 596; Hutchinson *v.* Decatur, 3 Cranch C. C. (U. S.) 291; Benson *v.* Fish, 6 Me. 141; Bronson *v.* Metcalf, 1 Disney (Oh.), 21; Coffin *v.* Gephart, 10 Ia. 256; Atkins *v.* State, 16 Ark. 568. New trials are often granted because improper evidence has been permitted to be given in the hearing of the jury, although they are afterwards instructed to disregard it. Penfield *v.* Carpender, 13 Johns. (N. Y.) 350; Irvine *v.* Cook, 15 Johns. (N. Y.) 239; *ante*, §§ 723, 2415. It has been held error to permit the jury to take out a book only three pages of which had been given in evidence, except with direction from judge to look only on the specified pages. Kalamazoo Novelty Man. Co. *v.* McAllister, 36 Mich. 327.

[1] State *v.* Taylor, 20 Kan. 643; Kittredge *v.* Elliott, 16 N. H. 77, 82; Schappner *v.* Second Ave. R. Co., 55 Barb. (N. Y.) 497; Winslow *v.* Campbell, 46 Vt. 746.

[2] Cowen, J., in Farmers' &c. Bank *v.* Whinfield, 24 Wend. (N. Y.) 419, 426.

[3] *Ante*, § 2321.

[4] Whitney *v.* Whitman, 5 Mass. 405.

[5] State *v.* Lantz, 23 Kan. 728.

[6] Farmers' &c. Bank *v.* Whinfield, 24 Wend. (N. Y.) 419, 425, 427.

papers are taken *inadvertently*, without the permission of the court, and not through an improper intervention of any person, and it is not shown what, or whether any use of them was made by the jury in their deliberations, this will afford no ground for a new trial.[1] But on principle, the real question is not so much whether the paper was material to the issues, as whether it was of a nature to prejudice the minds of the jurors against the unsuccessful party, if read by them in their retirement;[2] unless it is of such a tendency, the mere fact of its getting to the jury room should not afford ground of new trial.[3] A very cautious and conservative statement of the rule is that "where a paper which is *capable* of influencing the jury on the side of the prevailing

[1] Ball *v.* Carley, 3 Ind. 577; Bersch *v.* State, 13 Ind. 434; Glidden *v.* Towle, 31 N. H. 147, 171.

[2] *Ante*, § 2553; Walker *v.* Hunter, 17 Ga. 364, 414; Benson *v.* Fish, 6 Me. 141; Palmore *v.* State, 29 Ark. 248; Thrall *v.* Smiley, 9 Cal. 529, 537; Clark *v.* Whittaker, 18 Conn. 543, 549; Ruckersville Bank *v.* Hemphill, 7 Ga. 396, 418; State *v.* Accola, 11 Ia. 246; Greff *v.* Blake, 16 Ia. 222; Foster *v.* McO'Blenis, 18 Mo. 88; O'Brien *v.* Merchants' Fire Ins. Co., 6 Jones & Sp. (N. Y.) 482; Dolan *v.* Ætna Ins. Co., 22 Hun (N. Y.), 396; Winslow *v.* Campbell, 46 Vt. 746; People *v.* Wilson, 8 Abb. Pr. (N. Y.) 137; State *v.* Tindall, 10 Rich. L. (S. C.) 212; Peacham *v.* Carter, 21 Vt. 515; Hix *v.* Drury, 5 Pick. (Mass.) 297; Killen *v.* Sistrunk, 7 Ga. 283; McLeod *v.* Humeston &c. R. Co., 71 Ia. 138; *s. c.* 32 N. W. Rep. 246; Kruidenier *v.* Shields, 70 Ia. 428; *s. c.* 30 N. W. Rep. 681; Perry *v.* Cottingham, 63 Ia. 41; Wright *v.* Illinois &c. Tel. Co., 20 Ia. 195; Coffin *v.* Gephart, 18 Ia. 256; Stewart *v.* Burlington &c. R. Co., 11 Ia. 62; Bulen *v.* Granger, 58 Mich. 274; *s. c.* 29 N. W. Rep. 718. That one of the jurors by mistake took a blackboard on which counsel for both plaintiff and defendant had figured in the course of their arguments, into the jury room, though wrong in practice, would not, it was held, require a new trial, the board having remained in the jury room but a few minutes and affidavits of jurors showing that none of them looked at it while it was there. Wilkins *v.* Maddrey, 67 Ga. 766.

[3] In Viner's Abridgment (tit. Verdict, p. 19, citing 14 H. 7, 29), we find the following statement on Year Book authority: "If a scroll which concerns the issue, and does not induce any partiality, be cast among jurors in a house, this shall not make the verdict void." See Lansdale *v* Brown, 4 Wash. C. C. (U. S.) 148, 157, where the papers consisted of depositions, parts of which had been excluded; Page *v.* Wheeler, 5 N. H. 91, where the papers consisted of bills of goods, which showed merely facts which were admitted on the trial. See also Simms *v.* Templeman, 5 Cranch C. C. (U. S.) 163; Morrison *v.* Moreland, 15 Serg. & R. (Pa.) 61; Lott *v.* Macon, 2 Strobh. L. (N. C.) 178, 183.

party, goes to the jury by accident, and is read by them, the verdict will be set aside, although the jury may think that they were not influenced by such paper; for it is impossible for them to say what effect it may have had on their minds." [1] There was, therefore, good sense in holding, in a case of murder, that the fact that the jury took with them the record of the coroner's inquest and depositions, without leave of the court or consent of the prisoner's counsel, required a new trial; [2] but where, in a case of burglary, a new trial was ordered by an appellate court because of the *vitiating presence of a county map* in the jury room, this was nonsense.[3] After reviewing the modern cases on this subject, it was said that the following rules were fairly deducible from them: "1. If the jury take a paper which was given in evidence in the cause with the concurrence of the judge, it is not error — that proceeding resting entirely in the exercise of a sound discretion by him. 2. If the jury take a paper with the concurrence of the judge, though without the knowledge of the parties, and although it may not have been put in evidence, it is not error, if it appear either that it was not read or used by them, or that, being immaterial in its character it can be seen from an examination of the whole case that it could not have had any bearing upon the issues or the result." [4]

§ 2581. Distinction between Papers which show the Extent of a Party's Claim and Papers which have been Put in Evidence.— It is admissible to allow the jurors to take out with them, on their retirement, papers which are submitted to them by a party *for the purpose of showing the extent of the claim which he makes*,

[1] Hix *v.* Drury, 5 Pick. (Mass.) 296, 302. See also Short *v.* West, 30 Ind. 367; Lotz *v.* Briggs, 50 Ind. 346. Applying this rule, it was held that a new trial must be granted, where a *letter of the losing party* which was attached to the deposition of the prevailing party and read in evidence, fell into the hands of the jury, with other papers in the cause, inadvertently, and was read aloud and commented upon by one of the jurors while they were deliberating, and was returned into court with their verdict and the other papers. Toohey *v.* Sarvis, 78 Ind. 474.

[2] United States *v.* Clarke, 2 Cranch C. C. (U. S.) 152.

[3] State *v.* Lantz, 23 Kan. 728.

[4] Schappner *v.* Second Ave. R. Co., 55 Barb. (N. Y.) 497, 503, opinion by Brady, J.

and which are not offered in evidence, or claimed to be in any respect evidentiary in their character. To refuse to allow the jurors to take with them such papers is to suppose them incapable of discriminating between papers which have been put in evidence in support of the plaintiff's claim, and papers which, like the pleadings, are submitted to them for the purpose of showing the extent of his claim; and this involves a doubt or denial of their capacity to discharge, on the plainest point, the functions of their office, and carries with it an impeachment of the whole system of jury trial. We, therefore, find that several of the courts not only allow the jurors to take out with them the *pleadings*,[1] but also *statements of claim*,[2] *accounts*, *diagrams*,[3] *bills of particulars;*[4] or a *computation* made by the plaintiff's attorney,[5] or a *statement of account*, although containing some items of which there was no proof.[6] But in one jurisdiction it was held that a *plat of a survey* of land, which was not admissible in evidence because one line of it was run by a private surveyor, could not go to the jury room;[7] and in another, that it was error to let them take out a *memorandum drawn up by the court* to enable them to make the proper calculations, in case they should find for the plaintiff.[8] The same rule applies where the paper is carried out by the jury *without the authorization of the court;* if it is prejudicial in its nature, a new trial will be granted;[9] and where

[1] *Post*, § 2582.

[2] Ott *v.* Oyer, 106 Pa. St. 7, 19.

[3] O'Hara *v.* Richardson, 46 Pa. St. 385, 389. "If it is permissible to show a plan to the jury for the purpose of aiding them in understanding, applying and weighing the testimony, we do not see why they do not need, and should not have, that aid so long as they have the testimony under consideration." Hale *v.* Rich, 48 Vt. 217, 224. See also Wood *v.* Willard, 36 Vt. 82.

[4] Odd-fellows Hall *v.* Messer, 24 Pa. St. 507.

[5] Millar *v.* Cuddy, 43 Mich. 273. But where the computation was made by a witness, while the practice was condemned, a new trial was denied, the verdict being right. Hatfield *v.* Cheaney, 76 Ill. 488.

[6] Hall *v.* Rupley, 10 Pa. St. 231. Compare Sheaff *v.* Gray, 2 Yeat. (Pa.) 273.

[7] Way *v.* Arnold, 18 Ga. 181, 191.

[8] Burton *v.* Wilkes, 66 N. C. 604. Compare Dolan *v.* Ætna Ins. Co., 22 Hun (N. Y.), 396; Waltz *v.* Robertson, 7 Blackf. (Ind.) 499 (decided under a statute since repealed).

[9] Sanderson *v.* Bowen, 4 Thomp. & C. (N. Y.) 675.

the court cannot see what influence it would have on the minds of the jurors, prejudice will be presumed.[1]

§ 2582. **Pleadings and Process.** — Properly the jury have nothing to do with the pleadings and argument directed to the pleadings is addressed to the court. It is the duty of the court to state the issues,[2] and it is error to refer the jurors to the pleadings to find what the issues are.[3] The pleadings are often drawn in technical language, which might not be correctly understood by persons unlearned in the law; therefore it would seem, on principle, to be a proper rule of practice not to send the pleadings out with the jury. But the general practice is believed to be the contrary; and it has been held no ground for a new trial that the jury took to their room the indictment and other papers attached thereto.[4] So, where a declaration had been withdrawn and another one substituted in its place, it was held no ground for a new trial that the jury were permitted to take out the old one, it being substantially the same as that on which the cause was tried.[5] So, where the original writ in a cause was amended by increasing the claim for damages, and the jury retired from the bar without taking this paper with them, it was held no error for the judge to send it to them afterwards.[6]

§ 2583. **Written Instructions.** — In the absence of a contrary statutory direction on the subject, instructions given by the court to the jury in writing may, in the *discretion* of the court, be taken with them to their room when they retire to deliberate.[7] In Alabama, a statute requiring the judge to charge the jury in writing, and providing that the instructions shall "become part of the record, and may be taken by the jury with them on their

[1] Alger *v.* Thompson, 1 Allen (Mass.), 453. Compare Alexander *v.* Dunn, 1 Ind. 582.

[2] *Ante*, § 2314.

[3] *Ibid.*

[4] State *v.* Delong, 12 Iowa, 453; following Shields *v.* Guffey, 9 Iowa, 323. See also Wright *v.* Rogers, 2 N. J. L. 546.

[5] Hall *v.* Rupley, 10 Pa. St. 231.

[6] Smith *v.* Holcombe, 99 Mass. 553.

[7] Benton *v.* State, 30 Ark. 328; Hurley *v.* State, 29 Ark. 17, 29; State *v.* Tompkins, 71 Mo. 613. See Goode *v.* Linecum, 1 How. (Miss.) 281; Wilds *v.* Bogan, 57 Ind. 453, 456; Langworthy *v.* Myers, 4 Iowa, 18; Head *v.* Langworthy, 15 Iowa, 235.

retirement,"[1] has been held to be *mandatory*, and the judge must allow the jury to take the charge with them, if requested so to do.[2] In Georgia, on the other hand, it is held error for the judge to permit the jury to take with them, on their retirement, his written charge, against the objection of counsel. "This," said the court, "we think an unsafe practice. The precautionary injunction to the jury not to read any part without reading the whole, is not a reliable safeguard against even an unintentional misuse of the document."[3] In Wisconsin, it is not error to permit the jury to take out the written charge of the court,[4] and, as hereafter seen,[5] in Texas it is prescribed by statute that they shall do so. In Missouri, it is the practice for the jury to take out the written instructions; but where no objection is raised on account of their failure to do so, there is no ground of new trial.[6] But, as already seen,[7] it is not proper for the judge to send *additional instructions* to the jury room without consent of parties;[8] for regularly, instructions, whether written or oral, must be delivered to the jury in open court, in the presence of the parties or their counsel, or under circumstances which afford them an opportunity to be present.

§ **2584. Judge's Minutes.** — Jurors must receive the evidence as it is delivered to them by the witnesses; and while no error has been perceived in the act of the judge in restating the testimony of a witness to the jury, from his notes, in open court and in the presence of the counsel;[9] and while this is what he always does in fact where he sums up under the common-law system, yet new trials have been granted because the judge allowed the jury to take with them on their retirement his notes or minutes of the trial.[10]

[1] Ala. Code of 1886, § 2756.

[2] Miller *v.* Hampton, 37 Ala. 342.

[3] Gholston *v.* Gholston, 31 Ga. 625, 638.

[4] Wood *v.* Aldrich, 25 Wis. 695.

[5] *Post*, § 2595.

[6] Grove *v.* City of Kansas, 75 Mo. 672, 677.

[7] *Ante*, § 2363.

[8] Smith *v.* McMillen, 19 Ind. 391.

[9] *Ante*, § 2282.

[10] Neil *v.* Abel, 24 Wend. (N. Y.) 185; Mitchell *v.* Carter, 14 Hun (N. Y.), 448.

§ 2585. Jurors' Notes of the Testimony. — If a judge or referee were to try a cause without taking notes of the testimony, he would justly be regarded as derelict in the discharge of his duties; but, in the absence of statutes allowing jurors to take notes of the testimony, which, as hereafter seen,[1] exist in some jurisdictions, for a juror to presume to do this is regarded by some courts as *misconduct* for which a new trial ought to be granted.[2] The conception which supports this view is, that the jurors must "*register the evidence on the tablets of their memory*," provided they are able to do so; and it is to be observed that, in the jurisdiction where the rule is laid down, it is also a rule that the jurors are not to take the written evidence with them.[3] But, in order to make the fact available as ground for a new trial that a juror took notes of the evidence and read them in the jury-room, no objection having been made in court, it must appear that, not only the defendant, but also his counsel, was not aware that the juror took the notes; and, in the absence of a showing to the contrary, it will be *presumed* that they knew it and consented to it.[4] Nor is the act of a juror in taking notes of the evidence, as it is given, misconduct sufficient to set aside the verdict, where he, upon being admonished by the court of the impropriety of his act, ceases taking his notes.[5] In a case in North Carolina, the court allowed the jury to copy a memorandum of property sold and the prices therefor, which was made out by the plaintiff's counsel, although the defendant objected to this being done. The case stated that this memorandum was merely a copy of an account proved and admitted in evidence. The court held that it was therefore nothing more than a note of the evidence taken down by a juror, which was not only proper, but often commendable.[6] In Georgia it is laid down that the

[1] *Post*, § 2595.

[2] Cheek *v.* State, 35 Ind. 492, 495. See *ante*, § 991.

[3] *Ante*, § 2575; Cheek *v.* State, 35 Ind. 492, 495; Long *v.* State, 95 Ind. 481; Newkirk *v.* State, 27 Ind. 1; Eden *v.* Lingenfelter, 39 Ind. 19; Lotz *v.* Briggs, 50 Ind. 346; Nichols *v.* State, 65 Ind. 512, 525; Cluck *v.* State, 40 Ind. 264, 272.

[4] Long *v.* State, 95 Ind. 481, 485. The court cite Cluck *v.* State, 40 Ind. 263.

[5] Batterson *v.* State, 63 Ind. 531.

[6] Cowles *v.* Hayes, 71 N. C. 231; distinguishing Burton *v.* Wilkes, 66 N. C. 604.

jurors may be allowed to take notes of *what the respective counsel claim* and of calculations made by them, provided it can be done without an undue consumption of time. There is no power, it is there held, to compel a juror to comply with the request of counsel to take notes of his calculations, though the counsel of either party may properly make such a request.[1]

§ 2586. Law Books. — In a few American jurisdictions the extravagant conception prevails that jurors in criminal cases are judges of the law as well as of the facts, in the sense that they are not bound by the instructions of the court, but are at liberty to decide the law for themselves, overruling the decisions of the Supreme Court, and passing upon the constitutionality of statutes.[2] Where this conception prevails, the counsel in arguing to juries are entitled to read to them from books of the law.[3] But, as elsewhere seen,[4] the more widely prevailing view is that jurors in criminal cases must take the law from the bench, and this is the view in all jurisdictions in civil cases.[5] Whatever view on this subject prevails, it is agreed that the jurors ought not to be allowed to undertake independent investigations of the law in the jury room,[6] or to take out books of the law for that purpose.[7] In civil cases the practice is one so obviously improper that, even where the parties consent, the judge may, in his discretion, refuse to allow the jury to take the law book to their room.[8] And while it has been held, upon deliberate consideration, in a civil case, where no other point was presented, ground of setting aside a verdict, that the court allowed the jurors to have a copy of the general statutes in their room, with-

[1] Tift *v.* Towns, 63 Ga. 237, 242; Lilly *v.* Griffin, 71 Ga. 535.

[2] *Ante*, § 2140.

[3] *Ante*, § 945.

[4] *Ante*, § 2133.

[5] *Ante*, § 941.

[6] Harrison *v.* Hance, 37 Mo. 185; Merrill *v.* Nary, 10 Allen (Mass.), 416; State *v.* Smith, 6 R. I. 33; Newkirk *v.* State, 27 Ind. 1.

[7] State *v.* Kimball, 50 Me. 409, 418; Hardly *v.* State, 7 Mo. 607.

[8] Thus, in Burrows *v.* Unwin, 3 Car. & P. 310, after the jury had retired, they sent a message to the court requesting that Selwyn's Nisi Prius be sent to them. To this both parties consented, but Lord Tenterden refused the request, and further instructions were given them in open court.

out the knowledge of the parties, while deliberating;[1] yet the courts generally have not gone so far, even in criminal cases, as to hold that the mere presence in the jury room of a copy of the statutes,[2] or of the reports of the decisions of the Supreme Court,[3] will be ground of setting aside a verdict. And in one jurisdiction it has been held within the *discretion* of the trial judge, even in a capital case, to send the statutes to the jury, at their request, calling their attention to the section relating to homicide, which he had probably just read to them in his instructions.[4] In another capital case jurors were shown to have read, during their deliberations, from a copy of the Revised Statutes, which was properly in their room, the law with reference to the crime for which the accused was on trial. Afterwards they came into court, and received clear and explicit instructions concerning the law of the case. Under the circumstances it was held that there was no ground for a new trial.[5] But the prevailing view no doubt is that, where the jury *secretly*, — that is, without the knowledge of the parties or the judge, — send for and examine a book of the law while deliberating on their verdict, it will be set aside.[6] The difficulty of dealing with the subject is increased by the rule hereafter explained,[7] that the affidavits

[1] Merrill *v.* Nary, 10 Allen (Mass.), 416.

[2] Graves *v.* State, 63 Ga. 740. In this case, the jurors, after having agreed upon their verdict, merely procured a copy of the code to enable them to put their verdict in proper form.

[3] State *v.* Hopper, 71 Mo. 425.

[4] Gandolfo *v.* State, 11 Ohio St. 114, 118.

[5] People *v.* Gaffney, 14 Abb. Pr. (N. S.) (N. Y.) 36. Compare Wilson *v.* People, 4 Park. Cr. (N. Y.) 619, 632.

[6] State *v.* Smith, 6 R. I. 33; People *v.* Hartung, 4 Park. Cr. (N. Y.) 256; Newkirk *v.* State, 27 Ind. 3; Com. *v.* Jenkins, Thach. Crim. Cases, 118, 228, which held the contrary, is not only overruled by Merrill *v.* Nary, 10 Allen (Mass.), 416, but is wrongly reasoned. It proceeds upon the authority of Vicary *v.* Farthing, Cro. Eliz. 411, where the solicitor of the plaintiff came to the jury and delivered to them a church book which had been given to them in evidence before at the bar, and they found for the plaintiff. This, it was held (one of the four judges dissenting), ought not to avoid the verdict. But the distinction is vital between books or other documents offered and admitted in evidence, and law books which the jury desire to consult to inform themselves of the law.

[7] *Post*, § 2618.

of jurors are not received to impeach their verdict; they are not allowed to depose to the fact that they read such books, though they will be allowed to depose to the contrary.[1]

§ 2587. **Books of Science.**—It has already been pointed out[2] that counsel are not in general allowed to read books of science to the jury, because this would enable them to get before the jury the testimony of expert witnesses, who are not under oath and not subject to cross-examination. The same rule will operate to exclude books of science from the jury room; and it has been held no error to refuse to allow such a book to be taken out by the jury, even where it has been used in evidence.[3]

§ 2588. **Maps — Dictionaries — Directories.**— Maps, directories, etc., which have not been offered in evidence may be used in argument for the mere purpose of illustration;[4] but it is a different thing to allow them to be taken out by the jury. Thus, in an action to recover a penalty for obstructing the highway, the fact that the jury, without leave of court, procured and used, during their deliberations, a *map*, has been held such an irregularity as to require the granting of a new trial, unless it is shown that the map contained nothing which could have influenced the verdict, and the burden of showing this rests upon the successful party.[5] But this rule does not apply to the use by the jury of a *dictionary* for the purpose of ascertaining the meaning of a word employed by them in a special verdict;[6] and where, in the trial of a criminal case, the jurors procured and used in their room several *directories* of the city of New York, and, before they had delivered their verdict, this fact became known to the court, and the court admonished them to banish from their minds any information thus obtained, it was held not to afford sufficient ground for a new trial.[7]

[1] See Dakota Ter. *v.* Taylor, 1 Dak. 479; People *v.* Williams, 24 Cal. 31.

[2] *Ante*, § 996, *et seq.*

[3] State *v.* Gillick, 10 Iowa, 98.

[4] *Ante*, § 992.

[5] State *v.* Hartmann, 46 Wis. 248.

[6] Wright *v.* Clark, 50 Vt. 130.

[7] United States *v.* Horn, 5 Blatchf. (U. S.) 105.

§ 2589. Rule where the Paper has been Improperly Handed to the Jury. — If papers which the jury are not entitled to take out with them are handed to them by or at the suggestion of counsel for the unsuccessful party, the circumstance affords no ground of new trial, since he cannot complain of his own wrong.[1] But, on grounds of public policy, elsewhere explained,[2] if the paper is designedly delivered to the jury by the successful party or his counsel, without the consent of the opposing party, the verdict will be set aside as a punishment, without reference to the effect which the paper may have had on the minds of the jurors.[3] Even in criminal cases, where the prosecutor so misdemeans himself, the verdict will be set aside, not as a punishment to him, but lest, by sanctioning such practices, public confidence in jury trials should be destroyed.[4] But this rule cannot be applied where the character of the paper does not appear, since it cannot be known that it was a paper which the jurors ought not to take out.[5]

§ 2590. What if the Paper was not in Fact Read by the Jury. — If the paper was taken out by mistake, and not by the fraud or design of the prevailing party, or his counsel, and if it was not in fact read by the jury, then there is no occasion to grant a new trial; since no harm has been done to the party against whom the verdict was rendered, and the other party has

[1] Alcott *v.* Boston Steam Flour Mill Co., 11 Cush. (Mass.) 91.

[2] *Ante*, § 2560.

[3] Sheaff *v.* Gray, 2 Yeates (Pa.), 273; Foster *v.* McO'Blenis, 18 Mo. 88, 91; Page *v.* Wheeler, 5 N. H. 91, 92; Ball *v.* Carley, 3 Ind. 577, per Roache, J.; Jessup *v.* Eldridge, 1 N. J. L. 401; Heffron *v.* Gallupe, 55 Me. 563; Killen *v.* Sistrunk, 7 Ga. 281, 294; Lansdale *v.* Brown, 4 Wash. C. C. (U. S.) 148, 157. Thus in 21 Viner's Abridgment, 450 (title Trial, G. g. 9 pl. 19), it is said to have been decided in Pratt's Case (21 Jac. I.), that "if there be brought into court a great book of depositions, taken in chancery, but only some of them are read to the jury in evidence, after the jury depart from the bar, a solicitor of one party delivers this book of depositions to the jury, who carry it with them, and there read only those which were read in court, yet this shall quash the verdict; because they ought not be put in remembrance, after they are gone from the bar, of any evidence given before in court."

[4] State *v.* Hascall, 6 N. H. 352, 363.

[5] Wright *v.* Rogers, 2 N. J. L. 547.

done no wrong for which he is to be punished.[1] And the rule is the same where it is made to appear that the only jurors who read the objectionable paper had already agreed to return the verdict which was rendered.[2] As the affidavits of jurors are generally admissible to sustain their verdicts,[3] it may be shown by such evidence that the paper was not in fact read by any of the jury.[4] But, as the affidavits of jurors are not admissible to impeach their verdicts,[5] the court will not hear an affidavit to the effect that such a paper has been read by the jury.[6] There are also doubtful holdings to the effect that a new trial will not be granted where it is made to appear, by the affidavits of the jurors, that the paper did not affect their verdict,[7] as where such affidavits showed that the paper was not read until the jurors had made up their minds.[8] But the better view is, that affidavits of jurors can only be received in support of verdicts where they disclose facts, and not where they disclose the mental processes of the jurors;[9] and, for stronger reasons, that such affidavits will not be heard, where the paper was got before the jurors in pursuance of a design to tamper with them in the interests of the successful party.[10] Some courts *presume* that the objectionable paper was read by the jurors, and grant new trials in the absence of evidence overcoming this presumption;[11] others refuse new

[1] Hackley *v.* Hastie, 3 Johns. (N. Y.) 252; Hicks *v.* Drury, 5 Pick. (Mass.) 296; State *v.* Tindall, 10 Rich. L. (S. C.) 212; Wilds *v.* Bogan, 57 Ind. 453, 456.

[2] Abel *v.* Kennedy, 3 G. Greene (Ia.), 47; Morris *v.* Howe, 36 Ia. 490.

[3] *Post*, § 2623.

[4] Hackley *v.* Hastie, 3 Johns. (N.Y.) 252.

[5] *Post*, § 2618.

[6] State *v.* Tindall, 10 Rich. L. (S. C.) 212.

[7] Ball *v.* Carley, 3 Ind. 577.

[8] Morris *v.* Howe, 36 Iowa, 490.

[9] *Post*, § 2618. Page *v.* Wheeler, 5 N. H. 91, 93; Whitney *v.* Whitman, 5 Mass. 405. "Where a paper, which is capable of influencing the jury on the side of the prevailing party goes to the jury by accident, and is read by them, the verdict will be set aside, although the jury may think they were not influenced by such paper, it being impossible for them to say what effect it may have had upon their minds. If it was not read, it was the same thing as though it had not been delivered. Lumpkin, J., in Killen *v.* Sistrunk, 7 Ga. 294.

[10] Foster *v.* McO'Blenis, 18 Mo. 88, 91; Coster *v.* Merest, 3 Brod. & Bing. 272; *ante*, § 2560.

[11] Bronson *v.* Metcalf, 1 Disney (Oh.), 21; O'Brien *v.* Merchants' Fire

trials except upon affirmative proof that the paper was in fact read by them. It has been so held in civil cases with reference to depositions which have been used as evidence in the cause,[1] and the rule has been extended to documentary evidence,[2] to written instructions which have been asked for and refused,[3] to depositions, parts of which had been excluded,[4] and even to the case of newspapers containing prejudicial articles in criminal trials.[5]

§ 2591. Duty of Counsel to Object at the Time. — If counsel for the party complaining sees that a certain paper is about to be sent to the jury, and does not object at the time, or in a proper manner, it will be no ground for a new trial.[6] It must appear that the counsel for the party complaining objected thereto, or that he had not an opportunity to object, or otherwise that his rights were prejudiced thereby.[7] And where the attention of counsel is called severally to papers which it is intended to send out to the jury, with the inquiry whether he makes any objection to their being thus sent out, and he makes no other reply than that he objects to all of them, the fact that an improper paper goes out with the others, is a circumstance of which he cannot subsequently complain.[8] It is not enough for counsel to show in support of a motion for a new

Ins. Co., 6 Jones & Sp. (N. Y.) 482; Durfee *v.* Eveland, 8 Barb. 46; Clark *v.* Whitaker, 18 Conn. 543, 549.

[1] Shields *v.* Guffey, 9 Iowa, 322.

[2] Bersch *v.* State, 13 Ind. 434.

[3] Goode *v.* Linecum, 1 How. (Miss.) 281.

[4] Foster *v.* McO'Blenis, 18 Mo. 88.

[5] United States *v.* McKee, 91 U. S. 442.

[6] Watson *v.* Walker, 23 N. H. 472, 497; Little Schuylkill Nav. Co. *v.* Richards, 57 Pa. St. 142, 148; Greff *v.* Blake, 16 Iowa, 222; Davenport *v.* Cummings, 15 Iowa, 219; Littlefield *v.* Beamis, 5 Rob. (La.) 145; McDonald *v.* Hodge, 5 Hayw. (Tenn.) 85; Shomo *v.* Zeigler, 10 Phila. (Pa.) 611; Shields *v.* Guffey, 9 Iowa, 322; Langworthy *v.* Myers, 4 Iowa, 18.

[7] Turner *v.* Kelley, 10 Iowa, 573; Shields *v.* Guffey, 9 Iowa, 322.

[8] Kent *v.* Tyson, 20 N. H. 121, 127. This rule is in conformity with the principle that a general objection to the instructions which the court has given to the jury goes for naught, if any one of them is good. Johnston *v.* Jones, 1 Black (U. S.), 209; Rogers *v.* The Marshall, 1 Wall. (U. S.) 645, 654; Harvey *v.* Tyler, 2 Wall. (U. S.) 328, Hunt *v.* Maybee, 7 N. Y. 273; Decker *v.* Mathews, 12 N. Y. 313.

trial, that a particular paper was sent to the jury by the adverse party without his knowledge. It is his duty to ascertain what papers are sent to the jury before they leave the court; and no motion for a new trial should be allowed merely because this duty has been neglected. It should appear that the counsel used due care that none but proper papers were passed to the jury, and that the paper in question was nevertheless sent to the jury by some mistake, or through some trick or artifice of the opposite counsel.[1] At the same time it has been reasoned that it is not the duty of one counsel in a case to watch the opposite counsel to see that he does not send any improper papers to the jury.[2] Where the paper which the jury took was a deposition which had been offered in evidence by the counsel for the party complaining, there was, of course, no ground for a new trial;[3] and if a paper which is peculiarly the property of one of the counsel, such as his notes of the testimony, gets to the jury, there is a presumption that he gave it to them intentionally.[4]

§ 2592. What if the Court Instructs the Jury to Disregard the Paper. — If the paper has been offered in evidence and afterwards withdrawn by an instruction,[5] under a principle of evidence elsewhere stated;[6] or if a portion of it is evidence and the rest not, and the court has carefully instructed the jury that none but the particular portion is evidence;[7] or if, as soon as it is discovered that a paper not in evidence has been sent accidentally to the jury room, and the court instructs them to disregard it,[8] — the circumstance will ordinarily not be regarded as sufficient ground for a new trial; though in a capital case it was held error to allow the jurors to take to their room for any purpose a record containing the evidence given before the committing magistrate,

[1] Maynard *v.* Fellows, 43 N. H. 255, 259.

[2] Flanders *v.* Davis, 19 N. H. 139, 149. In this case the duty of counsel with reference to this matter is discussed.

[3] Davenport *v.* Cummins, 15 Iowa, 219.

[4] Durfee *v.* Eveland, 8 Barb. (N. Y.) 46.

[5] Warden *v.* Warden, 22 Vt. 563.

[6] *Ante*, §§ 723, 2354.

[7] Riggins *v.* Browne, 12 Ga. 271, 277. See also Foster *v.* McO'Blenis, 18 Mo. 88, 91.

[8] State *v.* Bradley, 6 La. Ann. 560.

not offered in evidence upon the trial, though the court instructed them that they must not read it.[1]

§ 2593. Manner of Presenting such Irregularities for Review. — If the taking out of the objectionable paper is discovered at the time, the attention of the court must be called to it with a request to withhold it from the jury; and if this is denied an exception must be taken. Moreover, the bill of exceptions must show the character of the paper, in order that the reviewing court may see whether or not it was of a nature to prejudice the excepting party.[2] Where this is not done, or where the irregularity is not discovered in time to do it, there is still another remedy, by a motion for new trial in the court below.[3] If the irregularity was noticed at the time, was objected to, the objection disregarded and an exception saved, — then, according to the practice in Missouri, and in several other States, the objection must be renewed in distinct terms in a motion for a new trial, or it will be waived, and cannot be made the subject of appellate review.[4] Where, as in New York, it is a matter of *discretion* with the trial court, whether to send out papers with the jury or not, an objection grounded upon the taking out of papers by the jury is not the subject of exception, but it involves an inquiry of fact which can only be made upon a motion supported and opposed by affidavits.[5] Where the bill of exceptions recited that, "the court, against the objection of defendants, allowed the account for the goods mentioned in the third count in the complaint, as made out by the plaintiffs, *to go to the jury*, and the defendants excepted," and the account was clearly inadmissible as evidence, the court considered the language as meaning, not that the account was allowed to go to the jury as

[1] Atkins *v.* State, 16 Ark. 568, 591.

[2] Foster *v.* McO'Blenis, 18 Mo. 88. Ordinarily it must be transcribed in the bill. Ott *v.* Oyer, 106 Pa. St. 7, 19; Riddlesburg Coal Co. *v.* Rogers, 65 Pa. St. 416.

[3] See Hopkinson *v.* Steel, 12 Vt. 582; Warden *v.* Warden, 22 Vt. 563.

[4] *Post*, § 2712.

[5] Howland *v.* Willetts, 5 Sandf (N. Y.) 219; Hackley *v.* Hastie, 3 Johns. (N. Y.) 252.

evidence, but that they were allowed to take the papers with them to their room on retiring.[1]

§ 2594. Recalling the Jury and Delivering Papers to them. — Subject to certain limitations, which it is unnecessary to state here, the judge may, of his own motion, recall the jury and deliver additional instructions to them.[2] For the same reason, if, by accident, the jury have omitted to take with them papers which they ought to consider in their room, the judge may, in his discretion, recall them and give them such papers.[3] And although private communications between the judge and jury are not tolerated by the law, and are generally ground for a new trial,[4] yet no reason is perceived why the judge might not, with propriety, send such papers to the jury room by an officer.

§ 2595. Rules under Particular American Statutes: in Civil Cases. — In several of the States the subject of this chapter is regulated by statute. Thus, in Alabama, in civil cases, the jury, on retiring for deliberation, may take with them "all instruments of evidence and depositions read to the jury;"[5] in California,[6] and Nevada,[7] "all papers which have been received as evidence in the cause, except depositions, or copies of such papers as ought not, in the opinion of the court, to be taken from the person having them in possession;" also "notes of the testimony or other proceedings on trial, taken by themselves or any of them, but none taken by any other person;" in Colorado, "all papers, except depositions, accounts, or account books, which have been received in the case, or copies of such papers as ought not, in the opinion of the court, to be taken from the person having them in possession;" also "notes of the testimony or other proceedings on the trial taken by themselves, or any of them, but none taken by any other person;"[8]

[1] New York &c. Contracting Co. *v.* Meyer, 51 Ala. 325.

[2] *Ante*, § 2363.

[3] Flanders *v.* Colby, 28 N. H. 34, 39.

[4] *Ante*, § 2555.

[5] Ala. Code of 1886, § 2757.

[6] Cal. Code Civil Proc., § 612; Deering's Codes, Vol. 3.

[7] Comp. Laws Nev. 1873, § 1230.

[8] Colo. Code Civil Proc. 1887, § 191.

in Delaware, "papers read in evidence to the jury, although not under seal, except depositions;[1] in Illinois, instructions which have been given to the jury in writing;[2] also "papers read in evidence other than depositions;"[3] in Iowa, "all books of accounts, and all papers which have been received as evidence in the cause, except depositions, which shall not be so taken, unless all the testimony is in writing, and none of the same has been ordered to be struck out;"[4] in Minnesota, "all papers, except depositions, which have been received as evidence in the cause, or copies of such parts of public records or private documents given in evidence, as ought not, in the opinion of the court, to be taken from the person having them in possession;" also "notes of the testimony or other proceedings on the trial, taken by themselves, or any of them, but none taken by any other person;"[5] in New Jersey, "papers read in evidence, though not under seal;"[6] in Oregon, "the pleadings in the cause, and all papers which have been received as evidence on the trial, except depositions, or copies of such parts of public records, or private documents given in evidence, as ought not, in the opinion of the court, to be taken from the person having them in possession;" also "notes of the testimony or other proceedings on the trial taken by themselves, or any of them, but none taken by any other person;"[7] and in Texas, "the charges and instructions in the cause, the pleadings and any written evidence, except the depositions of witnesses; but when part only of a paper has been read in evidence, the jury shall not take the same with them, unless the part so read to them is detached from that which was excluded."[8] In Maine, there is this provision: "If either party * * * purposely introduce among the papers in the case which are delivered to the jury when they retire with the cause, any papers which have any connection with it, but were

[1] Del. Rev. Code 1874, p. 649, § 26.

[2] 2 Starr & C. Ill. Stat. 1885, p. 1817, § 55.

[3] *Ibid.*, § 56.

[4] Rev. Code, Iowa, 1887, § 2797. See Peterson *v.* Haugen, 34 Iowa, 395.

[5] Minn. Stats. 1878, ch. 66, § 231.

[6] N. J. Rev. 1877, p. 876, § 182.

[7] 1 Hill's Laws, Ore., 1887, § 204.

[8] 1 Sayle's Stats. Tex. 1888, art 1303.

not offered in evidence, the court, on motion of the adverse party, may set aside the verdict and order a new trial."[1]

§ **2596.** [**Continued.**] **In Criminal Cases.** — In Arkansas, in criminal cases, the jury, on retiring for deliberation, may take with them "all papers which have been received as evidence in the cause;[2] in California, "all papers, except depositions, which have been received as evidence in the cause, or copies of such public records or private documents, given in evidence, as ought not, in the opinion of the court, to be taken from the person having them in possession;" also "the written instructions given, and notes of the testimony, or other proceedings on the trial, taken by themselves, or any of them, but none taken by any other person;"[3] in Iowa, "all papers which have been received as evidence in the case, except depositions, and copies of such parts of public records or private documents as ought not, in the opinion of the court, to be taken from the person having them in possession;"[4] also "notes of the testimony or other proceedings on the trial, taken by themselves, or any of them, but none taken by any other person;"[5] in Kentucky, "all papers and other things which have been received as evidence in the cause;"[6] in Minnesota, "all papers which have been received as evidence in the cause, or copies of such parts of public records or private documents, given in evidence, as ought not, in the opinion of the court, to be taken from the person having them in possession;" also "notes of the testimony, or other proceedings on the trial, taken by themselves or any of them, but none taken by any other person;"[7] in Nevada, "all papers, except depositions, which have been received as evidence in the case, or copies of such parts of public records or private documents given in evidence, as ought not, in the opinion of the court, to be taken from the person having them in possession; and also the instructions of the

[1] Rev. Stats. Me. 1883, ch. 82, § 90.
[2] Ark. Dig. Stats. 1874, § 1942.
[3] Cal. Penal Code, § 1137; Deering's Codes, vol. 4.
[4] Rev. Code Iowa 1886, § 4452.
[5] *Ibid.*, § 4453.
[6] Bullitt's Ky. Crim. Code, § 248.
[7] Minn. Stats. 1874, ch. 114, § 15.

court;"[1] also "notes of the testimony or other proceedings on the trial, taken by themselves, or any of them, but none taken by any other person;"[2] in New York, "any paper or article which has been received as evidence in the cause, but only upon the consent of the defendant and the counsel for the people;"[3] also "notes of the testimony or other proceedings on the trial, taken by themselves, or any of them, but none taken by any other person;"[4] in Oregon, the same as in civil cases;[5] in Texas, "the charges given by the court, after the same have been filed; but they shall not be permitted to take with them any charge or portion of a charge that has been asked of the court and which the court has refused to give;"[6] also "all the original papers in the cause, and any papers used as evidence."[7]

§ 2597. View that it is Discretionary with Trial Court.— In some jurisdictions, the whole subject of sending out with the jury papers which have been received in evidence, is remitted to the sound *discretion* of the trial court.[8] Analogous to this view is another, which is applied in cases where a paper gets into the jury room by mistake which ought not to go there. In such a case, it has been held, on exceptions, that the complaining party is not entitled to a new trial as a matter of right, but that the granting or refusing of it rests within the discretion of the trial court.[9]

[1] Comp. L. Nev. 1873, § 2017.

[2] *Ibid.*, § 2018.

[3] N. Y. Code Crim. Proc. (Laws 1881, ch. 442), and 4 R. S. 1882, § 425.

[4] *Ibid.*, § 426; *ante*, § 2595.

[5] Gen. Laws Ore. 1887, § 1356. See the preceding section.

[6] Texas Code Crim. Proc. 1879, art. 684.

[7] *Ibid.*, art. 693. See Heard *v.* State, 9 Tex. App. 1.

[8] Howland *v.* Willetts, 9 N. Y. 170; Porter *v.* Mount, 45 Barb. (N. Y.) 422; Shappner *v.* Second Ave. R. Co., 55 Barb. (N. Y.) 497; Sanderson *v.* Bowen, 4 Thomp. & C. (N. Y.) 675; Little Schuylkill Nav. Co. *v.* Richards, 57 Pa. St. 142, 148; O'Hara *v.* Richardson, 46 Pa. St. 385, 389; Spence *v.* Spence, 4 Watts (Pa.), 165; Hamilton *v.* Glenn, 1 Pa. St. 340; Hairgrove *v.* Millington, 8 Kan. 480, 485; Thayer *v.* Van Vleet, 5 Johns. (N. Y.) 111; Neil *v.* Abel, 24 Wend. (N. Y.) 185; Ott *v.* Oyer, 106 Pa. St. 7, 19.

[9] Clapp *v.* Clapp, 137 Mass. 183.

CHAPTER LXXII.

IMPROPER METHODS OF ARRIVING AT THE VERDICT.

SECTION

2601. Chance Verdicts set Aside.
2602. The "Quotient Verdict" Illegal.
2603. This Misconduct, how shown.
2604. Jurors not Allowed to make Experiments.
2605. Visiting the *Locus in Quo*.
2606. Compromise Verdicts.

§ 2601. Chance Verdicts set Aside. — Whether the verdict is the result of lot or chance cannot ordinarily be shown. Improper methods resorted to by the jury in arriving at their verdict can only be shown by such facts as may be gathered in a legal way from what others than the jury can testify to. But where it is shown, by such outside testimony, that the verdict is the result of lot or chance, it will be set aside.[1]

[1] Warner *v.* Robinson, 1 Root (Conn.), 194; Cowperthwaite *v.* Jones, 2 Dall. (U. S.) 55; Donner *v.* Palmer, 23 Cal. 40; Mitchell *v.* Ehle, 10 Wend. (N. Y.) 595; Boynton *v.* Trumbull, 45 N. H. 408; Levy *v.* Brannan, 39 Cal 485. It was so held where the bailiff in charge of the jury swore that, while there was considerable disorder in the jury room, he heard fragments of talk about numbers, whoever drew the highest number should get it, referring, as he supposed, to the verdict; and where it appeared from affidavits that members of the jury had told the affiants that the verdict was the result of lot or chance, and the counter affidavits of the jurors did not deny this charge. Obear *v.* Gray, 68 Ga. 182, 187. The old reports furnish an instance where the jury, being equally divided in opinion, came to an agreement by lot, and this method was approved by the court. Two sixpences were put into a hat, from which the officer having the jury in charge drew one out, and the verdict went accordingly. Windham, J., said: "This is as good a way of decision as by the strongest body, which is the usual way, and is suitable in such cases to the law of God." Prior *v.* Powers, 1 Keble, 811, pl. 87. Twisden, J., doubted. But with the disappearance of the wager of battle, such methods found no justification in the eyes of the judges; and later we find many examples of verdicts set aside where it appeared that they had been obtained by throwing up "cross and

§ 2602. **The "Quotient Verdict" Illegal.** — The method of arriving at the amount of the fine, of the damages where they are unliquidated, or the length of the term of imprisonment in criminal cases, whereby each juror puts a number into a hat and all the numbers so put in are added up and the sum divided by twelve,— vitiates the verdict, where the jurors agree in advance to abide by the result.[1] But it is otherwise where the amount which each juror puts into the hat is a mere proposition, and there is no previous agreement to abide by the result.[2] The

pile," hustling half pence in a hat, and by casting lots. Foy *v.* Harder, 3 Keble, 805; Fry *v.* Hardy, Sir T. Jones, 83; Philips *v.* Fowler, Comyns, 525; *s. c.* Barnes' Notes, 441; Rex. *v.* Lord Fitzwater, 2 Lev. 140; Foster *v.* Hawden, 2 Lev. 205; Mellish *v.* Arnold, Bunbury, 51; Hale *v.* Cove, Strange, 642; Parr *v.* Seames, Barnes' Notes, 438; Aylett *v.* Jewel, 2 W. Bl. 1299. Lord Mansfield denounced such conduct as a very high misdemeanor (Vasie *v.* Delaval, 1 T. R. 11), which the court upon an information, punished severely, as appears from the casual statement in Keble, that the punishment "broke Sir James Altham's heart, one of the jury in the case of Lord Fitzwater." 3 Keble, 805, pl. (11).

[1] Thompson *v.* Com., 8 Gratt. (Va.) 637; Joyce *v.* State, 7 Baxt. (Tenn.) 273; Crabtree *v.* State, 3 Sneed (Tenn.), 302; Leverett *v.* State, 3 Tex. App. 213; Hunter *v.* State, 8 Tex. App. 75; Dooley *v.* State, 28 Ind. 239; State *v.* Branseiter, 65 Mo. 149.

[2] Batterson *v.* State, 63 Ind. 531; Dunn *v.* Hall, 8 Blackf. (Ind.) 32; Harvey *v.* Rickett, 15 Johns. (N. Y.) 87; Dorr *v.* Fenno, 12 Pick. (Mass.) 521; Alexander *v.* Thomas, 25 Ind. 268; Grinnell *v.* Phillips, 1 Mass. 529; Miller *v.* St. Louis R. Co., 5 Mo. App. 472; Dana *v.* Tucker, 4 Johns. (N. Y.) 487; Harvey *v.* Jones, 3 Humph. (Tenn.) 157; Turner *v.* Tuolumne Co., 25 Cal. 397; Papineau *v.* Belgarde, 81 Ill. 61; Deppe *v.* Chicago &c. R. Co., 38 Iowa, 592; Kennedy *v.* Kennedy, 18 N. J. L. 450; Guard *v.* Risk, 11 Ind. 156; Smith *v.* Cheetham, 3 Caines (N. Y.), 57; Bennett *v.* Baker, 1 Humph. (Tenn.) 399; Elledge *v.* Todd, 1 Humph. (Tenn.) 43; Johnson *v.* Perry, 2 Humph. (Tenn.) 569, 574; Wilson *v.* Berryman, 5 Cal. 44; Ruble *v.* McDonald, 7 Iowa, 90; Schanler *v.* Porter, 7 Iowa, 482; Denton *v.* Lewis, 15 Iowa, 301; Barton *v.* Holmes, 16 Iowa, 252; Wright *v.* Illinois &c. Tel. Co., 20 Iowa, 195; Hendrickson *v.* Kingsbury, 21 Iowa, 379; Fuller *v.* Chicago &c. R. Co., 31 Iowa, 211; Hamilton *v.* Des Moines Valley R. Co., 36 Iowa, 31; Illinois &c. R. Co. *v.* Able, 59 Ill. 131; Com. *v.* Wright, 1 Cush. (Mass.) 46; Parham *v.* Harney, 6 Smed. & M. (Miss.) 55; Sawyer *v.* Hannibal &c. R. Co., 37 Mo. 240; Mulock *v.* Lawrence, 5 City Hall Rec. (N. Y.) 84; Conklin *v.* Hill, 2 How. Pr. (N. Y.) 6; Forbes *v.* Howard, 4 R. I. 364; St. Martin *v.* Desnoyer, 1 Minn. 156; Handley *v.* Leigh, 8 Tex. 129; Cheney *v.* Holgate, Brayton (Vt.), 171; Fowler *v.* Colton, Burnett (Wis.), 175; *s. c.* 1 Pinney (Wis.), 331; Chandler *v.* Barker, 2 Harr. (Del.) 387; Lee *v.* Clute, 19 Nev. 151. But see Roberts *v.* Failis, 1 Cow. (N. Y.)

ground of objection to the jurors binding themselves in advance to the amount to be determined by addition and division by twelve is, that such an agreement cuts off all deliberation on the part of the jurors, and places it in the power of a single juror to make the quotient unreasonably large or small, by naming a sum extravagantly high or ridiculously low.[1] It is not material on what particular scheme of averages this "quotient verdict" is devised; the vitiating fact is the agreement in advance to abide by the result. The verdict will, therefore, be bad where the agreement is that the verdict should consist of half of the aggregate of the highest and lowest sums which shall be marked.[2] Nor is it necessary that the jurors should have entered into the

238; Cowperthwaite *v.* Jones, 2 Dall. (U. S.) 55; Heath *v.* Conway, 1 Bibb (Ky.), 398; Zuber *v.* Geigar, 2 Yeates (Pa.), 522; Crabtree *v.* State, 3 Sneed (Tenn.), 302; Leverett *v.* State, 3 Tex. App. 213; Hunter *v.* State, 8 Tex. App. 75; Warren *v.* State, 9 Tex. App. 619; Cochlin *v.* People, 93 Ill. 410; *s. c.* 10 Reporter, 422; State *v.* Branstetter, 65 Mo. 149; Joyce *v.* State, 7 Baxt. (Tenn.) 273; Dooley *v.* State, 28 Ind. 239. And so, after resorting to such a method the jury return a verdict different from the aggregate so found. Bailey *v.* Beck, 21 Kan. 462; Cheney *v.* Holgate, Brayton (Vt.), 171; Birchard *v.* Booth, 4 Wis. 67; Shobe *v.* Bell, 1 Rand. (Va.) 39; Thompson *v.* Com., 8 Gratt. (Va.) 637; Cochlin *v.* People, 93 Ill. 410; *s. c.* 10 Reporter, 422. But *contra*, see Dunn *v.* Hall, 8 Blackf. (Ind.) 32.

[1] See, for example, Parham *v.* Harney, 6 Smed. & M. (Miss.) 55, where the amounts named by the jurors ranged from $30.00 to $10,000.00. Some courts have had difficulty with the question whether the subsequent assent of the jurors to the verdict in court, especially when they are polled, is not such a free assent as cures the irregularity. Allard *v.* Smith, 2 Metc. (Ky.) 297, 301; Denton *v.* Lewis, 15 Iowa, 301; Pekin *v.* Winkel, 77 Ill. 56, 58; Willey *v.* Belfast, 61 Me. 569; Heath *v.* Conway, 1 Bibb (Ky.), 398, 399. But they lose sight of the conception that, by agreeing in advance to this method, each juror puts himself under a restraint which interferes with the subsequent free exercise of his judgment; wherefore his assent to the verdict in open court should be regarded as a mere ratification of the previous improper agreement. One court has condemned the innocent practice of adopting this method of arriving at a verdict by way of experiment merely. Hamilton *v.* Des Moines Valley R. Co., 36 Iowa, 31, 36. But other courts have ably defended the method as innocent, provided no restraint is imposed upon the juror by an agreement in advance to abide the result. Thompson *v.* Com., 8 Gratt. (Va.) 637; Dorr *v.* Fenno, 12 Pick. (Mass.) 521.

[2] Boynton *v.* Trumbull, 45 N. H. 408. See also People *v.* Barker, 2 Wheeler Cr. C. (N. Y.) 19.

agreement in advance to abide the result; it is sufficient that a portion of them regarded themselves as so bound.[1]

§ 2603. **This Misconduct how Shown.** — But while this misconduct was pronounced by a great judge to be a very high misdemeanor,[2] yet the law is in such an incongruous state that it will not, on a supposed ground of public policy, allow the fact to be shown by the only evidence by which, in general, it can be shown, viz., the affidavits of jurors themselves.[3] But if the

[1] Ruble *v.* McDonald, 7 Iowa, 90; Johnson *v.* Hubbard, 22 Kan. 277.

[2] Vasie *v.* Delaval, 1 T. R. 11, per Lord Mansfield, C. J.

[3] Owen *v.* Warburton, 1 Bos. & Pul. (N. R.) 326, 330. See also Straker *v.* Graham, 4 Mees. & W. 721; *s. c.* 7 Dowl. P. C. 223; Burgess *v.* Langley, 5 Man. & Gr. 722; Harvey *v.* Hewitt, 8 Dowl. P. C. 598; Dana *v.* Tucker, 4 Johns. (N. Y.) 487; People *v.* Barker, 2 Wheeler Cr. C. (N. Y.) 19; Wilson *v.* Berryman, 5 Cal. 44; Turner *v.* Tuolumne Co., 25 Cal. 397; St. Martin *v.* Desnoyer, 1 Minn. 156; Dunn *v.* Hall, 8 Blackf. (Ind.) 32; Drummond *v.* Leslie, 5 Blackf. (Ind.) 453; Pleasants *v.* Heard, 15 Ark. 403; Heath *v.* Conway, 1 Bibb (Ky.), 398; Birchard *v.* Booth, 4 Wis. 67; Dorr *v.* Fenno, 12 Pick. (Mass.) 521; Boston &c. R. Co. *v.* Dana, 1 Gray (Mass.), 83; Sawyer *v.* Hannibal &c. R. Co., 37 Mo. 240; Cluggage *v.* Swan, 4 Binn. (Pa.) 150; Handley *v.* Leigh, 8 Tex. 129; Sheppard *v.* Lark, 2 Bailey (S. C.), 576; Cheney *v.* Holgate, Brayt. (Vt.) 171. The affidavit of one not of the jury as to what one or more jurors told him in regard to the manner of making up the verdict, is, for another and stronger reason, madmissible. Prior *v.* Powers, 1 Keble, 811; Goodwin *v.* Phillips, Loffl, 71; Owen *v.* Warburton, 1 Bos. & Pul. (N. R.) 326; Straker *v.* Graham, 4 Mees. & W. 721; Burgess *v.* Langley, 5 Man. & Gr. 722; Drummond *v.* Leslie, 5 Blackf. (Ind.) 453; Chandler *v.* Barker, 2 Harr. (Del.) 387; Mulock *v* Lawrence, 5 City Hall Rec. (N. Y.) 84; Birchard *v.* Booth, 4 Wis. 67; St. Martin *v.* Desnoyer, 1 Minn, 156. The contrary has been held in a few isolated cases. Phillips *v* Fowler, Barnes' Notes, 441; Parr *v.* Seames, *Id.* p. 438; Aylett *v.* Jewel, 2 W. Bl. 1299. But these cases are overruled by Rex *v.* Delaval, *supra*, and other English cases following it. The contrary has been held in two early American cases. Smith *v.* Cheetham, 3 Caines (N. Y.), 57; Grinnell *v.* Phillips, 1 Mass. 530. But these seem to have been subsequently overruled in the States in which they were pronounced: Dana *v.* Tucker, 4 Johns. (N. Y.) 487; Dorr *v.* Feno, 12 Pick. (Mass.) 521. In three American States the affidavits of jurors are receivable to impeach their verdict, — Iowa, Kansas and Tennessee. In two of these States we find decisions upholding the reception of the affidavits of jurors to show that their verdict was arrived at by this method: Johnson *v.* Husband, 22 Kan. 277; Elledge *v.* Todd, 1 Humph. (Tenn.) 43; Bennett *v.* Baker, 1 Humph. (Tenn.) 399; Crabtree *v.* State, 3 Sneed (Tenn.), 302; Joyce *v.* State, 7 Baxt. (Tenn.) 273. See *post*, § 2618.

bailiff in charge of the jury, or some officious *eaves-dropper*, can get his eye or ear at the key-hole of the jury room and discover the vitiating fact, *his* affidavit will be listened to;[1] though, of course, it may be contradicted by the affidavits of the jurors, showing that their deliberations were regular.[2] It is scarcely necessary to say that statements made by jurors to others, disclosing such a fact, is mere hearsay and no evidence of it.[3] Nor does the finding of a paper in the jury room, on which there is a computation indicating that this method was resorted to, afford ground of new trial, because it does not show that there was an agreement in advance to return a verdict in accordance with the result.[4] An affidavit made on *information and belief* proves nothing.[5] Nor does the affidavit of one who heard a violent altercation in the jury room, after which there was silence, and *was told by certain of the jurors* that their verdict was determined by lot.[6] In some States there are *statutory provisions* permitting the testimony of jurors to be introduced on a motion for a new trial, to show that the verdict was made by lot.[7] The "quotient verdict" has been held not within such a statute, on the plainly erroneous conception that it is not the result of chance.[8] It is certainly the result of chance on the part of every juror; since

[1] Fry *v.* Hardy, Sir T. Jones, 83; Burgess *v.* Langley, 5 Man. & Gr. 722, 725, per Creswell, J.; Harvey *v.* Hewitt, 8 Dowl. P. C. 598; Dana *v.* Tucker, 4 Johns. (N. Y.) 487; Wilson *v.* Berryman, 5 Cal. 45; Dunn *v.* Hall, 8 Blackf. (Ind.) 32; Parham *v.* Harney, 6 Smed. & M. (Miss.) 55; Kennedy *v.* Kennedy, 18 N. J. L. 450; Cheney *v.* Holgate, Brayt. (Vt.) 171; Birchard *v.* Booth, 4 Wis. 67; Illinois &c. R. Co. *v.* Able, 59 Ill. 131.

[2] Mellish *v.* Arnold, Bunbury, 51; Dana *v.* Tucker, 4 Johns. (N. Y.) 487; Wilson *v.* Berrymann, 5 Cal. 44; Papineau *v.* Belgarde, 81 Ill. 61; Kennedy *v.* Kennedy, 18 N. J. L. 450.

[3] Burgess *v.* Langley, 5 Man. & Gr. 722.

Forbes *v.* Howard, 4 R. I. 364; Leverett *v.* State, 3 Tex. App. 213; Wiley *v.* Belfast, 61 Me. 569.

[5] Pekin *v.* Winkel, 77 Ill. 56; Cummings *v.* Crawford, 88 Ill. 312; *post*, § 2622.

[6] Burgess *v.* Langley, 5 Man. & Gr. 722.

[7] Ark. Dig. Stat. 1874, § 1971; Tex. Code Crim. Proc. 1879, art. 777, subsecs. 3 and 8; Fain *v.* Goodwin, 35 Ark. 109; Hunter *v.* State, 8 Tex. App. 75; Donner *v.* Palmer, 23 Cal. 40; Turner *v.* Tuolumne Co., 25 Cal. 400.

[8] Turner *v.* Tuolumne Co., 25 Cal. 397; Boyce *v.* California Stage Co., 25 Cal. 460.

none can know how high or how low a sum his fellows will mark, in order to increase or diminish the final result.[1] Under a statute of Iowa, authorizing the use of affidavits of jurors on motion for new trial, jurors will not be subjected to examination, on the mere suggestion of an attorney that they have resorted to this method of arriving at their verdict;[2] though their voluntary affidavits disclosing the fact will afford ground of new trial.[3]

§ **2604. Jurors not Allowed to Make Experiments.** — There has been such an abnegation of common sense on the part of some of the American courts in relation to the subject of trial by jury, that we find decisions where new trials have been granted because jurors, in their deliberations, have resorted to those simple and ordinary experiments for the purpose of testing the value of the testimony delivered to them, which any man would resort to under like circumstances, — such as making a test to discover whether the foot-prints made by a man while running are shorter than while walking;[4] or experimenting with a pistol to ascer-

[1] "Quotient" verdicts are frequently spoken of as "chance" verdicts. Warner *v.* Robinson, 1 Root (Conn.), 195; Pekin *v.* Winkel, 77 Ill. 56, 58; Parham *v.* Harney, 6 Smed. & M. (Miss.) 55.

[2] Forshee *v.* Abrams, 2 Iowa, 571.

[3] Manix *v.* Maloney, 7 Iowa, 81; Ruble *v.* McDonald, 7 Iowa, 90; Schanler *v.* Porter, 7 Iowa, 482; Barton *v.* Holmes, 16 Iowa, 252; Wright *v.* Illinois &c. Tel. Co., 20 Iowa, 195; Hendrickson *v.* Kingsbury, 21 Iowa, 379; Fuller *v.* Chicago &c. R. Co., 31 Iowa, 211. In Warner *v.* Robinson, 1 Root (Conn.), 194, 195, the court ascertained this misconduct by inquiry of the jurors. Such a course has been supposed irregular: 1. Because if guilty of misconduct the jurors have violated their oaths, which they ought not to be heard to allege. 2. Because their misconduct renders them liable to punishment. If the court presumes to make inquiries of them upon this point, the jurors should be cautioned that they are not bound to answer. In Com. *v.* Wright, 1 Cush. (Mass.) 46, it was held libelous to publish of one in his capacity as a juror, that he agreed with another juror to stake the decision of damages, to be given in a cause then under consideration, upon a game of draughts. "The tendency of the publication," said Forbes, J., "was to degrade the prosecutor in the esteem and opinion of the world; it impeached his integrity as a juror, and must, if the charge which it contains were true, make him an object of distrust and contempt among men." *Ibid.* 62. See *post*, §§ 2618, 2627.

[4] Jim *v.* State, 4 Humph. (Tenn.) 289.

tain whether the deceased could have shot himself in the place where the ball entered.[1]

§ 2605. Visiting the Locus in quo. — As already seen,[2] inspection of persons and things in court is one of the recognized methods of producing evidence, or rather of dispensing with it; and, as further seen,[3] the view of places and things out of court, in proper cases and under proper safeguards, has been allowed, even in criminal cases, where not authorized by statute. Yet it is never tolerated that jurors should go on a *private search for evidence* and make such inspection of their own accord.[4] Regularly, the jurors must receive the evidence in open court,[5] and visits to the *locus in quo*, even when authorized by the court, are ground of new trial, unless the parties consent or unless there is a statute authorizing it;[6] and this is so, for stronger reasons, where such a visit takes place at the expense of the prevailing party in the suit.[7] Moreover, as already seen,[8] such inspections

[1] Yates *v.* People, 38 Ill. 527. The case will here be recalled where the prosecuting attorney brought a pan of soft mud into the court room, and requested the prisoner to put his foot into it (telling him that he need not do it if he did not want to), and he refused; and the mere circumstance that he was thus called upon to give evidence against himself, that is, to make a possible disclosure of the truth, had such a vitiating effect that the prosecuting attorney discovered, when the case got to the Supreme Court, that he had put his foot into it. Stokes *v.* State, 5 Baxt. (Tenn.) 619. As to experiments in the presence of the jury, see *ante*, §§ 864, 905; as to unauthorized views of the jury, *ante*, § 904.

[2] *Ante*, § 851, *et seq.*

[3] *Ante*, § 875, *et seq.*

[4] Stampofski *v.* Steffens, 79 Ill. 303; Ortman *v.* Union Pacific R. Co., 32 Kan. 419 (jurors separating and making unauthorized visits to the *locus in quo*). See also Hayward *v.* Knapp, 22 Minn. 5. But the mere fact that the jury, while taking a walk in the charge of an officer, passed the place where the homicide was committed, is not in itself, in a trial for murder, such misbehavior as will affect the verdict. People *v.* Montgomery, 13 Abb. Pr. (N. S.) (N. Y.) 208.

[5] Winslow *v.* Morrill, 68 Me. 362; Heffron *v.* Gallupe, 55 Me. 563; Bowler *v.* Washington, 62 Me. 302; Bradbury *v.* Cony, 62 Me. 223. See Thompson *v.* Mallet, 2 Bay (S. C.), 94; Perine *v.* Van Note, 4 N. J. L. 146. Compare Sanderson *v.* Nashua, 44 N. H. 492; People *v.* Bonney, 19 Cal. 426.

[6] Dowd *v.* Guthrie, 13 Bradw. (Ill.) 653.

[7] Compare Lyons *v.* Lawrence, 12 Bradw. (Ill.) 533.

[8] *Ante*, § 886.

in criminal cases cannot, according to the prevailing opinion, take place, even when authorized by statute, unless the prisoner accompanies the jurors.[1] It has been regarded as grossly irregular, not only to send out the jurors, but to send a witness with them to point out places which have been shown to them by a diagram.[2] The rules of the common law, devised to guard the integrity of juries, are of even greater importance in what are sometimes termed *inquests of office*, — that is, where a jury is sent to the country to make a view and assess damages for the laying out of a road, the flowage of land by a mill dam, or the condemning of land for a railway or other work of public utility, than in ordinary cases. In the absence of statutes, the rules of the common law touching the conduct of juries will be applied in such cases; [3] and statutes are found which re-enact these rules with more or less strictness.[4]

§ 2606. Compromise Verdicts. — Where the verdict which the jury return cannot be justified upon any hypothesis pre-

[1] People *v.* Lowrey, 70 Cal. 193; *s. c.* 11 Pac. Rep. 605 (following People *v.* Bush, 68 Cal. 623; *s. c.* 10 Pac. Rep. 169; People *v.* Jones, 11 Pac. Rep. 501).

[2] State *v.* Bertin, 24 La. Ann. 46. But where a *diagram* was made by a witness for the prisoner and used on the trial, it was held discretionary for the trial court to allow the jury to take it with them to their retirement, and that its exclusion from them presented no ground for error. Campbell *v.* State, 23 Ala. 46, 82. Where, by consent of the parties, the jurors had been allowed to view certain animals claimed to be those which were the subjects of the litigation in an action of trover, it was held not such misconduct as required the granting of a new trial for the jurors to look at the animals a second time, when neither the parties nor their counsel were present, and although no consent had been given for them so to do. Trafton *v.* Pitts, 73 Me. 408.

[3] Coleman *v.* Moody, 4 Hen. & M. (Va.) 1, 17.

[4] Thus, from the case just cited, it appears that there were some old statutes of this kind in Virginia. The act concerning roads prohibited a juror, on pain of being discharged from the inquest and imprisoned by the sheriff, from taking any meat or drink *from any persons whatever*, from the time the jury should come to the place which they were to view until their inquest was sealed. Va. Stat. 1794. ch. 19. The statute for the removal of the seat of government contained a similar provision. Va. Stat. 1799, ch, 21. In other States the statutes are more general, applying to all cases in which verdicts are returned by juries. See, for instance, Gen. Stats. Mass., ch. 132, § 33; Tripp *v.* County Commissioners, 2 Allen (Mass.), 556.

sented by the evidence, it ought obviously to be set aside. Thus, if a suit were brought upon a promissory note, which purported to be given for $100, and the only defense was that the defendant did not execute the note, and the jury should return a verdict for $50 only, it would not be allowed to stand; for it would neither conform to the plaintiff's evidence, nor to that of the defendant. It would be a verdict without evidence to support it; and it is not to be tolerated that the jury should thus assume, in disregard of the law and evidence, to arbitrate the differences of parties, or to decide according to some supposed natural equity, which in reality is merely their own whim. When, therefore, there was a claim and counter-claim, and the damages in each case were certain, and the only question was whether there was such a contract as that which was set up by the defendant in support of his counter-claim, and the jury found for the plaintiff in the amount of his claim, and for the defendant for a portion of the amount of his counter-claim only, it was held that, as there was no hypothesis of fact on which the verdict could be justified, as it must have been the result of a compromise or mistake, the judgment must be reversed.[1] The principle upon which cases of this kind proceed, could not be made clearer by multiplying illustrations.[2] This principle, however, applies only to

[1] St. Louis Brewery Co. *v.* Bodeman, 12 Mo. App. 573.

[2] Roeder *v.* Studt, 12 Mo. App. 566; Todd *v.* Boone Co., 8 Mo. 431; Ellsworth *v.* Central R. Co., 34 N. J. L. 93. But see Coyle *v.* Gorman, 1 Phila. (Pa.) 326. Where the plaintiff claimed on two distinct grounds, either of which, if found in his favor, would entitle him to a verdict, and it appeared that the jury did not consider and decide upon either ground separately, but that some might have decided upon one and some on the other, the verdict was set aside. Biggs *v.* Barry, 2 Curt. C. C. (U. S.) 259. It is no objection to a verdict that one of the jurors dissented while the jury were absent from the court, if he afterwards agreed to the verdict which was rendered. Thus, in a civil case, one of the jurors who could not agree with the others, said he was willing to return into court and allow the foreman to deliver a verdict for the plaintiff, and if they were polled he should declare his dissent; nevertheless, if, after that, the jury should again be sent out, he would agree to the verdict. The jury then came in, were polled, and this juryman declared his dissent from the verdict. They were again sent out, agreed upon a verdict, returned into court, were again polled, and each juryman answered that he agreed to the verdict,

cases where the *damages* sought to be recovered are *liquidated*. In suits for unliquidated damages where the jury give *a round sum*, the amount of their verdict is, in many cases necessarily the result of concession and compromise. In such cases a verdict will not be set aside, although the amount of the verdict itself raises a strong inference that it was arrived at as the result of striking an average—as where, in such a case, the verdict was five hundred and sixty dollars *and fifty cents*.[1]

which was in favor of the plaintiff. It was held that these facts were not sufficient ground for a new trial. Harrison *v.* Rowan, 4 Wash. C. C. (U. S.) 32. Where a juror held back, when pressed to agree to a verdict of murder in the second degree, suggesting to the other jurors to sign a petition for the pardon of the accused, and upon their agreeing to sign such a petition, assented to the verdict, and it sufficiently appeared that he was not opposed to the verdict and did not agree to it because they agreed to sign the petition, it was held no ground for a new trial. State *v.* Turner, 6 Baxt. (Tenn.) 201.

[1] St. Louis &c. R. Co. *v.* Myrtle, 51 Ind. 566.

CHAPTER LXXIII.

OF THE MISCONDUCT OF JURIES AS GROUND OF NEW TRIAL.

SECTION

2610. Preliminary.
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2612. What if upon the whole Case Justice has been done.
2613. Effect of Consent and Acquiescence.
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2624. Or to show the Misconduct of Parties.
2625. Or to Show the Misconduct of their Bailiff.
2626. Or upon a Question of Juror's Competency.
2627. Exceptional Rules Admitting the Affidavits of Jurors.

§ **2610. Preliminary.** — The purpose of this chapter is to make a *résumé* of the principles upon which courts proceed in granting or refusing new trials, because of the misconduct of jurors.

§ **2611. Improper Conduct not always Ground of New Trial.** — And first, as already observed,[1] in many cases the misconduct of jurors affords no ground of new trial, unless injury is shown to have resulted therefrom to the unsuccessful party; [2]

[1] *Ante*, § 2549.

[2] People *v.* Gaffney, 14 Abb. Pr. (N. s.) (N. Y.) 36; Medler *v.* State, 26 Ind. 171; Indianapolis *v.* Scott, 72 Ind. 196; State *v.* Baker, 63 N. C. 276; State *v.* Durham, 72 N. C. 447; Henry *v.* Ricketts, 1 Cranch C. C. (U. S.) 545; Purinton *v.* Humphreys, 6 Me. 379; Mason *v.* Russell, 1 Tex. 721; Newell *v.* Ayer, 32 Me. 334; State *v.*

and, of course, this is so, where the misconduct works in favor of the party complaining,[1] or where he himself participated in it.[2] As already seen, the question is closely allied to the question of the *burden of proof;* and if the moving party shows such misconduct as *may* have prejudiced the jurors, a new trial will often be granted, unless the successful party obviates the ordinary presumption which arises in such a case, by showing that prejudice did not result;[3] and, as already seen,[4] it will always be granted in a case of *tampering* with the jury by the successful party, whether the verdict was due to such tampering or not.[5]

§ 2612. What if upon the whole Case Justice has been done. — In one or two States the rule obtains that a new trial

Cucuel, 31 N. J. L. 249, 257. Thompson *v.* State, 26 Ark. 323, 328; Portis *v.* State, 27 Ark. 360; Pulaski *v.* Ward, 2 Rich. L. (S. C.) 119, 122. Rule under Texas statute: Jack *v.* State, 26 Tex. 1; Johnson *v.* State, 27 Tex. 758, 770. In a late case in Indiana the general rule is said to be that the misconduct of the jury must be *gross* and *clearly appear to have injured the complaining party*, to justify the granting of a new trial. Long *v.* State, 95 Ind. 481, 486. The court cite Ball *v.* Carley, 3 Ind. 577; Bersch *v.* State, 13 Ind. 434; Harrison *v.* Price, 22 Ind. 165; Whelchell *v.* State, 23 Ind. 89; Flatter *v.* McDermitt, 25 Ind. 326; Medler *v.* State, 26 Ind. 171; Achey *v.* State, 64 Ind. 56; Carter *v.* Ford Plate Glass Co., 85 Ind. 180. For illustrations of the rule in the case of a temporary separation of jurors, see Harrison *v.* Price, 22 Ind. 165; Whelchell *v.* State, 23 Ind. 89; Medler *v.* State, 26 Ind. 171.

[1] Allen *v.* State, 61 Ga. 166; Medler *v.* Dunn, 26 Ind. 171; Flatter *v.* McDermitt, 25 Ind. 326.

[2] It was so held, where, during the progress of the trial one of the jurors, contrary to the express instructions of the court, which were known to the defendant, visited the establishment where the latter carried on the business of rectifying spirits. Nothing was said concerning this misconduct on the part of the juror until after the conclusion of the trial. The verdict being against the defendant, the motion was made for a new trial because of this misconduct, and it was held that the motion must be overruled. United States *v.* Salentine, 8 Biss. C. C. (U. S.) 404.

[3] Luttrell *v.* Maysville &c. R. Co., 18 B. Mon. (Ky.) 291; Vaughn *v.* Dotson, 2 Swan (Tenn.), 348; Tripp *v.* County Comrs., 2 Allen (Mass.), 556; Pittsburgh &c. R. Co. *v.* Porter, 32 Ohio St. 328. See observations of Mr. Justice Clifford in Johnson *v.* Root, 2 Cliff. C. C. (U. S.) 108, 128.

[4] *Ante*, § 2560.

[5] Vaughn *v.* Dotson, 2 Swan (Tenn.), 348; Walker *v.* Walker, 11 Ga. 206; Walker *v.* Hunter, 17 Ga 364, 404; Cottle *v.* Cottle, 6 Me. 140; Sexton *v.* Lelievre, 4 Coldw. (Tenn.) 11; State *v.* Cucuel, 31 N. J. L. 249, 257.

will not be granted on the ground of misconduct of the jury, where the court can see, upon the whole case, that justice has been done.[1] These courts to some extent ignore the rule of public policy already stated, and proceed upon the view that, when applications for new trials are made, founded upon such complaints, they address themselves to judicial discretion rather than to strict law or absolute right; and that, whether in any given case the verdict should be avoided, must depend upon the abuse presumed to have followed, and the substantial justice of the case.[2] In Texas, expounding a statute, the doctrine appears to have taken root, in case of felony, even in those which are capital, that whether or not a new trial will be granted on the ground of misconduct of the jury, is a matter of discretion, in the determination of which the court below is guided by the application of the facts to the result attained in the verdict.[3]

§ 2613. Effect of Consent and Acquiescence. — In pursuance of the maxim, *omnis consensus tollit errorem*, the consent of the unsuccessful party in a civil case, to an irregularity in the conduct of a jury, will always estop him from claiming a new trial on that ground.[4] Moreover, if he is cognizant of the irregularity, and does not avail himself of the first opportunity to call the attention of the court to it, he thereby *waives* any right to make it the ground of an objection. If he fails to do this, he cannot raise such an objection for the first time by motion for a new trial.[5] The rule proceeds upon the ground that the party

[1] Peire *v.* Martin, 14 La. 64. See also Randall *v.* Bayou, 4 Mart. (N. S.) (La.) 132; McCarty *v.* McCarty, 4 Rich. L. (S. C.) 594.

[2] McCarty *v.* McCarty, 4 Rich. L. 394.

[3] Johnson *v.* State, 27 Tex. 758. See also Jack *v.* State, 26 Tex. 4; Wakefield *v.* State, 41 Tex. 556; Jenkins *v.* State, 41 Tex. 128. Other cases may be found where the fact that the verdict was clearly right on the evidence, obviously affected the conclusion of the court on this question. State *v.* Turner, 25 La. Ann. 573.

[4] Coleman *v.* Moody, 4 Hen. & M. (Va.) 1; Hahn *v.* Miller, 60 Ia. 96; Tower *v.* Hewett, 11 Johns. (N. Y.) 134.

[5] Valiente *v.* Bryan, 66 How. Pr. (N. Y.) 302; Downer *v.* Church, 21 W. Va. 24, 56. See Pettibone *v.* Phelps, 13 Conn. 445; Stewart *v.* Small, 5 Mo. 525; Fessenden *v.* Sager, 53 Me. 531; Jackson *v.* Jackson, 32 Ga. 325; Brunskill *v.* Giles, 9 Bingh. 13; Hahn *v.* Miller, 60 Ia. 96; Hallock *v.* Franklin,

ought not to be permitted, after discovering an act of misconduct which would entitle him to claim a new trial, to remain silent and take his chances of a favorable verdict, and afterwards, if the verdict goes against him, bring it forward as a ground for a new trial. Such a course is inconsistent with the candor and good faith which should characterize judicial proceedings. This rule applies to nearly all the errors and irregularities which take place in a judicial trial.[1] Perhaps one of the most familiar illustrations of it, is the case where improper evidence is

2 Mete. (Mass.) 558; Rowe *v.* Canney, 139 Mass. 41; People *v.* Morrissey, 1 Buff. (N. Y.) Sup. 295 (juror going to sleep after the trial); Allen *v.* Blunt, 2 Woodb. & M. (U. S.) 121, 148; Tingley *v.* Providence, 9 R. I. 388; Patton *v.* Hughesdale Mfg. Co., 11 R. I. 188; Lyman *v.* State, 69 Ga. 404; Musselman *v.* Pratt, 44 Ind. 126; Lee *v.* McLeod, 15 Nev. 158; Baxter *v.* People, 8 Ill. 368; Cogswell *v.* State, 49 Ga. 103; Martin *v.* Tidwell, 36 Ga. 332, 345; People *v.* Wilson, 8 Abb. Pr. (N. Y.) 137; *s. c.* 4 Park. Cr. (N. Y.) 619; Stampofski *v.* Steffens, 79 Ill. 303; Hussey *v.* Allen, 59 Me. 269; United States *v.* Boyden, 1 Lowell (U. S.), 266; Gale *v.* New York &c. R. Co., 13 Hun (N. Y.), 1. In Vermont, it is held that the fact that the moving party neglected to inform the court, before the jury retired, of misconduct on the part of jurors during the trial, which came to his knowledge, would not, if proved, necessarily, as a matter of law, defeat the motion for a new trial. McDaniels *v.* McDaniels, 40 Vt. 363. In a case in Iowa, it is said that the fact that the attorney of the moving party knew of the misconduct of the juror before the rendering of the verdict, would not constitute such a negligence as would defeat the motion, unless it was made to appear that after that time the prejudice might have been avoided. Oleson *v.* Meader, 40 Iowa, 662. Compare Fox *v.* Hazelton, 10 Pick. (Mass.) 275; *ante*, § 114. On like grounds, a party in a civil case cannot claim a new trial on the ground that one of the jurors was disqualified, without alleging in his motion, and making it appear that he did not know of the disqualification, during the trial. "A party cannot be permitted to lie by, after having knowledge of a defect of this kind, and speculate upon the result, and complain only when the verdict becomes unsatisfactory to him." Selleck *v.* Sugar Hollow Turnp. Co., 13 Conn. 453. To the same effect are Orrok *v.* Com. Ins. Co., 21 Pick. (Mass.) 457; Herbert *v.* Shaw, 11 Mod. 118; Reg. *v.* Sullivan, 8 Ad. & El. 831; Rex *v.* Sutton, 8 Barn. & Cres. 417; State *v.* Daniels, 44 N. H. 383; Rollins *v.* Ames, 2 N. H. 349; Hallock *v.* County of Franklin, 2 Met. (Mass.) 558; Merrill *v.* Berkshire, 11 Pick. (Mass.) 269; Howland *v.* Gifford, 1 Pick. (Mass.) 43, note; *ante*, § 114.

[1] State *v.* Hascall, 6 N. H. 352. "It is well settled that a new trial should not be granted for a cause existing at the trial which was not stated or excepted to then." Woodbury, J., in Allen *v.* Blunt, 2 Woodb. & M. (U. S.) 121, 148.

admitted, and no objection is made at the time, in which case, the error is no ground for a new trial.[1] In *criminal cases*, on the contrary, — at least in cases of *felony*, the consent of the prisoner does not ordinarily cure an irregularity in the conduct of the jury which would otherwise be ground of new trial; but it has been held otherwise in respect of such indulgence to the jury as the moderate use of ardent spirits;[2] and in one jurisdiction the principle has been further extended.[3] In cases where this principle is applied, it follows that, where a party moves for a new trial on the ground of misconduct on the part of the jury, which took place during trial, he must aver in his motion, and show affirmatively that he and his counsel were ignorant, until after the jury had retired, of the fact of such misconduct.[4]

§ 2614. View that New Trials on this Ground are Discretionary. — Some of the courts apply to the subject of the grant-

[1] Nichols *v.* Alsop, 10 Conn. 263; Torry *v.* Holmes, 10 Conn. 499; Russel *v.* Union Ins. Co., 1 Wash. C. C. (U. S.) 440; Jackson *v.* Jackson, 5 Cow. (N. Y.) 173; Wait *v.* Maxwell, 5 Pick. (Mass.) 217; Rice *v.* Bancroft, 11 Pick. (Mass.) 469; Worford *v.* Isbell, 1 Bibb (Ky.), 247; Cannon *v.* Alsbury, 1 A. K. Marsh. (Ky.) 76; Train *v.* Collins, 2 Pick. (Mass.) 145.

[2] United States *v.* Gibert, 2 Sumn. (U. S.) 19, 23.

[3] It was so held where during the progress of a trial for larceny the prosecuting attorney instituted proceedings by attachment for a contempt against one of the jurors, charging him with having stated during an adjournment of the court that no man could identify the class of goods sought to be identified in the case. The court thereupon stopped the trial and had the juror file his answer to the charge. The court, after examining the answer, informed the counsel for the defendant that if they would consent the court would discharge the jury. They replied that they were consenting to nothing and were ready to proceed with the trial. The trial thereupon proceeded and the accused was convicted. It was held that the defendant, having refused to consent to the discharge of the jury, and having consented to go on with the trial, thereby waived any objection to what had occurred and could not claim a new trial by reason thereof. Harrington *v.* State, 76 Ind. 112. For another instance, see Hunter *v.* State, 43 Ga. 484, 524.

[4] Woodruff *v.* Richardson, 20 Conn. 238; Pettibone *v.* Phelps, 13 Conn. 445; Allen *v.* Blunt, 2 Woodb. & M (U. S.) 121, 148; Martin *v.* Tidwell, 36 Ga. 332, 345; Hunter *v.* State, 43 Ga. 484, 524; Cogswell *v.* State, 49 Ga. 103; McAllister *v.* Sibley, 25 Me. 474, 487. For other applications of the same principle see Gibson *v.* Williams, 39 Ga. 660; Brown *v.* State, 28 Ga. 439; Cannon *v.* Bullock, 26 Ga. 431; Barlow *v.* State, 2 Blackf. (Ind.) 114.

ing of new trials for the misconduct of juries the common-law rule,[1] that the granting of a new trial is remitted to the *discretion* of a trial court, which discretion is not ordinarily the subject of revision on appeal or error.[2] This rule is based upon the conception that, where the question of granting a new trial depends upon the decision of questions of fact, the whole subject must be remitted to the trial court; since appellate courts have not the means of conveniently deciding such questions. The conclusion is therefore unavoidable, under a constitution, such as that of Louisiana of 1846, which limits the jurisdiction of the Supreme Court to questions of law.[3] A more liberal view is that this discretion, like judicial discretion in other cases, is a *legal discretion*, and subject to review where it is exercised contrary to law,[4] or where it is manifestly abused; but even here, the decision of the court upon the facts adduced in support of the motion, will have, in the appellate court, at least the conclusive effect which is ascribed to a verdict at law.[5] In two or three jurisdictions, as

[1] Hill. New Tr., § 7.

[2] Downer *v.* Baxter, 30 Vt. 467, 474; State *v.* Tucker, 10 La. Ann. 501; State *v.* Brette, 6 La. Ann. 652, 657. See also State *v.* Hunt, 4 La. Ann. 438; Smith *v.* Willingham, 44 Ga. 200; Moore *v.* Edmiston, 70 N. C. 471; State *v.* Tilghman, 11 Ired. L. 513; State *v.* Miller, 1 Dev. & Bat. 500; Love *v.* Moody, 68 N. C. 200; Vest *v.* Cooper, 68 N. C. 131; Exchange Bank *v.* Tiddy, 67 N. C. 169; Pittsburgh &c. R. Co. *v.* Porter, 32 Ohio St. 328, 332; Borland *v.* Barrett, 76 Va. 128, 138. The doctrine has been asserted in the case of *felonies* (State *v.* Hester, 2 Jones L. (N. C.) 83, 86), and even in the case of *capital felonies*. State *v.* Miller, 1 Dev. & Bat. (N. C.) 500, 509. In Alabama, the improper conduct of the jury after they have retired to make up their verdict, is no ground for a motion in *arrest of judgment*, but may be a ground for a motion for a new trial. Nevertheless, the action of the trial court in refusing a new trial on that ground, is not revisable on error. Brister *v.* State, 26 Ala. 107.

[3] State *v.* Hunt, 4 La. Ann. 438; State *v.* Brette, 6 La. Ann. 652.

[4] Pittsburg &c. R. Co. *v.* Porter, 32 Ohio St. 328, 332.

[5] *Ante*, § 2273; Carlisle *v.* Sheldon, 38 Vt. 440, 444. In Louisiana the statement of the facts by the trial judge is conclusive on appeal. State *v.* Caulfield, 23 La. Ann. 148. In Nevada, the decision of the trial court on the question of fact presented by the motion is likewise regarded as a matter with which the appellate court has nothing to do. State *v.* Jones, 7 Nev. 408, 414. In Massachusetts, the Supreme Judicial Court limits itself to considering whether, upon the finding of facts which the trial judge is required to make, the law requires a disallowance of the verdict. Tripp *v.* County Commissioners, 2 Allen (Mass.), 556. To support a motion of

in North Carolina, the *granting* of a new trial is the subject of appellate revision. But here, for obvious reasons, the appellate court will be more reluctant to revise the discretion of the trial court than where it is exercised in refusing a new trial.[1] It should be added that the manner of bringing these questions for revision before the appellate tribunals is almost exclusively regulated by statute. At common law, a motion to *arrest the judgment*, does not lie upon this ground;[2] nor is it a ground of reversing a judgment on error.[3]

§ 2615. Question how Saved for Review. — It will not be attempted to state the various methods in use in different States, by which this question may be saved for review, beyond saying that the more usual method is by a motion for a new trial in the court below, supported by affidavits, which motion and affidavits, if the motion is overruled, are embodied in a bill of exceptions, signed and sealed by the judge as in other cases. If not so incorporated into a bill of exceptions, the affidavits will not be noticed by the appellate court for any purpose. It is not sufficient that they were copied into the record by the clerk.[4] The record proper, it must be remembered, usually consists of the process, the pleadings and the entry or entries of judgment.[5] Other matters transpiring in the course of the cause can only be made a part of the record by being incorporated into a bill of

this description it is ruled in Maine that it is not a universal rule that the production of a report of the evidence given at the trial is necessary, or that the affidavit of the party or his attorney would not be regarded as sufficient proof that the facts were material to the issue tried. Gifford *v.* Clark, 70 Me. 94. It will hence not be set aside unless it is clearly wrong. Todd *v.* Brenner, 30 Ia. 439; McNamara *v.* Dratt, 40 Ia. 413; Hewitt *v.* Pioneer Press Co., 23 Minn. 178.

[1] Smith *v.* Willingham, 44 Ga. 200; Love *v.* Moody, 68 N. C. 200. What is "matter of law or legal inference" under the North Carolina statute when applied to this subject: Moore *v.* Edmiston, 70 N. C. 471; State *v.* Tilghman, 11 Ired. L. (N. C.) 513.

[2] Brister *v.* State, 26 Ala. 107. *Contra* in Connecticut: Brown *v.* Congdon, 50 Conn. 302 (two judges dissenting).

[3] United States *v.* Gillies, 1 Pet. C. C. (U. S.) 159; *s. c.* 3 Wheeler C. C. (N. Y.) 308.

[4] Scott *v.* Smith, 70 Ind. 299, 305; Fruberger *v.* Perkins, 66 Ind. 19; *post*, §§ 2774, 2775.

[5] *Post*, § 2715.

exceptions which is signed and sealed by the judge; and the mere fact that the clerk may see fit to copy into the record motions, affidavits, etc., does not make them a part of the record, in the sense that they can be considered on appeal or error.[1]

§ 2616. Presumption of Right Acting on the Part of the Jury. — That presumption of right acting which attends all official conduct,[2] extends to the conduct of juries, and, as a general rule, this presumption can only be *overcome by clear and satisfactory proof*.[3] A new trial will not be granted where the evidence fails to make out a fair presumption that the jurors were guilty of misconduct.[4] The evidence to establish the misconduct must be clear and positive.[5] The mere statement by an affiant of his *impressions* counts for nothing; [6] and the same may be said of affidavits made on *information and belief*, — at least unless such an affidavit discloses from whom the affiant acquired his information, and then it must appear why the testimony of such person can not be had.[7] In one State, the injustice of putting the jurors on trial after verdict has been so sensibly felt, that a rule has been adopted requiring that the impeaching affidavits must be served upon the inculpated jurors, and a reasonable time given them to answer on oath.[8] Moreover, while a motion for a

[1] United States *v.* Gamble, 10 Mo. 457; State *v.* Eldridge, 65 Mo. 584; Collins *v.* Barding, 65 Mo. 496; Jefferson City *v.* Opel, 67 Mo. 394; Sturdivant *v.* Watkins, 47 Mo. 177; State *v.* Shehane, 25 Mo. 565; Christy *v.* Myers, 21 Mo. 112; State *v.* Wall, 15 Mo. 208. Compare Pelham *v.* Page, 6 Ark. 535, 539.

[2] Broom Leg. Max. 495; Hicks *v.* Ellis, 65 Mo. 176, 184.

[3] People *v.* Williams, 24 Cal. 31, 38; Mathis *v.* State, 18 Ga. 343; State *v.* Duestoe, 1 Bay (S. C.), 377, 380; M'Causland *v.* M'Causland, 1 Yeates (Pa.), 372.

[4] State *v.* Dumphey, 4 Minn. 438; State *v.* Ayer, 23 N. H. 301, 321.

[5] Johnson *v.* Root, 2 Cliff. (U. S.) 108, 128; *s. c.* 2 Fisher's Pat. Cas. 291.

[6] Mullins *v.* Cottrell, 41 Miss. 291, 326.

[7] People *v.* Williams, 24 Cal. 31, 38; Cummins *v.* Crawford, 88 Ill. 312; *post*, § 2622.

[8] State *v.* Duestoe, 1 Bay (S. C.), 377, 380; McCluny *v.* Lockhart, 1 Bailey (S. C.), 117; State *v.* Harding, 2 Bay (S. C.), 267. It was necessary to serve such papers or copies before the rise of the court. Key *v.* Holeman, 2 Bay (S. C.), 315; Pulaski *v.* Ward, 2 Rich. L. (S. C.) 119. In the latter case this rule as to the time of making the application was said not to be inflexible.

new trial on this ground must be verified by affidavits,[1] yet there is no rule of law which requires the trial judge to believe the impeaching affidavits, even where they are not contradicted; since the jurors themselves are under oath well and truly to try, and it remains in a sense the case of oath against oath;[2] and of course an appellate court will not interfere with the decision of the trial court where the affidavits are conflicting.[3]

§ 2617. Presumption of Prejudice from Misconduct or Improper Influence. — But the rule which accords the *presumption* of right acting to the jurors until the contrary is shown, does not extend to the *effect* which misconduct on their part, or on the part of the unsuccessful party in connection with them, is to have on their verdict. There is no presumption that such misconduct or tampering did not influence them to the prejudice of the unsuccessful party, though such will be the fair conclusion of fact under many circumstances.[4] But where the surrounding circumstances do not of themselves support the integrity of the verdict, — in other words, where the misconduct was of such a nature that prejudice *might* have resulted from it, a presumption of prejudice arises, which, unless rebutted by the successful party, will require the granting of a new trial.[5] But this dis-

[1] Gifford *v.* Clark, 70 Me. 94.

[2] State *v.* Duestoe, 1 Bay (S. C.), 377, 380.

[3] Dill *v.* Lawrence, 10 N. East. Rep. 573; *s. c.* 109 Ind. 564. See also Doles *v.* State, 97 Ind. 555, and cases cited; Luck *v.* State, 96 Ind. 16; Shields *v.* State, 95 Ind. 299; Catterlin *v.* City of Frankfort, 87 Ind. 45; Elliott *v.* State, 73 Ind. 11.

[4] Thus where the record in a criminal case, which had been appealed, showed that, while a witness was giving some immaterial testimony, a juror who had been absent came into court, it was held that the presumption was, until the contrary appeared, that the juror was absent by permission of the court and in charge of its officer. State *v.* Parsons, 7 Nev. 57.

[5] Johnson *v.* Root, 2 Cliff. (U. S.) 108, 128; Thompson *v.* State, 26 Ark. 323, 328; Pope *v.* State, 36 Miss. 121, 136; Ned *v.* State, 33 Miss. 364, 372; Organ *v.* State, 26 Miss. 83; Hare *v.* State, 4 How. (Miss.) 187; McCann *v.* State, 9 Smed. & M. (Miss.) 465, 469; Phillips *v.* Com., 19 Gratt. (Va.) 485; Riley *v.* State, 9 Humph. (Tenn.) 646; Nesmith *v.* Clinton Fire Ins. Co., 8 Abb. Pr. (N. Y.) 141; Com. *v.* Shields, 2 Bush (Ky.), 81; Davis *v.* State, 35 Ind. 496; Westmoreland *v.* State, 45 Ga. 225, 282; State *v.* Fox, Ga. Decis., pt. I, p. 35; State *v.* Negro Peter, Ga. Decis., pt. I, p. 46; State *v.* Cucuel, 31

tinction must be carefully borne in mind, that, in order to create this presumption, the irregularity must have been of such a character that its *natural tendency would be to disqualify the jurors* for the proper and unbiased discharge of their duties: a mere departure from prescribed forms, which have no tendency to create such a disqualification, does not create this disqualification.[1]

§ 2618. Testimony of Jurors not Received to Impeach their Verdict.—Upon grounds of public policy, courts have almost universally agreed upon the rule that no affidavit, deposition, or other sworn statement of a juror will be received to impeach the verdict,[2]

N. J. L. 249, 259; Madden *v.* State, 1 Kan. 340, 354; Coker *v.* State, 20 Ark. 53, 60; Stanton *v.* State, 13 Ark. 317, 320; Cornelius *v.* State, 12 Ark. 782, 809; Stone *v.* State, 4 Humph. (Tenn.) 27; People *v.* Brannigan, 21 Cal. 340; People *v.* Turner, 39 Cal. 370, 375; Monroe *v.* State, 5 Ga. 85, 152; State *v.* Prescott, 7 N. H. 288; Russell *v.* State, 53 Miss. 368; State *v.* Parsons, 7 Nev. 57.

[1] See the language of Chief Justice Shaw in the leading case of Com. *v.* Roby, 12 Pick. (Mass.) 496, 518; also the opinion of the Supreme Court of Louisiana in State *v.* Bradley, 6 La. Ann. 554, 560, where this distinction is pointed out. See also Stone *v.* State, 4 Humph. (Tenn.) 27, 38. For good illustrations of the rule that, where the presumption is rebutted there is no ground of new trial, see McKenzie *v.* State, 26 Ark. 334, 343; Collier *v.* State, 20 Ark. 36, 50. *In Mississippi* the doctrine seems to be that in capital cases a separation of the jury conclusively vitiates the verdict and entitles the prisoner to a new trial; but "*in all other cases of irregularity*, in which it may be made to appear that the jury, during the trial, have been exposed to improper influence which *might* have affected the purity of their verdict, such exposure shall vitiate their verdict, unless it affirmatively appear that such influence failed to have any effect in procuring it." Woods *v.* State, 43 Miss. 364, 372.

[2] Holmead *v.* Corcoran, 2 Cranch C. C. (U. S.) 119; Dana *v.* Tucker, 4 Johns. (N. Y.) 487; McCray *v.* Stewart, 16 Ind. 377; Ladd *v.* Wilson, 1 Cranch C. C. (U. S.) 5; Pleasants *v.* Heard, 15 Ark. 403; Amsby *v.* Dickhouse, 4 Cal. 102; Castro *v.* Gill, 5 Cal. 40; Bennett *v.* State, 3 Ind. 167; Com. *v.* Drew, 4 Mass. 391, 399; Johnson *v.* Davenport, 3 J. J. Marsh. (Ky.) 393; Murdock *v.* Sumner, 22 Pick. (Mass.) 156; State *v.* Doon, R. M. Charlt. (Ga.) 1; Cook *v.* Castner, 9 Cush. (Mass.) 266; Cain *v.* Cain, 1 B. Mon. (Ky.) 213; Folsom *v.* Manchester, 11 Cush. (Mass.) 334; Boston &c. R. Co. *v.* Dana, 1 Gray (Mass.), 83; Chadbourn *v.* Franklin, 5 Gray (Mass.), 312; State *v.* Coupenhaver, 39 Mo. 430; Pratte *v.* Coffman, 33 Mo. 71; Folsom *v.* Brawn, 25 N. H. 114; Leighton *v.* Sargent, 31 N. H. 119; Suttrell *v.* Dry, 1 Murph. (N. C.) 94; Schenck *v.* Stevenson, 2 N. J. L. 387; Den *v.* McAllister, 7 N. J. L. 46; Price *v.* Warren, 1 Hen. & M. (Va.) 385; Brewster *v.* Thompson, 1 N. J. L. 32; Randall *v.* Grover, 1 N. J. L. 151; Bridge *v.* Eggleston, 14 Mass.

to explain it,[1] to show on what grounds it was rendered,[2] or to show a mistake in it;[3] or that they misunderstand the

245; Bull *v.* Com., 14 Gratt. (Va.) 614; Hannum *v.* Belcherton, 19 Pick. (Mass.) 311; Walker *v.* Kennison, 34 N. H. 257; State *v.* Tindall, 10 Rich. L. (S. C.) 212; Willing *v.* Swasey, 1 Browne (Pa.), 123; Cluggage *v.* Swan, 4 Binney (Pa.), 150; White *v.* White, 5 Rawle (Pa.), 61; Cochran *v.* Street, 1 Wash. (Va.) 79; Taylor *v.* Giger, 1 Hardin (Ky.), 586; Smith *v.* Culbertson, 9 Rich. L. (S. C.) 106; Mason *v.* Russell, 1 Tex. 721; Burns *v.* Paine, 8 Tex. 159; Robbins *v.* Windover, 2 Tyler (Vt.), 11; Bentley *v.* Fleming, 1 Com. B. 479; Dorr *v.* Fenno, 12 Pick. (Mass.) 521, 525; Hester *v.* State, 17 Ga. 146; Jackson *v.* Williamson, 2 T. R. 281; Elliott *v.* Mills, 10 Ind. 368; Barlow *v.* State, 2 Blackf. (Ind.) 114; Connor *v.* Winton, 8 Ind. 316; Sinclair *v.* Roush, 14 Ind. 456; Hughes *v.* Listner, 23 Ind. 396; Edmiston *v.* Garrison, 18 Wis. 594; Haun *v.* Wilson, 28 Ind. 296; Steele *v.* Logan, 3 A. K. Marsh. (Ky.) 394; Heath *v.* Conway, 1 Bibb (Ky.), 398; State *v.* Caldwell, 3 La. Ann. 435;

[1] People *v.* Hosmer, 1 Wend. (N. Y.) 297; Jeter *v.* Heard, 12 La. Ann. 3; Stafford *v.* State, 55 Ga. 591; Lloyd *v.* McClure, 2 G. Greene (Ia.), 139; Com. *v.* Skeggs, 3 Bush. (Ky.), 19; Smith *v.* Smith, 50 N. H. 212; Wright *v.* I. & M. Tel. Co., 20 Ia. 195; Fox *v.* Wunderlich, 64 Ia. 187, 192.

[2] Sheldon *v.* Perkins, 37 Vt. 550; Tucker *v.* South Kingstown, 5 R. I. 558; Price *v.* Warren, 1 Hen. & M. (Va.) 385; Brownell *v.* McEwen, 5 Denio (N. Y.), 367; Larkins *v.* Tarter, 3 Sneed (Tenn.), 681; Heath *v.* Conway, 1 Bibb (Ky.), 398; Taylor *v.* Giger, Hardin (Ky.), 588; Jeter *v.* Heard, 12 La. Ann. 3; Mirick *v.* Hemphill, Hempst. (U. S.) 179; Clark *v.* Carter, 12 Ga. 500; Coker *v.* Hayes, 16 Fla. 368; Ward *v.* State, 8 Blackf. (Ind.) 101; Ford *v.* State, 12 Md. 514; St. Martin *v.* Desnoyer, 2 Minn. 156; Folsom *v.* Brawn, 25 N. H. 114; Lindauer *v.* Teeter, 41 N. J. L. 256; Danville Bank *v.* Waddill, 31 Gratt. (Va.) 469; Buchanan *v.* Reynolds, 4 W. Va. 681; Lewis *v.* McMullin, 5 W. Va. 582; Reynolds *v.* Tompkins, 23 W. Va. 229. In Tennessee, where contrary to the weight of authority in England, and America, jurors have been permitted to make affidavits impeaching their verdicts on motions for new trials, it is nevertheless held that a juror's affidavit will not be received for the purpose of showing that his verdict was rendered upon a mistaken opinion of the law or the facts, — as that he misunderstood the charge of the judge. Norris *v.* State, 3 Humph. (Tenn.) 338; Saunders *v.* Fuller, 4 Humph. (Tenn.) 518; Dunnaway *v.* State, 3 Baxt. (Tenn.) 206; Fish *v.* Cantrell, 2 Heisk. (Tenn.) 578; Wade *v.* Ordway, 1 Baxt. (Tenn.) 229; Lewis *v.* Moses, 6 Cold. (Tenn.) 193; Roller *v.* Bachman, 5 Lea (Tenn.), 154.

[3] Duhon *v.* Landry, 15 La. Ann. 591; Haight *v.* Turner, 21 Conn. 593; Clark *v.* Carter, 12 Ga. 500; Withers *v.* Fiscus, 40 Ind. 131; Bosley *v.* Chesapeake Ins. Co., 3 Gill & J. (Md.) 473, note; Wells *v.* State, 11 Neb. 409; Ex parte Caykendoll, 6 Cow. (N. Y.) 53; Kelly *v.* Sheehy, 8 Daly (N. Y.), 29; Lester *v.* Goode, 2 Murph. (N. C.) 37; Taylor *v.* Everett, 2 How. Pr. (N. Y.) 23; Hutchinson *v.* Sandt, 4 Rawle (Pa.), 234; Dunnaway *v.* State, 3 Baxt. (Tenn.) 206; Oregon &c. R. Co. *v.* Oregon Steam Nav. Co., 3 Ore. 178. Compare Cutler *v.* Cutler, 43 Vt. 660.

charge of the court;[1] or that they otherwise mistook the law, or the result of their finding;[2] or that they agreed on their verdict by average,[3] or by lot.[4] The rule has been held specially applicable to the case of a verdict on an issue out of chancery.[5] It

Circ *v.* Rightor, 11 La. 140; State *v.* Millican, 15 La. Ann. 557; State *v.* Brette, 6 La. Ann. 653; Bishop *v.* Georgia, 9 Ga. 121; Jacobs *v.* Dooly, 1 Idaho, 36; Lawrence *v.* Boswell, Sayer, 100; Stanton *v.* State, 13 Ark. 317; Haight *v.* Turner, 21 Conn. 593; State *v.* Freeman, 5 Conn. 348; Clark *v.* Carter, 12 Ga. 500; Brown *v.* State, 28 Ga. 199; Coleman *v.* State, 28 Ga. 78; McElven *v.* State, 30 Ga. 869; Hoye *v.* State, 39 Ga. 718; King *v.* King, 49 Ga. 622; Anderson *v.* Green, 46 Ga. 361; Moughon *v.* State, 59 Ga. 309; Oatis *v.* Brown, 59 Ga. 711; Hill *v.* State, 64 Ga. 453; Coker *v.* Hayes, 16 Fla. 368; Forester *v.* Guard, 1 Ill. 44; Peck *v.* Brewer, 48 Ill. 54; Martin *v.* Ehrenfels, 24 Ill. 187; Niccolls *v.* Foster, 89 Ill. 386; Bradford *v.* State, 15 Ind. 347; Dunn *v.* Hall, 8 Blackf. (Ind.) 32; Stanley *v.* Sutherland, 54 Ind. 339; Butt *v.* Tuthill, 10 Iowa, 585; Stewart *v.* Burlington &c. R. Co., 11 Iowa, 62; Hall *v.* Robinson, 25 Iowa, 91; Cowles *v.* Chicago &c. R. Co., 32 Iowa, 515; Cook *v.* Sypher, 3 Iowa, 484; Garretty *v.* Brazell, 34 Iowa, 100; Wright *v.* Illinois Tel. Co., 20 Iowa, 195; State *v.* Horne, 9 Kan. 119; Perry *v.* Bailey, 12 Kan. 539; Johnson *v.* Husband, 22 Kan. 277; Doran *v.* Shaw, 3 T. B. Mon. (Ky.) 415; Com. *v.* Skeggs, 3 Bush (Ky.), 19; Greeley *v.* Mansur, 64 Me. 211; State *v.* Pike, 65 Me. 111; Bradt *v.* Rommel, 26 Minn. 505; State *v.* Stokely, 16 Minn. 282; State *v.* Mims, 26 Minn. 183; Riggs *v.* State, 26 Miss. 51; Friar *v.* State, 3 How. (Miss.) 422; Lucas *v.* Cannon, 13 Bush (Ky.), 650; Campbell *v.* Miller, 1 Mart. (La.) (N. S.) 514; Digard *v.* Michaud, 9 Rob. (La.) 387; Sawyer *v.* Hannibal &c. R. Co., 37 Mo. 240; State *v.* Underwood, 57 Mo. 40; State *v.* Branstetter, 65 Mo. 149; State *v.* Alexander, 66 Mo. 148;

[1] Saunders *v.* Fuller, 4 Humph. (Tenn.) 516, 518; Norris *v.* State, 3 Humph. (Tenn.) 333; State *v.* Millican, 15 La. Ann. 557. "It is sufficient if the charge be correct. If the verdict, from misapprehension, be found, either against the law of the case, or the weight of testimony, the evil can be easily remedied by a new trial without affidavit; and if it be against neither the one nor the other, there is no remedy required, and no necessity for investigating the secret operations of the minds of the jurors in arriving at the verdict." Saunders *v.* Fuller, *supra*, per Turley, J.

[2] Jeter *v.* Heard, 12 La. Ann. 3; Duhon *v.* Landry, 15 La. Ann. 591.

[3] *Ante*, § 2602; Pleasants *v.* Heard, 15 Ark. 403; Sawyer *v.* Hannibal &c. R. Co., 37 Mo. 241, 263; Dana *v.* Tucker, 4 Johns. (N. Y.) 487; Heath *v.* Conway, 1 Bibb (Ky.), 398; Haun *v.* Wilson, 28 Ind. 296. Compare Bennett *v.* Baker, 1 Humph. (Tenn.) 399.

[4] Owen *v.* Warburton, 1 Bos. & Pul. (N. R.) 326. So ruled in Vasie *v.* Delaval, 1 T. R. 11; Straker *v.* Graham, 4 Mees. & W. 721; Burges *v.* Langley, 6 Scott (N. R.), 518; State *v.* Doon, R. M. Charlt. (Ga.) 1.

[5] But there are some statutes changing the rule in relation to fortuitous verdicts: Fain *v.* Goodwin, 25 Ark. 109, 113; Steptoe *v.* Flood, 31 Gratt. (Va.) 323.

has been attempted to show, by evidence of this kind, that the jury misapprehended the effect of their verdict as to the costs; [1] that the foreman of the jury, after they had retired, had gone from the jury-room, in order to learn from persons not of the jury, the amount of damages which ought to be found in order to carry costs; [2] that the jurors making the affidavit were influenced in their verdict by information given by one of the jurors in the jury-room; [3] or that they had intended to give the plaintiff a greater amount of damages, and conceived that the verdict which they rendered was for such increased sum.[4] But in these and other like cases the courts have steadily refused to listen to such affidavits. Neither is it admissible to show by the oath of a

Ryan *v.* Kelly, 9 Mo. App. 591; Leighton *v.* Sargent, 31 N. H. 120; State *v.* Ayer, 23 N. H. 301; Breck *v.* Blanchard, 27 N. H. 100; Brewster *v.* Thompson, 1 N. J. L. 32; Dare *v.* Ogden, 1 N. J. L. 91; Hutchinson *v.* Consumer's Coal Co., 36 N. J. L. 24; Nichols *v.* Suncook Man. Co., 24 N. H. 437; People *v.* Hartung, 4 Park. Cr. (N. Y.) 256; *s. c.* 8 Abb. Pr. (N. Y.) 132; Brownell *v.* McEwen, 5 Denio (N. Y.), 367; People *v.* Carnal, 1 Park. Cr. (N. Y.) 256; Green *v.* Bliss, 12 How. Pr. (N. Y.) 429; Gale *v.* New York &c. R. Co., 53 How. Pr. (N. Y.) 385; State *v.* Smallwood, 78 N. C. 560; State *v.* McLeod, 1 Hawks (N. C.), 344; Taylor *v.* Everett, 2 How. Pr. (N. Y.) 23; Lindauer *v.* Teeter, 41 N. J. L. 256; Fish *v.* Cantrell, 2 Heisk. (Tenn.) 578; Scott *v.* State, 7 Lea (Tenn.), 232; Mason *v.* Russell, 1 Tex. 721; Davis *v.* State, 43 Tex. 189; Clark *v.* Read, 5 N. J. L. 486; Johnson *v.* State, 27 Tex. 759; Sheldon *v.* Perkins, 37 Vt. 550; Downer *v.* Baxter, 30 Vt. 467; Read *v.* Com., 22 Gratt. (Va.) 924; Thomas *v.* Jones, 28 Gratt. (Va.) 383, 387; Steptoe *v.* Flood, 31 Gratt. (Va.) 323, 344; Cherry *v.* Sweeny, 1 Cranch C. C. (U. S.) 530; Custiss *v.* Georgetown Turnpike Co., 2 Cranch C. C. (U. S.) 81; Howard *v.* Cobb, 3 Day (Conn.), 310; Cline *v.* Bray, 1 Ore. 89; Meade *v.* Smith, 16 Conn. 346; Trafton *v.* Pitts, 73 Me. 408; Probst *v.* Braeunlich, 24 W. Va. 356, 359; Howard *v.* McCall, 21 Gratt. (Va.) 212; Bull's Case, 14 Gratt. (Va.) 613, 632; Read's Case, 22 Gratt. (Va.) 925; Thompson's Case, 8 Gratt. (Va.) 641, 650; Danville Bank *v.* Waddill, 31 Gratt. (Va.) 433; Shobe *v.* Bell, 1 Rand. (Va.) 39; State *v.* Cartright, 20 W. Va. 43; State *v.* Robinson, 20 W. Va. 713; Reynolds *v.* Tompkins, 23 W. Va. 229; Com. *v.* Haines, 15 Phila. (Pa.) 363; Territory *v.* Taylor, 1 Dak. 479; Miller *v.* St. Louis R. Co., 5 Mo. App. 472, 476; People *v.* Sprague, 53 Cal. 491; Long *v.* State, 95 Ind. 481; Chadbourn *v.* Franklin, 5 Gray (Mass.), 312; Rowe *v.* Canney, 139 Mass. 41; Fain *v.* Goodwin, 35 Ark. 109, 113.

[1] Folsom *v.* Brawn, 25 N. H. 114, 123.

[2] Clum *v.* Smith, 5 Hill (N. Y.), 560.

[3] Price *v.* Warren, 1 Hen. & M. (Va.) 385.

[4] Jackson *v.* Williamson, 2 T. R. 281.

juror that he *did not agree to the verdict* as rendered ;[1] or that he consented to the return of the verdict, without concurring in it, in order to secure his discharge,[2] or because his health absolutely required him to be released from confinement:[3] or that the verdict which was rendered *was not, in fact, the verdict* of the particular jurors.[4] It will not be admissible thus to show that the verdict was *by mistake* returned as the verdict of the whole jury, when some of them were, in fact, in favor of finding it for the other party.[5]

§ 2619. Otherwise as to Matters Taking Place in Court. — The rule of public policy which excludes the testimony of jurors to impeach their verdict, extends only to matters taking place during their retirement; it does not extend to matters taking place in open court.[6] Such an affidavit is accordingly received in respect of a matter which took place *on the delivery of their verdict*.[7] Thus, while, as just seen,[8] the affidavit of a juror will not be received to show a mistake in his verdict, yet it is otherwise where the foreman, by mistake, *announces in court a different verdict* from that agreed upon by the jury. Here the court, upon such testimony as to the mistake, has the power to correct the record and record the proper verdict.[9] The rule is the same

[1] Johnson *v.* Davenport, 3 J. J. Marsh. (Ky.) 390, 396; Hester *v.* State, 17 Ga. 146; Thomas *v.* Jones, 28 Gratt. (Va.) 383; Garretty *v.* Brazell, 34 Iowa, 100.

[2] Scott *v.* State, 7 Lea (Tenn.), 232.

[3] State *v.* Stokely, 16 Minn. 282; Dare *v.* Ogden, 1 N. J. L. 91.

[4] Reaves *v.* Moody, 15 Rich. L. (S. C.) 312; Boette *v.* Landa, 22 Tex. 105; Cochran *v.* Street, 1 Wash. (Va.) 79; Cire *v.* Rightor, 11 La. 140.

[5] Two jurors made affidavit that they were mistaken in the verdict when they rendered it; that they thought they were finding for the opposite party. It was held that the affidavit could not be received on a motion for a new trial. Cire *v.* Rightor, 11 La. 140.

[6] Metcalf *v.* Deane, Cro. Eliz. 189; Knight *v.* Freeport, 13 Mass. 218.

[7] Roberts *v.* Hughes, 7 Mees. & W. 399.

[8] *Ante*, § 2618.

[9] Cogan *v.* Ebden, 1 Burr. 383; Jackson *v.* Dickenson, 15 Johns. (N. Y.) 309; Roberts *v.* Hughes, 7 Mees. & W. 399; Prussell *v.* Knowles, 4 How. (Miss.) 90; Dalrymple *v.* Williams, 63 N. Y. 361. Folger, J., dissented. Where, upon the jury being polled, one of them declared that the verdict was against his conscience, and that he consented to it only because all the rest had agreed to it, it was held that the jury should be directed to retire and reconsider their verdict; but where, after such a declaration of the juror, the verdict was

as to *arbitrators;* an *award may be impeached for fraud*, and on this question the affidavits of arbitrators are admissible as to what

received and recorded without objection from the party against whom it was found, it was held no error to refuse a new trial on that ground. Farrel *v.* Hennesy, 21 Wis. 632. See in this connection Cheney *v.* Holgate, Brayt. (Vt.) 171; Cutler *v.* Cutler, 43 Vt. 660. It has been held that, where the foreman of a jury changed the finding from guilty as accessory after the fact to guilty simply, without consulting with the other jurors, this was such an irregularity as required the granting of a new trial. State *v.* Levy, 5 La. Ann. 64. In the leading case on the doctrine of the text, application to set aside a verdict was made on the ground that it was given by the foreman contrary to the opinion of *eight* of the jury. It appeared that the defendant justified under a right of way over the plaintiff's ground, to *two* closes of the defendant, namely Broadmoor, and three acres; upon which two different issues were joined, namely, one upon the right of a way to Broadmoor, the other upon the right of a way to the three acres. And the foreman gave the verdict as a general verdict for the defendant, upon both issues. But eight of the jury made affidavit "that it was the meaning and intention of the whole jury to find the former issue for the defendant, and the latter for the plaintiff; and that this mistake was discovered by them an hour afterwards; but not till the judge was gone to his lodgings." The foreman of the jury declined to make any affidavit, because, he said, he should make himself appear a fool to the Court of King's Bench. And upon the judge's report, it appeared that, though there was indeed evidence on both sides, yet the weight of evidence was, as it appeared to him, on the side of the plaintiff, as to this latter issue. The report goes on to say that "the court were all clear that this was a mistake arising from the jury's being unacquainted with business of this nature, and from the associate's omission in not asking the jury particularly 'how they found each respective issue,' and in not making the jury fully understand their own meaning; and that it was agreeable to right and justice that the mistake be rectified. And they had no doubt about the fact of this mistake, from the affidavit of the eight jurors, confirmed (as they held it in effect to be) by their foreman's declining to make any affidavit at all; especially as the judge's notes showed the weight of evidence to have been for the plaintiff as to this latter issue. And Lord Mansfield and Mr. Justice Denison thought that as it was a mere slip, there might be some method of rectifying the verdict according to the truth of the case, from the judge's notes if they were sufficiently particular, without sending the issue to be tried over again at great expense." Lord Mansfield afterwards proposed to the counsel who made the motion to set aside the verdict, that he should make a motion to have a rule to show cause why, upon reading the affidavits of those eight jurors, *the verdict should not be amended and set right according to the truth of the finding*. Such a motion was afterwards made, and a rule to show cause granted; but it never came before the court any more, "it plainly appearing that the court, upon deliberation among themselves, had come to the opinion that in this shape the verdict might be set right." Cogan *v.* Ebden, 1 Burr. 383.

took place at the hearing before them.[1] But whether such an affidavit will be received as to what took place during the deliberations of the arbitrators, where there is a rule which would exclude similar affidavits of jurors, may be a matter of more doubt.

§ 2620. Misconduct of Jurors in the Presence of the Court. — If a juror misconducts himself in the presence of the court, the fact may be brought to the attention of the court by affidavit as a ground for a new trial;[2] and it seems that the affidavit of a juror is admissible for this purpose.[3] Courts are, however, reluctant to consider such matters as ground for a new trial, and for the reason that the misconduct ought to have been brought to the attention of the court at the time.[4] It has even been said that the fact that a *juror fell asleep* for a time during the argument of the defendant's counsel in a criminal case, does not furnish sufficient ground for a new trial;[5] or that in a civil trial, a juror was, during a portion of the trial, *to all appearances asleep*.[6] And in no case will a new trial be granted upon the ground that the juror misbehaved during the trial, unless it be made to appear affirmatively that the party complaining and his counsel did not know the fact before the jury retired to consider of their verdict.[7]

§ 2621. Court may Interrogate Jury as to the Grounds of their Finding. — It is held in Massachusetts that, when the jury have returned into court with their verdict, before they are discharged, and while yet they are a jury, it is competent for the court to interrogate them as to the grounds of their finding, if there is more than one distinct ground upon which a verdict might be given. The idea of these decisions is, that where there

[1] 2 Greenl. Ev., § 78; Roop *v.* Brubacker, 1 Rawle (Pa.), 304; Zeigler *v.* Zeigler, 2 Serg. & R. 286; Alder *v.* Savill, 5 Taunt. 454; Spurck *v.* Crook, 19 Ill. 415, 425.

[2] Cogswell *v.* State, 49 Ga. 103.

[3] Roberts *v.* Hughes, 2 Mees & W. 398.

[4] *Ante*, § 2613.

[5] McClary *v.* State, 75 Ind. 260.

[6] Pelham *v.* Page, 6 Ark. 535, 538.

[7] Cogswell *v.* State, 49 Ga. 103; Baxter *v.* People, 8 Ill. 368; People *v.* Wilson, 8 Abb. Pr. (N. Y.) 137; *s. c.* 4 Park. Cr. L. (N. Y.) 619.

are several distinct grounds upon which a verdict might be based, it is not improper for the judge to ascertain which ground the jury adopted, since there may be little or no evidence upon any one ground, and sufficient evidence upon another; and if it appears that all of them did not agree upon either of the grounds, their verdict will not be allowed to stand, because unanimity is required.[1] But where the jurors, so questioned by the court, disclosed, not in response to the court's question, their own misconduct, — as that their verdict was agreed upon by average, in pursuance of a previous agreement to abide by the result, — such statements will not be listened to as showing such misconduct, and the verdict will not be set aside for that reason.[2]

§ 2622. Testimony of Others on Information Derived from Jurors not Received. — If the courts refuse, on grounds of public policy, to listen to primary evidence of a fact, they will, of course, for stronger reasons, refuse to listen to secondary evidence of it. What the law will not allow to be proved by the oath of the person having the knowledge, it obviously will not allow to be proved by the oath of another person deriving his information from the unsworn statements of the former person. It follows that the affidavits of counsel, or other persons, of the misconduct of the jury, upon information derived from particular jurors, will not be heard to impeach the verdict. If the same grounds of public policy did not intervene as in the case where the fact is sought to be proved by the oath of the juror himself, a consideration of the infirmity which attaches to hearsay testimony would operate to exclude it.[3]

[1] Parrott *v.* Thacher, 9 Pick. (Mass.) 426; Pierce *v.* Woodward, 6 Pick. (Mass.) 206; Spoor *v.* Spooner, 12 Metc. (Mass.) 281. This rule was adopted in the United States Circuit Court for Massachusetts, by Curtis, J., Biggs *v.* Barry, 2 Curt. C. C. (U. S.) 259. Compare Cogan *v.* Ebden, 1 Burr. 383.

[2] Dorr *v.* Femmo, 12 Pick. (Mass.) 521, the court saying: "The question was proper, but the answer was irrelevant, and seems to us to be inadmissible. Now, the jury may have been guilty of misbehavior, but if so, we have no evidence of it, and can derive none from them."

[3] People *v.* Hartung, 8 Abb. Pr. (N. Y.) 132; People *v.* Wilson, 8 Abb. Pr. (N. Y.) 137; Pleasants *v.* Heard, 15 Ark. 403, 411; Hindle *v.* Birch, 8 Taunt. 26; Price *v.* McIlvain, 2 Treadw.

§ 2623. Affidavits of Jurors Received to Sustain their Verdict. — Whilst the testimony of jurors will not be received to impeach their verdict, it does not follow that such testimony will not be received to sustain it when assailed. If the jurors are accused of misconduct, they may always show by their oaths, not only in their own vindication, but in furtherance of justice, that they were not guilty of the misconduct charged against them.[1]

Const. (S. C.) 503; Drummond *v.* Leslie, 5 Blackf. (Ind.) 453, 455; Allison *v.* State, 45 Ill. 37; Dunn *v.* Hall, 8 Blackf. (Ind.) 32; St. Martin *v.* Desnoyer, 1 Minn. 156; Irish *v.* Wright, 8 Rob. (La.) 428; State *v.* Beatty, 30 La. Ann. 1266; Smith *v.* Smith, 50 N. H. 212; Gale *v.* New York &c. R. Co., 53 How. Pr. (N. Y.) 385; Aylett *v.* Jewel, 2 W. Bl. 1299; Trohan *v.* McMannus, 2 La. 209; Stone *v.* State, 4 Humph. (Tenn.) 27. Compare Rowland *v.* State, 14 Ind. 575.

[1] State *v.* Dumphey, 4 Minn. 438; People *v.* Frost, 5 Park. Cr. (N. Y.) 53; Hix *v.* Drury, 5 Pick. (Mass.) 296; Hackley *v.* Hastie, 3 Johns. (N. Y.) 252; Taylor *v.* Greely, 3 Me. 204; Haskell *v.* Becket, 3 Me. 92; People *v.* Hunt, 59 Cal. 430; Cannon *v.* State, 3 Tex. 31; Dana *v.* Tucker, 4 Johns. (N. Y.) 487; Elliott *v.* Mills, 10 Ind. 368; Barlow *v.* State, 2 Blackf. (Ind.) 114; Staunton *v.* State, 13 Ark. 319; Cornelius *v.* State, 12 Ark. 810; Hamm *v.* Wilson, 28 Ind. 296; Smith *v.* Eames, 4 Ill. 76; Peck *v.* Brewer, 48 Ill. 54; Bradford *v.* State, 15 Ind. 347; Harding *v.* Whitney, 40 Ind. 379; State *v.* Underwood, 57 Mo. 40; Smith *v.* Powers, 15 N. H. 546; State *v.* Hascall, 6 N. H. 352; State *v.* Ayer, 23 N. H. 301; Tenney *v.* Evans, 13 N. H. 462; Hutchinson *v.* Consumers' Coal Co., 26 N. J. L. 24; Farrer *v.* State, 2 Ohio St. 54; Gilleland *v.* State, 44 Tex. 356; Bowen *v.* State, 3 Tex. App. 617; Anshicks *v.* State, 6 Tex. App. 524; Downer *v.* Baxter, 30 Vt. 467. Where a juror, during the progress of the trial, has been temporarily separated from his fellows, and a new trial is asked for on this ground, it is said to be the practice to receive the affidavit of the juror as to what took place with him during the separation; and if his affidavit shows that he held no improper communication with any one, listened to no remarks about the merits of the case, and was not otherwise tampered with, such affidavit is deemed sufficient to rebut the presumption against the purity of the verdict, which the fact of separation raises. State *v.* Cucuel, 31 N. J. L. 249, 260; State *v.* Carstaphen, 2 Hayw. (N. C.) 238. Such affidavits will always be closely scrutinized, and if the act of separating was in itself an act of misconduct, they will receive little weight. *Ante*, § 2549. Indeed, in the estimation of some courts, they were entitled to little weight, even where the act of separating was under the sanction of the court. "How are jurors to make it appear that they were guilty of no misconduct? If they swear generally that they were not, they swear to a conclusion only, depending upon their sense of what is improper; asking the court to be satisfied because they were satisfied. Jur-

§ 2624. Or to show the Misconduct of Parties. — Moreover such affidavits will be admitted to show the misconduct of *other persons*. This exception to the rule is supported by the strongest reasons of policy. If it did not exist, the attempts of parties, or their agents, or friends to corrupt jurors would be clothed with substantial immunity.[1] Not only this, but where there has been ground to suspect that the jury have been improperly influenced, it seems that the court may rightfully interrogate them on the subject. Thus, if papers have got into their hands which ought not to have got there, the court may interrogate the jurors as to whether the papers were read by them.[2]

§ 2625. Or to Show the Misconduct of their Bailiff. — While it has been held that the affidavits of jurors are not admissible to show misconduct on the part of the officer having them in charge tending to influence their verdict,[3] yet the weight of reason and authority seems to be the other way.[4]

§ 2626. Or upon a Question of Jurors' Competency. — Cases are rare in which new trials are granted on account of the discovery after verdict of some fact affecting the qualification of a particular juror;[5] and where affidavits are admitted tending to show a disqualifying fact, the counter-affidavit of a particular juror will be admitted.[6] Whether the affidavit of a juror will be admitted to show his own disqualification, is more doubt-

ors are rarely, perhaps, willfully guilty of improper conduct to disturb their verdict. A well-meaning juror who is unconsciously so guilty, will deny it. So that a juror's denial of the conclusion can weigh little. And the forms of improper conduct are so various that it would be very difficult to deny them to the satisfaction of a court." State *v.* Dolling, 37 Wis. 398, per Ryan, C. J.

[1] *Ante*, § 2560; Chews *v.* Driver, 1 N. J. L. 166; Reynolds *v.* Champlain Trans. Co., 9 How. Pr.(N. Y.) 7; Ritchie *v.* Holbrooke, 7 Serg. & R. (Pa.) 458.

[2] Hix *v.* Drury, 5 Pick. (Mass.) 296.

[3] Doran *v.* Shaw, 3 T. B. Mon. (Ky.) 415.

[4] Reins *v.* People, 30 Ill. 256; Wilson *v.* People, 4 Park. Cr. (N. Y.) 619, 632; Nelms *v.* State, 13 Smed. & M. (Miss.) 500, 508; Wiggins *v.* Downer, 67 How. Pr. (N. Y.) 65; Cole *v.* Swan, 4 G. Greene (Iowa), 32 (under a statute).

[5] *Ante*, § 117.

[6] *Ibid.*

ful. In Indiana it has been held that such affidavits are admissible.[1] In Wisconsin, such an affidavit was admitted to show that the affiant juror was so ignorant of the English language that he was not able to understand what the witnesses swore to at the trial; and it was held no error to grant a new trial for this reason.[2] But in another case the affidavit of a juror was offered to show that, by reason of indisposition, he was unable to attend to and understand all the testimony given at the trial. It was held that such an affidavit could not be received.[3] There is no rule of public policy which will exclude evidence of the declarations of jurors made before being summoned as jurors, which goes to show disqualification to sit in a particular case; and such evidence is constantly received.[4]

§ 2627. Exceptional Rules Admitting the Affidavits of Jurors. — An exceptional rule exists in *Tennessee*, whereby the affidavits of jurors are received to show their own misconduct,[5] as that they struck their verdict by *average*, having previously agreed to abide the result.[6] But there, such affidavits are not admissible to show the grounds on which they rendered their verdict;[7] and there is in that State a growing disposition to reject such affidavits.[8] It is there held that it is the duty of the

[1] Lafayette Plank Road Co. *v.* New Albany &c. R. Co., 13 Ind. 90.

[2] Shaw *v.* Fisk, 21 Wis. 368. See *ante*, §§ 10, 55.

[3] Greeley *v.* Mansur, 64 Me. 211.

[4] Cain *v.* Cain, 1 B. Mon. (Ky.) 213.

[5] Crawford *v.* State, 2 Yerg. (Tenn.) 60; Booby *v.* State, 4 Yerg. (Tenn.) 111; Donston *v.* State, 6 Humph. (Tenn.) 275.

[6] Joyce *v.* State, 7 Baxt. (Tenn.) 273; Elledge *v.* Todd, 1 Humph. (Tenn.) 43; Crabtree *v.* State, 3 Sneed (Tenn.), 302. See also Bennett *v.* State, 1 Humph. (Tenn.) 399, and Harvey *v.* Jones, 3 Humph. (Tenn.) 157, where such affidavits were received, though a new trial was refused, as it did not appear that the jurors had agreed in advance to abide by the result.

[7] Hudson *v.* State, 9 Yerg. (Tenn.) 408. So ruled in Larkins *v.* Tarter, 3 Sneed (Tenn.), 681; Lewis *v.* Moses, 6 Coldw. (Tenn.) 193; Galvin *v.* State, 6 Coldw. (Tenn.) 283; Dunnaway *v.* State, 3 Baxt. (Tenn.) 206.

[8] In Fish *v.* Cantrell, 2 Heisk. (Tenn.) 578, it is said that "it is time that circuit judges had ceased to allow the affidavits of jurors as to the grounds of their verdict, to be read on motions for new trials, unless in extraordinary cases." See also Fletcher *v.* State, 6 Humph. (Tenn.) 249; Dunnaway *v.* State, 3 Baxt. (Tenn.) 206; Scott *v.* State, 7 Lea (Tenn.), 232; Galvin *v.* State, 6 Coldw. (Tenn.) 283.

court to examine the jurors in open court in respect of such misconduct. "Such course," said the court, "gives the adverse side full opportunity to test the witness and place before the court the facts in their true light. No room is left for sliding over or concealing facts, which, if left out of an affidavit, put on the matter a face wholly different from the truth."[1] In *Iowa* the rule seems to be that affidavits of jurors may be received, for the purpose of avoiding a verdict, to show any matter occurring during the trial, or in the jury-room, which does not essentially inhere in the verdict itself, — as that a juror was improperly approached by a party, his agent or attorney; that witnesses or others conversed as to the facts or the merits of the case, out of court and in the presence of the jurors; that the verdict was determined by aggregation and average, or by lot or game of chance, or by other artifice, or in any other improper manner. But it was held that such affidavits may not be received to show any matter which does not essentially inhere in the verdict, — as that the affiant juror did not assent to it; that he misunderstood the instructions of the court, the statements of the witnesses, or the pleadings in the case; that he was unduly influenced by the statements of his fellow jurors, or mistaken in his calculation or judgment, or other matters resting alone in the juror's breast.[2] It is accordingly held, that such affidavits will be received to show that the verdict which was returned was a quotient verdict.[3] But such affidavits were rejected when they set forth the basis or calculation upon which the jurors arrived at their verdict;[4] when they showed that a juror had read a part of the answer and an exhibit thereto which had been held bad on demurrer, and that he was thereby influenced to consent to the verdict;[5] or that the

[1] Whitmore *v.* Ball, 9 Lea (Tenn.), 35.

[2] Wright *v.* Illinois &c. Tel. Co., 20 Iowa, 195.

[3] Wright *v.* Illinois &c. Tel. Co., 20 Iowa, 195; Hendrickson *v.* Kingsbury, 21 Iowa, 379; Fuller *v.* Chicago &c. R. Co., 31 Iowa, 211.

[4] Hall *v.* Robinson, 25 Iowa, 91; Barton *v.* Holmes, 16 Iowa, 252.

[5] Cowles *v.* Chicago &c. R. Co., 32 Iowa, 515. But they were received to show that the jury took with them to their room a deposition which had been suppressed, and that a portion of it was read by one of the jurors,

verdict was not assented to by all the jurors;[1] or that the affiant juror was unduly influenced by his fellows.[2] Nor are such affidavits received to show that the jurors misunderstood the instructions of the court.[3] And where such affidavits were introduced to the effect that the jurors misunderstood the testimony, it was doubted whether they could properly be received, but it was held that it must at least appear *that they had reasonable ground for misunderstanding it.*[4] But such affidavits are received to show the misconduct of a juror in drinking intoxicating liquors during the progress of the trial; but it is said that it ought only to be received when no other evidence is attainable, and ought to be explicit in giving the juror's name and the time and place when the act occurred.[5] The rule upon which the Supreme Court of Iowa thus settled[6] — if, indeed, it possesses sufficient certainty to be called a rule — has been adopted in Kansas in express terms. It is accordingly held in that State, that such affidavits are not admissible to show that the jurors agreed to find the prisoner guilty, through fear that mob violence would result to him in case of an acquittal.[7] But they will be received to show that one of the jurors was intoxicated during their deliberations,[8] or that the verdict was ob-

though, on account of the showing made by exculpatory affidavits, the court refused to grant a new trial. Morris *v.* Howe, 36 Iowa, 490.

[1] Garretty *v.* Brazell, 34 Iowa, 100.

[2] Bingham *v.* Foster, 37 Iowa, 339; Dunlavey *v.* Watson, 38 Iowa, 398. It may be doubted whether this rule is capable of being applied with uniformity or certainty.

[3] Davenport *v.* Cummings, 15 Iowa, 219 (overruling Packard *v.* United States, 1 G. Greene (Ia.), 225).

[4] Jack *v.* Naber, 15 Iowa, 450; Moffit *v.* Rogers, 15 Iowa, 453. The court does not explain how a man can have a reasonable ground for misunderstanding a thing. For decisions under the repealed statute of 1851 (Iowa Code, 1851, § 1810), see Packard *v.* United States, 1 G. Greene (Ia.), 225; Lloyd *v.* McClure, 2 *Id.* 139; Abel *v.* Kennedy, 3 *Id.* 47; Forshee *v.* Abrams, 2 Iowa, 571; Grady *v.* State, 4 Iowa, 461; Crumley *v.* Adkins, 12 Iowa, 363; Cook *v.* Sypher, 3 Iowa, 484; State *v.* Douglass, 7 Iowa, 413; Manix *v.* Maloney, 7 Iowa, 81; Ruble *v.* McDonald, 7 Iowa, 90; Schanler *v.* Porter, 7 Iowa, 482; Butt *v.* Tuthill, 10 Iowa, 585; Stewart *v.* Burlington &c. R. Co., 11 Iowa, 62; State *v.* Accola, 11 Iowa, 246.

[5] State *v.* McLaughlin, 44 Ia. 83.

[6] In Wright *v.* Illinois &c. Tel. Co., 20 Iowa, 195.

[7] State *v.* Horne, 9 Kan. 119.

[8] Perry *v.* Bailey, 12 Kan. 539.

tained by aggregation and division, the jurors agreeing in advance to be bound by the result of that method of arriving at their verdict.[1] By statute in *California*, the affidavits of jurors are admissible to show that the verdict was the result of "a resort to the determination of *chance*."[2] And a rule exists in *Arkansas* whereby the affidavits of jurors may be received to show that their verdict was determined by lot.[3] By a statute in *Texas*,[4] the affidavits of jurors are admitted to prove their own misconduct, as well as to sustain their verdict. Under this statute it has been held that it is competent to show, by the affidavit of a juror, that he had founded his verdict upon statements made by another juror in the jury-room, prejudicial to the defendant, and that, upon such a showing, a new trial ought to be granted;[5] or that the verdict which was returned was a quotient verdict, the jurors agreeing in advance to be bound by the result.[6]

[1] Johnson *v.* Husband, 22 Kan. 277.

[2] Cal. Code Civ. Proc., § 657. That the statute was retroactive: Donner *v.* Palmer, 23 Cal. 40; that it did not embrace the *quotient verdict*. *Ante*, § 2602; Turner *v.* Tuolumne Water Co., 25 Cal. 397; that it is in derogation of common law and to be strictly construed: *Ibid.*; People *v.* Hughes, 29 Cal. 257; Polhemus *v.* Heiman, 50 Cal. 438.

[3] Ark. Dig. Stat. 1874, § 1971; Fain *v.* Goodwin, 35 Ark. 109.

[4] Tex. Code Cr. Proc. 1879, art. 777, sub-sec. 8.

[5] Anschicks *v.* State, 6 Tex. App. 524.

[6] Hunter *v.* State, 8 Tex. App. 75. In this case it is said by Winkler, J.: "The practice of permitting jurors to impeach their verdict by exposing their own misconduct is to be reprehended rather than encouraged; but still the law seems to provide that their misconduct may be exposed by their own affidavits when voluntarily made." The misconduct alluded to in the statute must be such as to affect the fairness of the trial. Jack *v.* State, 26 Tex. 4; Anschicks *v.* State, 6 Tex. App. 525, 536. Decisions prior to the statute: Campbell *v.* Skidmore, 1 Tex. 475; Mason *v.* Russell, 1 Tex. 721; Kilgore *v.* Jordan, 17 Tex. 341; Little *v.* Birdwell, 21 Tex. 597; Johnson *v.* State, 27 Tex. 758; Brennan *v.* State, 33 Tex. 266.

TITLE VIII.

THE VERDICT.

CHAPTER LXXIV. — DELIVERY AND RECEPTION OF THE VERDICT.
CHAPTER LXXV. — OF GENERAL VERDICTS.
CHAPTER LXXVI. — OF SPECIAL VERDICTS.
CHAPTER LXXVII. — SPECIAL FINDINGS OF JURIES.

CHAPTER LXXIV.

DELIVERY AND RECEPTION OF THE VERDICT.

SECTION
2632. Delivery and Reception of the Verdict.
2633. Requiring the Jury to put the Verdict in Proper Form.
2634. Permitting Foreman to Sign after Verdict Brought into Court.
2635. Recording the Verdict.
2636. Mandamus to Compel Inferior Court to Receive and File Verdict.

§ **2632. Delivery and Reception of the Verdict.** — In every jurisdiction the rule is believed to be, both in civil and criminal cases, that, although the jury may have deposited with the clerk a sealed verdict and then separated, yet when their verdict is delivered in court and published they must *all be present*, in order that they may be *polled*, if either party requires it.[1] The

[1] Sargent *v.* State, 11 Ohio, 472; Bishop *v.* Mugler, 33 Kan. 145, 147; Crotty *v.* Wyatt, 3 Bradw. (Ill.) 388; Normaque *v.* People, Breese (Ill.), 145; Martin *v.* Morelock, 32 Ill. 485; Rigg *v.* Cook, 9 Ill. 336. Either party has a right to have the jury polled, unless he has waived that right. Fox *v.* Smith, 3 Cow. (N. Y.) 23; Bunn *v.* Hoyt, 3 Johns. (N. Y.)

verdict can only be delivered and received *in open court;* the judge has no power to receive it after the court is adjourned,[1] nor has he power to designate a member of the bar to receive it in his absence;[2] nor can he receive it at his private residence;[3] and, in the view of some courts, it cannot be received *on Sunday*,[4] though other courts hold that a verdict returned on Sunday is good;[5] and the mere fact that the jury *concluded their deliberations* on Sunday does not, it seems, vitiate their verdict.[6] The *manner* in which the jury *deliver* their verdict, where they are not polled, is well illustrated by a case where they reported to the court that they found the respondent guilty of voluntary manslaughter, and the verdict was reduced to form, and the clerk then said: "Gentlemen of the jury, you say you find the respondent, Jacob Stubenvoll, guilty of manslaughter, in manner and form as the people in their information charge,—so say you, Mr. Foreman; so say you all?" and the jurors answered, "We do." It was held that this was a sufficient announcement by the jury of their verdict.[7] Where the jury is polled, each juror should be required distinctly to affirm his assent to the verdict.

255; Jackson *v.* Hawks, 2 Wend. (N. Y.) 619; Root *v.* Sherwood, 6 Johns. (N. Y.) 68; Warner *v.* New York &c. R. Co., 52 N. Y. 437; James *v.* Doss, 55 Miss. 57; Johnson *v.* Howe, 7 Ill. 342; Rigg *v.* Cook, *supra;* Maduska *v.* Thomas, 6 Kan. 153, 155; Thornburg *v.* Cole, 27 Kan. 490. A party cannot be allowed while the jury is being polled to question a juror as to the *misconduct* of the jury during the trial. Bassham *v.* State, 38 Tex. 622. It has been held that, where the jury have made a verdict and then dispersed by previous consent of counsel and leave of court, it is not proper to poll them when the verdict is afterwards returned and read; but why, is not perceived. City Bank *v.* Kent, 57 Ga. 285.

[1] Chicago *v.* Rogers, 61 Ill. 188.

[2] Britton *v.* Fox, 39 Ind. 369.

[3] Rosser *v.* McColley, 9 Ind. 587, 589.

[4] Bass *v.* Irvin, 49 Ga. 436; Davis *v.* Fish, 1 G. Greene (Iowa), 410; Shaw *v.* McCombs, 2 Bay (S. C.), 232 (denied in Heller *v.* English, 4 Strobh. L. (S. C.) 486.

[5] Com. *v.* Marrow, 3 Brewst. (Pa.) 402; Cary *v.* Silcox, 5 Ind. 370; Rosser *v.* McColly, 9 Ind. 587; McCorkle *v.* State, 14 Ind. 39; Hoghtaling *v.* Osborn, 15 Johns. (N. Y.) 119; Baxter *v.* People, 8 Ill. 385; Webber *v.* Merrill, 34 N. H. 202; Cary *v.* Silcox, 5 Ind. 370; Heller *v.* English, 4 Strohb. L. (S. C.) 486. See also Bedoe *v.* Alpe, W. Jones, 156; Butler *v.* Kelsey, 15 Johns. (N. Y.) 177.

[6] Stone *v.* Bird, 16 Kan. 488; True *v.* Plumley, 36 Me. 466.

[7] People *v.* Stubenvoll (Mich.), 8 Crim. Law. Mag. 265.

This is well illustrated by a case where a juror, on being polled, replied to the question, "Is that your verdict?" by saying, "I agreed to it." This answer was objected to, and the court again propounded it, and he said, "I agreed to it, I suppose." The court said that the juror was not asked for a *supposition*, but for what he *knew*, and added, "Is this your verdict, or is it not?" The answer was, "I suppose it is, if that's the proper answer to your question." The court then said: "You are an intelligent man, Mr. Randall, please answer me." And the juror answered: "Yes, sir; I agreed to it." Thereupon the verdict was received over the defendant's objection. It was held that it was properly received, and that the juror could not impeach it by his subsequent affidavit saying that he had not agreed to it.[1] Where a verdict is plain and unmistakable in its terms and legal effect, it has been held error to permit counsel for the unsuccessful party to interrogate the jury, on the reading of the verdict by the clerk, as to what they intended thereby. The verdict, not being ambiguous, must speak for itself.[2] With the qualification above stated, relating to sealed verdicts, the jury may always be sent back to correct a defective verdict.[3]

§ 2633. Requiring the Jury to put the Verdict in Proper Form. — If the jury bring in a verdict which is informal, it is within the power of the court, at any time before the verdict is recorded and the jury are discharged, to send them out and require them to put the verdict in proper form,[4] and to advise them how to do it.[5] It is equally clear that the court may reduce the verdict of the jury to proper form and cause it to be read to them, and that if they assent to it, it will be their verdict.[6] Where the jury have signed and sealed their verdict and delivered it to the clerk after the adjournment of the court, and have then dispersed,

[1] Hill *v.* State, 64 Ga. 453.

[2] Anderson *v.* Green, 46 Ga. 361.

[3] Noble *v.* Epperly, 6 Ind. 468; Reed *v.* Thayer, 9 Ind. 157.

[4] Coffee *v.* Groover, 20 Fla. 64, 83.

[5] Hadley *v.* Heywood, 121 Mass. 236.

[6] Repps *v.* Barker, 4 Pick. (Mass.) 238; Osgood *v.* McConnell, 32 Ill. 74; Wright *v.* Phillips, 2 G. Greene (Ia.), 191; Burk *v.* Com., 5 J. J. Marsh. (Ky.) 675; Proff. Jury Tr., §§ 456, 461.

they may, when called to the bar the next day, before their verdict is recorded, be sent back to correct it, if it is found to be informal.[1] Yet it is error to do so, for the purpose of *altering the substance* of their verdict at the suggestion of the court.[2] Where the jury are sent back in a criminal case, at the request of the defendant and against the objection of the prosecuting attorney to find another verdict, the defendant cannot afterwards take advantage of the irregularity, if such it be. "It is the same as though, on the coming in of a verdict in any case, the parties should stipulate that the verdict be not received, but that the same jury should find another verdict on the testimony already in."[3]

§ 2634. Permitting Foreman to Sign after Verdict Brought into Court. — In a criminal trial in Nebraska the verdict, as presented by the jury, although signed by all the individual jurors, was not signed by any one of them as "foreman." By direction of the court this omission was supplied by the foreman in the presence and by the consent of all the other jurors, without returning to the jury room. It was held that this was proper. There was no necessity for sending the jury out again to cure this technical defect, if such it were; but the court thought that the verdict was good as at first presented.[4]

§ 2635. Recording the Verdict. — The determination of a jury, although formally stated in a verdict, and signed and sealed, is not final with them, but remains within their control and subject to any alteration or amendment which they may desire to make, until it is actually rendered in court and recorded; and any member of the jury is at liberty to withdraw his consent to a verdict previously agreed upon, at any time before it is received and recorded.[5] In short, until a verdict is properly re-

[1] Edelen *v.* Thompson, 2 Har. & G. (Md.) 31.

[2] McConnell *v.* Linton, 4 Watts (Pa.), 357.

[3] Loew *v.* State, 60 Wis. 559, 563.

[4] Clough *v.* State, 7 Neb. 323, 342.

[5] Bishop *v.* Mugler, 33 Kan. 145; Root *v.* Sherwood, 6 Johns. (N. Y.) 68; Proff. Jury Tr., § 449.

ceived and recorded in court, it is without force or validity.[1] The form of the verdict *as recorded* must govern, in case of any *discrepancy* between it and the verdict which the jury actually returned into court, — the presumption being that the jury assented to the verdict as recorded.[2]

§ 2636. **Mandamus to Compel Inferior Court to Receive and File Verdict.** — If the verdict has been unanimously agreed upon by the jury, reduced to writing in due form, returned by the jury, and regularly presented to the court, and if, for insufficient reasons, the court refuses to receive and record the same, it may be compelled to do so by a *mandamus*, sued out in a tribunal possessing superintending jurisdiction over it.[3] But where the verdict has not been regularly returned into court by all the jurors assembled for that purpose, the court properly declines to record it as a verdict, enters a mistrial, and continues the cause for future disposition; and in such a case *mandamus* will not lie to compel the court to receive and record the paper, for it is no verdict.[4]

[1] Bishop *v.* Mugler, *supra;* Proff. Jury Tr., § 460.

[2] Leftwich *v.* Day, 32 Minn. 512.

[3] Munkers *v.* Watson, 9 Kan. 668.

[4] Bishop *v.* Mugler, 33 Kan. 145.

CHAPTER LXXV.

OF GENERAL VERDICTS.

SECTION

2639. Must Find all the Issues.
2640. Erroneous where there are Several Counts.
2641. On a Petition or Indictment Stating same Cause of Action in Different Counts.
2642. Power of Court to Amend the Verdict.
2643. Instances Showing how this Power has been Exercised.
2644. Verbal Inaccuracies Disregarded.
2645. Instances of a Formal Verdict.

§ 2639. Must Find all the Issues. — A leading characteristic of a good verdict, whether general or special, is that it must embody a finding upon all the issues made by the pleadings. This must be done in language not to be misunderstood, and a verdict which finds only a part of the issues is defective.[1] Therefore, in an action of ejectment, the following verdict, "We the jury find for the defendant H. W. Moore, *one-half* of the one thousand and twenty acres of land claimed by him," was void because the issue related to the *whole tract* of ground, and a verdict disposing of one-half left the other half undisposed of.[2] So, on the trial of an issue as to the right of property in *two slaves*, levied upon under an execution, the verdict was held bad because it found the issue as to *one* of the slaves only.[3]

[1] Moore *v.* Moore, 67 Tex. 293; *s. c.* 3 S. W. Rep. 284.

[2] Moore *v.* Moore, 67 Tex. 293; *s. c.* 3 S. W. Rep. 284.

[3] McCoy *v.* Rives, 1 Smed. & M. (Miss.) 592. See also Sawyer *v.* Fitts, 4 Stew. & P. (Ala.) 365; Crouch *v.* Martin, 3 Blackf. (Ind.) 256; Smith *v.* Raymond, 1 Day (Conn.), 189; Schmitz *v.* Lauferty, 29 Ind. 400; People *v.* Doesburg, 17 Mich. 135; Phillips *v.* Hill, 3 Tex. 397; Crutcher *v.* Williams, 4 Humph. (Tenn.) 345; Middleton *v.* Quigley, 12 N. J. L. 352; Longcope *v.* Bruce, 44 Tex. 434.

§ 2640. General Verdicts Erroneous where there are Several Counts. — Where several distinct causes of action are joined in the petition in different counts, as they must be, a general verdict in favor of the plaintiff is void, since it cannot be known to which of the counts it applies.[1] The jury must, in such a case, return a verdict on each of the counts, and it is proper for the court to send them back and require them to do so.[2] For the same reason, where *distinct offenses* are charged in *separate counts of an indictment*, the jury must either return a general verdict of not guilty, or a verdict which responds to each separate charge in the indictment.[3] It has been held, on the trial of a misdemeanor, that, if the defendant does not request a verdict upon each count of the indictment, he thereby waives the right to have such a verdict, and a general verdict is good.[4] It has been ruled in Massachusetts that, if a declaration contains several causes of action, and a general verdict is returned for the plaintiff, but *for nominal damages*, he has no ground of exception to any ruling given at the trial, or to any refusal to rule, unless such ruling or refusal to rule relates to the question of damages. The general verdict for the plaintiff, must in such a case, be taken to be a verdict for him on every cause of action alleged in the declaration, if there be more than one.[5]

§ 2641. On a Petition or Indictment Stating same Cause of Action in Different Counts. — Where the petition apparently counts upon two separate causes of action, but the two counts are manifestly *for the same cause of action*, and one of the counts is good and the other bad, the good count will support a general verdict for the plaintiff.[6] So, a general verdict, upon an information in several counts, *for a single forfeiture*, under the

[1] Bricker *v.* Mo. Pac. R. Co., 83 Mo. 391, 394.

[2] Hadley *v.* Haywood, 121 Mass. 236.

[3] Casey *v.* State, 20 Neb. 138; *s. c.* 29 N. W. Rep. 264; 8 Crim. Law Mag. 597; Wilson *v.* State, 20 Oh. 26; Williams *v.* State, 6 Neb. 334.

[4] State *v.* Basserman, 54 Conn. 88; *s. c.* 6 Atl. Rep. 185.

[5] Rowley *v.* Ray, 139 Mass. 241. See also Wood *v.* Southwick, 97 Mass. 354; Hadley *v.* Haywood, 121 Mass. 236.

[6] McKee *v.* Calvert, 80 Mo. 348; Brownell *v.* Pacific R. Co., 47 Mo. 240

United States internal revenue laws, is valid, if one of the counts is good.[1] This is in conformity with the general rule of criminal procedure, that a general verdict, upon an indictment or information containing several counts, but *seeking in different forms one object*, must be upheld, if one count is good.[2]

§ 2642. Power of the Court to Amend the Verdict. — The adjudged cases show that, from a very early period, the courts have freely exercised the power of amending verdicts, so as to correct manifest errors, both of form and substance.[3] These amendments have been constantly permitted after the lapse of the term at which the case was tried, and even after writ of error brought and joinder in error.[4] Such amendments may be made from the judge's notes of the evidence, or from any other evidence, equally clear and satisfactory, which may be submitted to the consideration of the court.[5] A limitation of the rule is, that the amendment must in all cases be such as to make the verdict conform to *the real intention of the jury;* the judge cannot, under the disguise of amending the verdict, invade the exclusive province of the jury, or substitute his verdict for theirs.[6]

§ 2643. Instances Showing how this Power has been Exercised. — In an old case the issue was as to two rights of way under which the defendant justified. The jury found specially for the defendant as to one, and for the plaintiff as to the other,

[1] Snyder *v.* United States, 112 U. S. 216.

[2] Clifton *v.* United States, 4 How. (U. S.) 242, 250; Lacker *v.* United States, 7 Cranch (U. S.), 339.

[3] Chapman *v.* Gale, 2 Lev. 22; Eddowes *v.* Hopkins, 1 Dougl. 361; Harris *v.* Davis, 1 Chit. 625 (note); Doe *v.* Perkins, 3 T. R. 749; Henley *v.* Mayor, 6 Bing. 100; Richardson *v.* Mellish, 3 Bing. 334; *s. c.* on error 7 Barn. & C. 819; Clark *v.* Lamb, 8 Pick. (Mass.) 415; Matheson *v.* Stewart, 2 How. (U. S.) 263, 279; Hay *v.* Ousterout, 3 Oh. 384; Bosse *v.* Thomas, 3 Mo. App. 472, 479; State *v.* Steptoe, 1 Mo. App. 19; Ranney *v.* Bader, 48 Mo. 539; State ex rel. *v.* Knight, 46 Mo. 83; Henley *v.* Arbuckle, 13 Mo. 209.

[4] Clark *v.* Lamb, 6 Pick. (Mass.) 512, and 8 Pick. (Mass.) 415; Matheson *v.* Stewart, 2 How. (U. S.) 263, 279.

[5] Matheson *v.* Stewart, *supra.*

[6] Acton *v.* Dooley, 16 Mo. App. 441, 449.

but returned a verdict for the defendant as to both, and separated. This verdict was corrected on the affidavit of the jurors.[1] In a case in New York the jury delivered in court a verdict *against two*, when the verdict which they had really agreed upon was *against one* and in favor of the other party. It was recorded, and the jury separated. Afterwards, on the same day, on the affidavit of all the jurors, the verdict was corrected and judgment entered thereon.[2] In a case in a Federal court, the action was for personal services; the jury returned a verdict for the plaintiff in the sum of $3,500; two days thereafter, while counsel for both parties were present, the court directed the jury to be recalled, and they all, on being asked if that was their verdict, answered that it was not, — that their verdict was for $3,500, *with interest*. It was held that the court had power to cause the mistake to be corrected, and to render judgment thereon for $3,500 and interest.[3] So, where a jury, in an action of replevin, sealed a verdict "for plaintiff to the amount of replevin, with interest," and then separated, and, on bringing it into court after the separation, the court, after instructing them to find a verdict in an exact amount, submitted to them a calculation of the amount of the replevin with interest, which amount they accepted, and rendered a verdict therefor, upon which the judgment was entered, — it was held that no error had been committed.[4] So, where a paper purporting to be a verdict *omits the names of the parties*, the record of the court, showing that it was rendered in open court as the verdict, and filed in the case as such, will supply the omission.[5]

§ **2644. Verbal Inaccuracies Disregarded.** — The court will disregard verbal inaccuracies in a general or special verdict, and give judgment thereon, if the facts found are sufficient and the meaning is sufficiently clear.[6] A verdict will not be held void

[1] Cogan *v.* Ebden, 1 Burr. 383.

[2] Dalrymple *v.* Williams, 63 N. Y. 361.

[3] Burlingame *v.* Central &c. R. Co., 23 Fed. Rep. 706.

[4] Smith *v.* Meldren, 107 Pa. St. 348.

[5] Miller *v.* Morgan, 143 Mass. 25; *s. c.* 3 N. Eng. Rep. 119.

[6] Fenn *v.* Blanchard, 2 Yeates (Pa.), 543; Thames &c. Co. *v.* Beville, 100

merely because expressed in *bad English*, if it clearly manifests the intention and finding of the jury upon the issues submitted to them.[1]

2645. INSTANCE OF A FORMAL VERDICT. — The following verdict was held correct, both in form and in substance: —

ANTON SCHINDLER
vs.
MORRISSEY BROS. ET AL.

In District Court Nebraska.

Verdict for Plaintiff.

We, the jury, duly impaneled and sworn in the above entitled cause and to try the issues joined therein, do find for the plaintiff, and assess his damages at the sum of $350.

[Signed by the Foreman.][2]

In this case the criticism was upon the title of the cause. While the court doubted whether counsel could improve it, yet the court held that all that was necessary was that the title should identify the cause in which the verdict was rendered.[3]

Ind. 309, 312; Thayer *v.* Burger, 100 Ind. 262; Daniels *v* McGinnis, 97 Ind. 549.

[1] Snyder *v.* United States, 112 U. S. 216; Parks *v.* Turner, 12 How. (U. S.) 39, 46; Lincoln *v.* Iron Co., 103 U. S. 412; Rev. Stat. U. S. 954.

[2] Morrissey *v.* Schindler, 18 Neb. 673.

[3] *Ibid.*

CHAPTER LXXVI.

OF SPECIAL VERDICTS.

SECTION

2649. Origin of Special Verdicts.
2650. Must Find Issues in Favor of one Party or the Other.
2651. Must Find all the Facts Essential to a Recovery.
2652. Must Find Facts, not Evidence.
2653. Must Find Facts, not Conclusions of Law.
2654. Construction of Special Verdicts.
2655. Duty of Counsel to Draw up Verdict.
2656. Power of the Court to Supply Undisputed or Established Facts.
2657. *Venire de Novo*, when Awarded.
2658. Of Special Findings of Fact by the Judge.
2659. [Continued.] Practice in New York.
2660. Request for a Special Finding under Indiana Statute.
2661. Of a "Case Stated."
2662. General Verdict Subject to Opinion of Court on Point of Law.
2663. What is a Good Statutory Inquest.

§ **2649. Origin of Special Verdicts.** — "On a general verdict," said Mr. Tidd, "if false, the jury were liable to be attainted.[1] To relieve them from this difficulty, it was enacted by the statute of Westm. 2,[2] that 'the justices of assize shall not compel the jurors to say precisely whether it be a decision or not, so as they state the truth of the fact, and pray the aid of the justices; but if they will say of their own accord that it is disseisin, their verdict shall be admitted at their own peril.' Upon the statute, it has become the practice of the jury, when they have any doubt as to the matter of law, to find a special verdict, stating the facts, and referring the law arising thereon to the decision of the court; by concluding conditionally, that if, upon the whole matter alleged, the court shall be of opinion

[1] Citing Gilb. C. P. 71. The writ of attaint was abolished by 6 Geo. IV., chap. 50, § 60.

[2] 13 Edw. I., chap. 30, § 2.

that the plaintiff had cause of action, they then find for the plaintiff; if otherwise, then for the defendant." [1]

§ 2650. Must Find the Issues in Favor of One Party or the Other.— A special verdict will be set aside, if it does not find all the facts put in issue by the pleadings; and it has been held that this is so, although the evidence may establish beyond controversy the existence of the facts not found.[2] Regularly, a special verdict, after stating the facts, must find the issue *in favor of the plaintiff, or in favor of the defendant*, according to the opinion of the court upon the law; that must be the conclusion of the verdict. The finding one way or the other must be the finding of the jury, and not the finding of the court, or the verdict is bad.[3] Accordingly, in a criminal case, where the jury submitted to the court whether the defendant was guilty of an assault, but, after reciting the facts which they found, did not find the defendant guilty if, in the opinion of the court as matter of law, he was guilty, and did not find him not guilty if, in the opinion of the court as matter of law, he was not guilty, but recited the facts merely and left the finding to the court,— it was held that the verdict was bad, and that the proper course was to direct a *venire de novo*.[4]

§ 2651. Must Find all the Facts Essential to a Recovery. — It is a rule that a special verdict must state all the facts essential to a recovery, and that nothing can be supplied by intendment.[5]

[1] 2 Tidd Prac. 896, 897; 3 Bla. Com. 377, 378.

[2] Paschal *v.* Cushman, 26 Tex. 74.

[3] State *v.* Wallace, 3 Ired. L. (N. C.), 195.

[4] State *v.* Wallace, 3 Ired. L. (N. C.) 195.

[5] Rice *v.* Evansville, 108 Ind. 7; *s. c.* 6 West. Rep. 242; Dixon *v.* Duke, 85 Ind. 434; Pittsburg &c. R. Co. *v.* Adams, 105 Ind. 151; Redelsheimer *v.* Miller, 107 Ind. 485; *s. c.* 5 West. Rep. 619; Farr *v.* Newman, 4 T. R. 621, 646; Lawrence *v.* Beaubien, 2 Bail. (S. C.) 623; 2 Tidd Pr. 897; Seward *v.* Jackson, 8 Cow. (N. Y.) 406; Hill *v.* Covell, 1 N. Y. 522; Langley *v.* Warner, 3 N. Y. 327; Hallett *v.* Jenks, 1 Caine's Cas. (N. Y.) 43; Thayer *v.* Society &c., 20 Pa. St. 60; Kuhlman *v.* Medlinka, 29 Tex. 385. The modern codes of procedure have not changed this rule. Pittsburg &c. R. Co. *v.* Spencer, 98 Ind. 186, 193; Eisemann *v.* Swan, 6 Bosw. (N. Y.) 668; Williams *v.* Willis, 7 Abb. Pr. (N. Y.) 90. "If

Accordingly, where the existence of a deed is material to the case of the party sustaining the burden of proof, and the jury have not found its existence, the court will not help out the verdict by the presumption of a deed.[1] So, the court has no power to reduce the verdict to such an amount as the court thinks proper, and render a judgment for the reduced amount.[2] There is a corresponding rule touching the special finding of juries under statutes empowering courts to submit *special interrogatories* to them: that, if facts are not found in the special findings, they will be presumed, as against the party having the burden of proof, not to have been proved.[3] This rule is especially strong where

the facts found are not sufficient to entitle a plaintiff to a judgment, then the defendant's motion for judgment should be sustained, unless the case is one where the burden is upon the defendant." Dixon *v.* Duke, 85 Ind. 434, 436, opinion of the court by Elliott, J. The meaning and modern development of this principle is that, unless the jury find all the facts in favor of the party sustaining the burden of proof, which are essential to the support of his action or defense, the judgment upon the special verdict must go against such party. Dixon *v.* Duke, 85 Ind. 434, 437; Jones *v.* Baird, 76 Ind. 164; Henderson *v.* Dickey, 76 Ind. 264; Stropes *v.* Board &c., 72 Ind. 42; Ex parte Walls, 73 Ind. 95; Pitzer *v.* Indianapolis &c. R. Co., 80 Ind. 569; La Frombois *v.* Jackson, 8 Cow. (N. Y.) 589, 597; Barnes *v.* Williams, 11 Wheat. (U. S.) 415; Lee *v.* Campbell, 4 Port. (Ala.) 198; Bolling *v.* Mayor, 3 Rand. (Va.) 577; Brown *v.* Ralston, 4 Rand. (Va.) 516; Sewall *v.* Glíden, 1 Ala. 52, 57; Sisson *v.* Barrett, 2 N. Y. 406; Hill *v.* Covell, 1 N. Y. 522; Langley *v.* Warner, 3 N. Y. 327; Butts *v.* Bilke, 4 Price, 240; Rex *v.* Messenger, Kelyng. 78, 79; Rex *v.* Huggins, 2 Ld. Raym. 1574, 1585; *s. c.* 2 Strange, 882; Fenn *v.* Blanchard, 2 Yeates (Pa.), 543. A curious reason was given for this rule by Chief Justice Bridgman, Anno, 1662: "It being matter in fact, the court shall not intend upon the verdict the jury found either one way or the other; for, if they did, the jury must be attainted by reason of the judgment of the court, if they give it upon a wrong supposal of the truth of the fact; and therefore, if there be not, as I have said, sufficient without it to find for the plaintiff, the court can give no judgment in it, but there must be in such case a *venire de novo*." Holland *v.* Fisher, O. Bridgman, 181, 188. The true reason is that it is the province of the jury, and not the province of the court, to find the facts, and if the court "intends"— to use an expression frequent in the old books — the existence of a fact not found by the special verdict, the court in so doing takes upon itself the office of finding such fact.

[1] Bolling *v.* Mayor &c., 3 Rand. (Va.) 563, 577.

[2] Brown *v.* McLeish, 71 Iowa, 381; *s. c.* 32 N. W. Rep. 385.

[3] Mitchell *v.* Colglazier, 106 Ind. 464; Krug *v.* Davis, 101 Ind. 75.

there is a general verdict against the party claiming the benefit of the special findings. In such a case neither presumption nor intendment can be resorted to for the purpose of awarding him a judgment.[1] It is, however, not necessary that the jury should disclose in their special verdict, *every fact* with the proof of which they are satisfied. It is said that, if they return facts, intelligently set forth, which show no right of recovery, or which show a good cause of action, without available defense, it would certainly be the duty of the court to render a judgment upon their verdict.[2]

§ **2652. Must Find Facts, not Evidence.** — Another leading rule in regard to special verdicts is, that they should find the ultimate or constitutive facts which are necessary to support the judgment of the court, and should not find those matters which are merely evidentiary in their nature, and which merely tend to show the existence of the ultimate facts.[3] The reason of this rule is that, if the jury could merely construct their verdict in the form of giving a summary of the evidence, and if the court should hold such a verdict sufficient, the effect would be to enable the jury to cast upon the court the performance of their function of finding the facts from the evidence in the case.[4] And this applies with equal force to the "*special findings*" of the judge, sitting, in a case at law, as a jury. The judge must find the facts,

[1] Baltimore &c. R. Co. *v.* Rowan, 104 Ind. 88.

[2] Lee *v.* Campbell, 4 Port. (Ala.) 198, 204.

[3] Indianapolis &c. R. Co. *v.* Bush, 101 Ind. 582; Rex *v.* Huggins, 2 Ld. Raym. 1574, 1581; *s. c.* 2 Strange, 882; Witham *v.* Derby, 1 Wilson, 48; Bird *v.* Appleton, 1 East, 111; Seward *v.* Jackson, 8 Cow. (N. Y.) 406, 413; La Frombois *v.* Jackson, 8 Cow. (N. Y.) 589, 599; Barnes *v.* Williams, 11 Wheat. (U. S.) 415; Henderson *v.* Allens, 1 Henn. & M. (Va.) 235; Bertrand *v.* Morrison, Breese (Ill.), 175; Sisson *v.* Barrett, 2 N. Y. 406; Hill *v.* Covell, 1 N. Y. 522; Rex *v.* Giles, 8 Price, 383; Langley *v.* Warner, 3 N. Y. 327; State *v.* Watts, 10 Ired. L. (N. C.) 369; Thompson *v.* Farr, 1 Spears (S. C.), 93; Blake *v.* Davis, 20 Oh. 231, 249; Hambleton *v.* Dempsey, *Id*, 168, 172; Brown *v.* Ralston, 4 Rand. (Va.) 504.

[4] In Arkansas the statute confirms the common-law rule, that a special verdict "must present the facts as established by the evidence, and not the evidence to prove them." Rev. 1874, § 4678.

and not the evidence.[1] Applying this rule, it has been held that, where the jury are required to find whether the defendant promised to pay a debt, they do not discharge this duty by finding the language which defendant used: they must find the fact whether the promise was made or not. The language was regarded by the court as evidence of the fact; and whether it imported a promise to pay the debt was a question of fact for the jury, and not a question of law for the court.[2] Moreover, where a special verdict mingles together the finding of certain ultimate or constitutive facts with the statement of certain evidentiary matters, the court, in interpreting it, with the view of determining whether it is sufficient to support a judgment, will *consider only the facts found*, rejecting its statements of evidence.[3]

§ 2653. Must Find Facts, not Conclusions of Law. — It is the office of a special verdict to find facts, and not conclusions of law.[4] Accordingly, if the jury find a *deed*, specially, they ought to find it *in hœc verba*, and not to find what they judge to be the substance of it, that the court may inspect it and put a construction upon it; but if the deed be lost, it is the duty of the jury to find the substance of it, if this be proved.[5] But if the jury take it upon themselves to find conclusions of law as well as facts, the court will *reject their conclusions of law as surplusage*, and render judgment on the facts found, provided they are sufficient to that end.[6]

[1] Cottrell *v.* Nixon, 109 Ind. 378; *s. c.* 10 N. East. Rep. 122, 124; Kealing *v.* Van Sickle, 74 Ind. 529; Hessong *v.* Pressley, 86 Ind. 555.

[2] Lanagin *v.* Nowland, 44 Ark. 84, 89. Compare Shaw *v.* Burney, 86 N. C. 331; Allen *v.* Ferguson, 18 Wall. (U. S.) 1.

[3] Dixon *v.* Duke, 85 Ind. 434, 436. See also Locke *v.* Merchants' National Bank, 66 Ind. 353; Kealing *v.* Van Sickle, 74 Ind. 529; *s. c.* 39 Am. Rep. 101; Woodfill *v.* Patton, 76 Ind. 575.

[4] Indianapolis &c. R. Co. *v.* Bush, 101 Ind. 582; Locke *v.* Merchants' Nat. Bank, 66 Ind. 353; Pittsburgh &c. R. Co. *v.* Spencer, 91 Ind. 186; Goldsby *v.* Robertson, 1 Blackf. (Ind.) 247. To the same effect see Dixon *v.* Duke, 85 Ind. 434; Vinton *v.* Baldwin, 95 Ind. 433; 2 Tidd's Prac. 897.

[5] Bac. Abr., Verdict E; Miller *v.* Shackleford, 4 Dana (Ky.), 274.

[6] Indianapolis &c. R. Co. *v.* Bush, 101 Ind. 582; Miller *v.* Shackleford, 4 Dana (Ky.), 274; Peterson *v.* United States, 2 Wash. C. C. (U. S.) 36. Compare Butler *v.* Hopper, 1 Wash. C. C. (U. S.) 499.

§ **2654. Construction of Special Verdicts.** — A leading rule under this head is, that a special verdict, like any other instrument of writing, or like a statute, must be *taken as an entirety*, and all the material facts which it finds must be considered together.[1] Another rule is, that it is to be *liberally* or *favorably construed*, with the view of sustaining it if possible. Technical objections to the want of form in its wording will be disregarded, but the court will assume the duty of moulding it into proper form.[2]

§ **2655. Duty of Counsel in Drawing up Verdict.** — It is ordinarily the duty of the plaintiff's counsel to have the special verdict properly drawn up, settled and entered on the record.[3] It is assumed that, where the plaintiff sustains the burden of proof, it is ordinarily the duty of his counsel to draw up and submit to the court, for submission to the jury, the proper form of a special verdict, embracing the facts necessary to judgment, within the scope of the evidence, upon the plaintiff's hypothesis; and so of the defendant's counsel, where he sustains the burden of proof. An experienced judge will promote the ends of justice and diminish the probability of a reversal, by taking upon himself the performance of this important duty. According to the old English practice, the minutes of a special verdict, intended to be found, ought to be signed by one of the counsel for each party, and should be approved by the judge; it being his province to take care that the question of law be fairly stated; and they ought to be delivered to the jury before they find their verdict. If all of the counsel of one party refuse to sign a verdict from the minutes, the judge may direct the jury to find a verdict from the minutes, as signed by the counsel of the other party.[4] It is an obvious suggestion of reason that, in drawing up

[1] Dixon *v.* Duke, 85 Ind. 434, 437.

[2] Picket *v.* Richet, 2 Bibb (Ky.), 178; Hawks *v.* Crofton, 2 Burr. 700; Worford *v.* Isbell, 1 Bibb (Ky.), 251; Crozier *v.* Gano, *Id.* 257; Marshall, J., in Miller *v.* Shackleford, 4 Dana (Ky.), 274; Leftwich *v.* Day, 32 Minn. 512; Pettes *v.* Bingham, 10 N. H. 514; Hill, New Trial, 133, 134.

[3] Wallingford *v.* Dunlap, 14 Pa. St. 31.

[4] Bac. Abr. Verdict, D.; Miller *v.* Shackleford, 4 Dana (Ky.), 271

these "minutes" of a special verdict to be submitted to the jury, the conclusions of fact ought not to be so incorporated therein as to intimate to the jury the opinion of the court as to the facts which they should find; for this would be an invasion of their exclusive province. "The facts," it has been said, "are to be found upon their own convictions and responsibility; the form of the finding, and its sufficiency as to the extent of facts embraced, must be looked to by the court."[1] But it has been held no objection to a special verdict that it was drawn up by the counsel in the cause so as to indicate to the jury what facts must be inserted in it, if found to be true, and the form in which they should state such facts, — the court having fully explained to them the effect of their verdict, general or special, and the consequence of omitting to find particular facts.[2]

§ 2656. Powers of the Court to Supply Undisputed or Established Facts. — According to the practice of the English courts of law, an exception to the rule that the court would not intend anything upon a special verdict existed in favor of the *power of amendment*, to this extent, that, where the jury had omitted to find an essential fact, and the evidence in support of this fact was clear and undoubted, the court would supply the deficiency in the verdict by amending it. An early instance of this kind was where, in trover, the jury had omitted to find the quantity of goods converted, but, as the quantities were proved at the trial, the court refused to award a *venire de novo*, but supplied the defect by amending the verdict in that respect.[3] It is believed that the power of amending special verdicts in matters of form exists as broadly and is supported on the same grounds, as the power to amend general verdicts.[4] It has been laid down, in affirmance of this view, that, while undisputed facts should be incorporated by the jury into their verdicts, as well as their findings upon disputed facts, yet if undisputed facts are omitted by them through mistake, the court may, upon full evidence, amend

[1] *Ibid.*
[2] *Ibid.*
[3] Mayo *v.* Archer, 1 Strange, 531, 514.
[4] *Ante*, § 2642, *et seq.*

the verdict so as to incorporate such undisputed facts.[1] But if the omitted facts are material, and such as the court would not be authorized to find without the aid of the jury, the power of amendment will not be exercised, but a *venire facias de novo* will be awarded.[2]

§ **2657. Venire de Novo, when Awarded.** — Where, then, the verdict is so imperfect that no judgment can be rendered upon it, and it cannot be cured by the exercise, by the court, of its power of amendment, the practice at common law is to award a *venire de novo*.[3] Accordingly, in ejectment, if the jury find a general verdict of not guilty as to part of the land, and specially as to the residue, without stating what the residue is, the verdict will be bad, and a *venire facias de novo* will be awarded.[4] So, where, prior to Fox's Libel Act, in a criminal prosecution against the publisher of the letters of Junius, the jury returned a verdict, "Guilty of printing and publishing only," it was held that no judgment could be rendered thereon, and a *venire facias de novo* was awarded.[5] So, in an action of detinue, if the jury find a special verdict, and, as to some of the chattels, omit to state a circumstance which is necessary to enable the court to ascertain whether the plaintiff is entitled to them or not, the verdict is insufficient, and a *venire de novo* will be awarded.[6] But if the verdict be not ambiguous or uncertain in itself, but the plaintiff has stated a

[1] Wallingford *v.* Dunlap, 14 Pa. St. 31.

[2] United States *v.* Attaching Creditors, 2 Brev. (S. C.) 85.

[3] Bird *v.* Appleton, 1 East, 111; Rex *v.* Hayes, 2 Ld. Raym., 1518, 1521; Rex *v.* Huggins, 2 Ld. Raym. 1574, 1585; *s. c.* 2 Strange, 882, 885; Wallingford *v.* Dunlap, 14 Pa. St. 31; Seward *v.* Jackson, 8 Cow. (N. Y.) 406, 429; Lee *v.* Campbell, 4 Port. (Ala.) 198, 204; Tunnell *v.* Watson, 2 Munf. (Va.) 283; Lawrence *v.* Beaubien, 2 Bail. (S. C.) 623, 653; Peterson *v.* United States, 2 Wash. C. C. (U. S.) 36; Robinson *v.* Brock, 1 Hen. & M. (Va.) 213; Bellows *v.* Augusta Bank, 2 Mason (U. S.), 31, 42; State *v.* Wallace, 3 Ired. L. (N. C.) 195; United States *v.* Attaching Creditors, 2 Brev. (S. C.) 85; Whitesides *v.* Russell, 8 Watts & S. (Pa.) 44; Pegram *v.* Isabell, 1 Hen. & M. (Va.) 387; Woolmer *v.* Caston, Cro. Jac. 113; Bentley *v.* Smith, 3 Smith (K. B.), 17.

[4] Woolmer *v.* Caston, Cro. Jac. 113.

[5] Rex *v.* Woodfall, 5 Burr. 2661.

[6] Robinson *v.* Brock, 1 Hen. & M. (Va.) 213.

defective case or a defective title, then the verdict ought to be for the defendants, and a *venire de novo* ought not to be granted.[1] In Indiana, where it is the custom to submit *special interrogatories* to juries, the rule is that a motion for a *venire de novo* will not be sustained except where there is some defect, uncertainty or ambiguity on the face of the verdict, rendering it so defective that a judgment cannot be rendered upon it.[2] A special verdict,[3] or a case stated,[4] which omits to state the *amount of the recovery*, unless the amount is a mere matter of calculation which would not require the aid of the jury (or in case of a default, a writ of inquiry), is defective in a respect which is not amendable, and a *venire facias de novo* must be awarded, and there can of course be no subsequent writ of inquiry to help out such a defect in a special verdict.[5] So, where a proceeding by *mandamus* to the mayor, aldermen and assistants of an incorporated town to compel them to admit the plaintiff to the office of alderman, the jury found a special verdict as to the facts, but omitted to find damages and costs, it was held that this verdict was imperfect, that no judgment could be rendered upon it, and accordingly that a *venire de novo* must be awarded.[6]

§ **2658. Of Special Findings of Fact by the Judge.** — In several of the American codes of procedure, provisions exist whereby the judge, when he sits as the trier of the facts, returns special findings of fact, and then states his conclusions of law thereon. Such a finding of facts is *in the nature of a special verdict*, and is interpreted and its sufficiency is determined by the same rules. Accordingly, it is laid down that the judge must find *facts*, and *not* the mere *evidence* of facts, and that his finding must not leave a part of the facts to be presumed, but

[1] Bellows *v.* Augusta Bank, 2 Mason (U. S.), 31, 42.

[2] Indianapolis &c. R. Co. *v.* Bush, 101 Ind. 582; Heckelman *v.* Rupp, 85 Ind. 286; Henderson *v.* Dickey, 76 Ind. 264; Brickley *v.* Weghorn, 71 Ind. 497; Knox *v.* Trofalet, 94 Ind. 346. See also Sewall *v.* Glidden, 1 Ala. 52, 57.

[3] Miller *v.* Hower, 2 Rawle, 53.

[4] Whitesides *v.* Russell, 8 Watts & S. (Pa.) 44, 47.

[5] Whitesides *v.* Russell, *supra*.

[6] Shrewsbury *v.* Kynaston, 7 Brown Parl. Cas. 396.

must state all the facts which are deemed material, so that the court will have nothing to do but declare the law upon the same.[1] Under the California statute, the court is required to find the facts specially, unmixed with the law, so that the judicial mind may see that the conclusion of law is a deduction of the law from the facts — the unmixed and ultimate facts which the court has found.[2] It has been said that the test of the sufficiency of the findings of the judge is, "Would they answer, if presented by a jury in the form of a special verdict?" And it has been added concerning a special verdict, that it "must present the facts so distinctly as to refer the court clearly to the questions of law arising on them." It must, in the language of Blackstone, present the *naked facts*.[3] Accordingly, it has been held that the following finding, "We find that there was no assessment for taxes for the year mentioned," — is bad, as not finding the facts upon which the court can pronounce, as a conclusion of law, whether an assessment had been made or not.[4] Such findings of fact and conclusions of law, separately stated, are the foundation of, and must precede the judgment. In the absence of such statement of findings and conclusions, the judgment will be reversed on appeal; for in such a case there is no presumption that it is supported by the evidence.[5] In Indiana, it is laid down that a finding, though in form a special one, is nothing more than a general finding, unless the record shows that it was *made at the request* of some one of the parties to the action.[6]

§ 2659. [CONTINUED.] PRACTICE IN NEW YORK. — By section 1023 of the New York Code of Civil Procedure it is provided that the court

[1] Sisson *v.* Barrett, 2 N. Y. 406; *ante*, § 2652.

[2] Emeric *v.* Alvarado, 64 Cal. 531, 603.

[3] Breeze *v.* Doyle, 19 Cal. 101; re-affirmed in Lucas *v.* San Francisco, 28 Cal. 596; Pralus *v.* Pacific &c. Co., 35 Cal. 35; Emeric *v.* Alvarado, 64 Cal. 531, 605.

[4] Emeric *v.* Alvarado, *supra*. It would seem, however, that the conclusion of the court is erroneous.

[5] Reich *v.* Rebellion &c. Co., 3 Utah, 254.

[6] Cruzan *v.* Smith, 41 Ind. 288; Kyser *v.* Wells, 60 Ind. 261; Barkley *v.* Tapp, 87 Ind. 25; Trentman *v.* Eldridge, 98 Ind. 525.

shall, at or before the time when the decision is rendered, note in the margin of the statement, the manner in which each proposition has been disposed of, and must either file or return to the attorney the statement so noted. This provision is mandatory in its language, and it is said that no authority has been given to disregard it when the propositions may be considered not to be either important or material. The party is entitled to have each proposition of fact or law acted upon and noted; and it is only after that has been done that the materiality of either is to be regularly considered. Until that has been done an appeal from the decision of the trial court is not in a condition to be heard. The decision of the points presented by the appeal should be suspended until these propositions shall be considered and separately noted; and in order to have that done, they should be returned to and disposed of by the trial judge.[1]

§ 2660. Request for a Special Finding under Indiana Statute. — A request for a special finding of facts, with conclusions of law thereon, under § 551, Rev. Stat. Ind. 1881, need not be accompanied with a statement that it is made with a view to except to the conclusions of law.[2] The Indiana court construe the section to mean that, upon a trial by the court, either party may require a statement of its finding of the facts, for the purpose of enabling him to except to the decision of the court upon the questions of law involved at the trial, provided that such decision shall be adverse to him, and that he shall desire, at the proper time, to reserve an exception to the decision. When, therefore, a party requests the court to state its finding of facts, and its conclusion of law upon the facts as found, the purpose of the request is impliedly, and hence sufficiently disclosed.[3] Where the judge, who makes and signs the findings, states in it that, a jury being waived, the parties each requested the court to find the facts specially, and to

[1] Goetting *v.* Biehler, 33 Hun (N. Y.), 500. See also James *v.* Cowing, 82 N. Y. 449. A similar practice existed before this statute went into effect; and where the practice was not followed it was not considered proper to send the case back to have the propositions submitted passed upon by the trial court. Bigler *v.* Pinkney, 80 N. Y. 636.

[2] Western Union Tel. Co. *v.* Trissal, 98 Ind. 566; Trentman *v.* Eldridge, 98 Ind. 525.

[3] Western Union Tel. Co. *v.* Trissal, *supra*. The court say that "the intimation that a contrary construction might, with propriety, be placed upon § 551 of the Code, contained in the case of Moore *v.* Barnett, 17 Ind. 349, has met with no response in any case since decided in this court."

state his conclusions of law thereon. Such a statement shows the request, and where there is a duly authenticated finding in the record, the reasonable presumption is that the request was a proper one, and that it was seasonably made.[1]

§ **2661. Of a "Case Stated."** — "Another method," says Mr. Tidd, "of finding a species of special verdict, is when the jury find the verdict generally of either party, but subject nevertheless to the opinion of the court, on a special case stated by the counsel on both sides, with regard to a matter of law: which has this advantage over a special verdict, that it is attended with much less expense, and obtains a speedier decision; the *postea* being stayed in the hands of the officer of *nisi prius* till the question be determined, and the verdict is then entered, for the plaintiff or defendant, as the case may happen. The practice of granting cases is not of very modern date, there being an instance as far back as the reign of Charles II., where a point was reserved at *nisi prius* for the opinion of the court on a special case."[2] "A case stated," said Rogers, J., "is a substitute for a special verdict, adopted for convenience, to save the labor and expense of finding the same facts by the jury in the form of a special verdict.[3] It is, therefore, but a reasonable construction of the agreement, that it shall be attended with the same effects and liable to the same incidents as a special verdict.[4] Whether there be a special verdict, subject to the opinion of the court on specific points of law, or a case agreed by the parties, the jury should always find, or the parties agree, for what sum or thing the judgment shall be rendered, in case the law be determined to be in favor of the plaintiff.[5] "Sometimes, it is true, according to our loose practice, for a supposed convenience, the case stated contains a stipulation that the amount shall afterwards be ascertained by the parties; but such an agreement cannot be inferred when the clause is omitted. When the parties neglect

[1] Trentman *v.* Eldridge, 98 Ind. 525.

[2] 2 Tidd Pr. 898.

[3] Whitesides *v.* Russell, 9 Watts & S. (Pa.) 44, 47.

[4] Whitesides *v.* Russell, 8 Watts & S. (Pa.) 44, 47; Brewer *v.* Opie, 1 Call (Va.), 212; Jones *v.* M'Williams, 6 Munf. (Va.) 501.

[5] Whitesides *v.* Russell, 8 Watts & S. (Pa.) 44, 47.

to ascertain the sum for which the judgment is to be rendered in the event of an opinion favorable to the plaintiff, it is the duty of the court peremptorily to refuse to proceed to the argument, until the case stated is perfected; and where the parties refuse to amend, as they may, to award a *venire de novo*." [1]

§ 2662. **General Verdict Subject to Opinion of Court on Point of Law.** — It has been ruled that a jury may find a verdict generally for either party, subject to the decision of the court upon a single point of law, and that this, though not strictly a special verdict, is nevertheless a good verdict. Such a verdict has been said to be, "a general conclusion drawn by the jury from the facts, in favor of one or the other party; subject, however, to the opinion of the court as to the law arising on *a case specially stated by the jury*. Such a general conclusion for one party necessarily carries with it the idea that such party must prevail, unless the law upon the special case referred to the court shall be against him. All facts, not found in the case specially, are excluded from the consideration of the court, or are negatived by the general finding in his favor. The special case would be nugatory if the court were to go out of it." Accordingly, where, in a suit for freedom, the jury found the following verdict, — "that they find for the plaintiffs their freedom, and one cent damages, subject to the opinion of the court, whether the removal of Richard Wetherhead, with his family, from the State of Maryland to the County of Rockingham, in this State, in the month of November, 1800, and the bringing with him the plaintiffs and the taking of the oath prescribed by law, within sixty days from his arrival in the said county of Rockingham, by Elizabeth, the wife of the said Richard, was a compliance with the law regulating the importation of slaves. If, in the opinion of the court, the law be for the defendant, then they find for the defendant." Upon this verdict the court gave judgment for the plaintiff, and, on the grounds above stated, the judgment was affirmed.[2]

[1] *Ibid.*, per Rogers, J.

[2] McMichen *v.* Amos, 4 Rand. (Va.) 134, 138.

§ **2663. What is a Good Statutory Inquest.** — By an *inquest*, as distinguished from a *verdict*, is meant the decision of a jury upon matters which are required to be *viewed* under the direction of the sheriff, such as a mill-dam in a proceeding to assess damages for a flow of water, or a road in a proceeding to assess damages for laying it out. It has been laid down, as applicable to such an inquest, that it is sufficient if it is clearly responsive to all those matters which the statute requires the jury to investigate, but that any finding of the jury which falls short of this requirement is defective, and will authorize a vacation of the entire proceedings, or the quashing of them, on motion of any party to the record.[1] A recital, in such an inquest, that the jury, before proceeding to their investigation, were "first duly sworn and charged by said sheriff as required by law," will not be ground of quashing the inquest, where, in addition to the recital, the return of the sheriff shows that the jury were sworn and charged by him, in the precise language of the statute.[2]

[1] McAllilley *v.* Horton, 75 Ala. 491; Martin *v.* Rushton, 42 Ala. 289; Owen *v.* Jordan, 27 Ala. 608.

[2] McAllilley *v.* Horton, 75 Ala. 491; Rushton *v.* Martin, 43 Ala. 555.

CHAPTER LXXVII.[1]

SPECIAL FINDINGS OF JURIES.

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[1] This chapter was contributed by W. W. Thornton, Esq., of Crawfordsville, Ind.

§ **2667. Historical.** — At an early day in Massachusetts the practice seems to have grown up to ask the jury, when they returned a verdict, whether they had or had not found a certain fact necessarily involved in a general finding. This practice has been preserved in a reported case, announcing that, "where the judge is surprised by the verdict, it is not unusual to ask the jury upon what principle it was found."[1] In another case it was said that, if there are two grounds upon which a verdict can stand, and it appears by their answers they did not agree on either, it cannot stand.[2] Still further, it is said, that the court can consider such questions and answers, in making up a bill of exceptions, or in granting a new trial because of the insufficiency of the evidence;[3] even asking them if they had considered papers improperly before them in the jury room.[4] Relying upon these Massachusetts cases, in Maine it has been held that, after the reading of a verdict, before it is affirmed, the court may rightfully inquire of the jury upon what principle it is founded.[5] In New Hampshire it was held that, without the consent of the parties, the court could question the jury or submit interrogatories to them;[6] in other cases the consent was necessary, and on appeal that it would be presumed;[7] and still farther, that the court could not direct a return of answers to questions without a general verdict was returned with them.[8] In New York, previous to the adoption of the code, the appellate court sanctioned the practice of a trial court, in submitting to the jury written interrogatories for them to answer, such as is now authorized by the codes of several States.[9] In England, however, the power of the court to question the jury has been denied.[10]

[1] Pierce *v.* Woodward, 6 Pick. (Mass.) 206.

[2] Parrott *v.* Thacher, 9 Pick. (Mass.) 426. See Spurr *v.* Shelburne, 131 Mass. 429.

[3] Lawler *v.* Earle, 5 Allen, 22; Mair *v.* Bassett, 117 Mass. 356.

[4] Hix *v.* Drury, 5 Pick. (Mass.) 296.

[5] Smith *v.* Putney, 18 Me. 87.

[6] Walker *v.* Sawyer, 13 N. H. 191.

[7] Allen *v.* Aldrich, 29 N. H. 63; Willard *v.* Stevens, 24 N. H. 271.

[8] Johnson *v.* Haverhill, 35 N. H. 74. See Barstow *v.* Sprague, 40 N. H. 27.

[9] McMasters *v.* West Chester County &c. Co., 25 Wend. (N. Y.) 379.

[10] Mayor of Devizes *v.* Clark, 3 Ad. & El. 506.

§ **2668. Statutes.** — When the code of New York was adopted (in 1848), a section was inserted authorizing the continuance of the practice that had grown up, and which is preserved in their present statute, as follows:[1] "Where the jury finds a general verdict, the court may instruct it to find also specially, upon one or more questions of fact, stated in writing. The special verdict or special finding must be in writing; it must be filed with the clerk, and entered in the minutes." "When a special finding is inconsistent with a general verdict, the former controls the latter, and the court must render judgment accordingly." In Indiana, which took her code from New York, after providing for a general and special verdict, it is declared that "in all cases, when requested by either party, [the court] shall instruct them [the jury], if they render a general verdict, to find specially upon particular questions of fact, to be stated in writing. This special finding is to be recorded with the verdict." "When the special finding of facts is inconsistent with the general verdict, the former shall control the latter, and the court shall give judgment accordingly."[2] In Iowa it is provided that, "in any case in which they render a general verdict, they may be required by the court, and must be so required on the request of any party to the action, to find specially upon any particular questions of fact to be stated to them in writing, which questions of fact shall be submitted to the attorneys of the adverse party before argument to the jury is commenced. When the special finding of facts is inconsistent with the special verdict, the former controls the latter, and the court may give judgment accordingly."[3] In Michigan, it is provided that, "in all cases where an issue of fact is tried before any court of record, the court shall, at the request in writing of the counsel of either party, instruct the jury, if they return a general verdict, also to find upon particular questions of fact to be stated in writing, and may direct a written finding thereon; * * * and when a special finding of fact shall be inconsistent with a general verdict, the former shall control the latter, and the court shall give

[1] Code, Civ. Proc., §§ 1187, 1188.
[2] 1 R. S. 1888, §§ 546, 547.
[3] 2 Miller's Stat. 1886, §§ 2808, 2809.

judgment accordingly."[1] In Minnesota "[the court] in all cases may instruct them, if they render a general verdict, to find upon particular questions of fact, to be stated in writing, and may direct a written finding thereon. * * * When a special finding of facts is inconsistent with the general verdict, the former controls the latter, and the court shall give judgment accordingly."[2] In Wisconsin "the court may also direct the jury, if they render a general verdict, to find in writing upon any particular questions of fact, to be stated as aforesaid." "When a special finding of fact shall be inconsistent with the general verdict, the former shall control the latter, and the court shall give judgment accordingly."[3] In Nebraska, "in all cases the court may instruct them, if they render a general verdict, to find upon particular questions of fact to be stated in writing, and may direct a written finding thereon. * * * When the special finding of facts is inconsistent with the general verdict, the former shall control the latter, and the court may give judgment accordingly."[4] In Kansas, "in all cases the jury shall render a general verdict, and the court shall in any case at the request of the parties thereto, or either of them, in addition to the general verdict, direct the jury to find upon particular questions of fact, to be stated in writing by the party or parties requesting the same. When the special finding of facts is inconsistent with the general verdict, the former controls the latter, and the court may give judgment accordingly."[5]

[1] Sess. L. 1871, vol. 1, p. 66; act 54; 2 Howell's Stat. 1882, § 7606.

[2] Minn. Stat. 1878, p. 744, §§ 236, 237.

[3] R. S. 1878, §§ 2858, 2860.

[4] Comp. Stat. 1887, p. 776, §§ 293, 294. The California code is exactly like the Nebraska code, except the word "must" for "may" is used in the last line. 3 Deering's Codes & Stats. 1885 (Civ. Proc.), § 625.

[5] Comp. Laws (1885), chap. 80, §§ 286, 287. The statute previous to 1870 left it discretionary with the court to submit interrogatories to the jury. Gen. Stat., 684 § 286, (1868); City of Topeka *v.* Tuttle, 5 Kan. 311, 323; Hairgrove *v.* Millington, 8 Kan. 480. There are some other statutes that we do not quote for lack of space. For the Missouri statute, see Acts 1885, p. 214, revising section 3629 and 3630 of Rev. Stats. 1879; approved April 31, 1885; repealed by Act of 1887, p. 229. Ohio, Whittaker's Annotated Code, §§ 5201, 5202. Utah, Dakota, Montana, Idaho, Nevada, and Oregon have similar statutes.

§ **2669. Differ from Special Verdict.** — A special finding of facts is essentially different from a special verdict. The former is a single inquiry directed to a particular fact necessary to the findings of a general verdict, while a special verdict is a finding of all the facts proved or admitted at the trial of the court. "It is evident from the statute that by the phrase, 'particular questions of fact,' is intended something less than an issue presented in the case. It obviously means that a party may require the jury to return a special answer to single questions of fact, pertinent to and involved in the issue, and tending to support or defeat it, and which would be impliedly covered by a general verdict. And the office of such special finding is, that if, under the law, the particular facts so found are inconsistent with the general verdict, the former shall control the latter."[1] In another case, referring to a special verdict, it is said to be, "not an isolated fact, tending to support or defeat an issue, but it is an issue joined between the parties, arising upon a cause of action in the complaint, and a denial of it in the answer, * * * put in issue by the reply."[2] In still another case it was said that the design of a special verdict is "to exhibit the facts of the case in such a manner that the court can decide according to law, and relieve the jury from the necessity of deciding legal questions on which they may have doubts. To justify the court in rendering judgment for the plaintiff on a special verdict, the verdict must exhibit all the facts which it was necessary for the plaintiff to prove in order to recover."[3]

§ **2670. Object of.** — The defect to be cured in enacting a statute permitting these interrogatories has been very well expressed by Justice Hanna, of Indiana: "Before the enactment of our statute, enabling a party to ask that a jury shall respond

[1] Morse *v.* Morse, 25 Ind. 156, 161.

[2] Bird *v.* Lanius, 7 Ind. 615. See Manning *v.* Gasharie, 27 Ind. 399; Todd *v.* Fenton, 66 Ind. 25.

[3] Goldsby *v.* Robertson, 1 Blackf. (Ind.) 247; Housworth *v.* Bloomhuff, 54 Ind. 487; Pittsburgh &c. R. Co. *v.* Spencer, 98 Ind. 186; Hazard Powder Co. *v.* Viergutz, 6 Kan. 471; Smith *v.* Warren, 60 Tex. 462; Ross *v.* United States, 12 Ct. of Cl. 565; First Nat. Bank *v.* Peck, 8 Kan. 660; Glantz *v.* South Bend, 106 Ind. 305.

to interrogatories, it was difficult to have placed upon the record of a trial, the component parts of, or elements which entered into and proved the verdict of a jury. This was felt, and considered as operating injuriously in many instances, because of the current of decisons in this court for many years, to the effect that a verdict in a civil case should not be disturbed on the evidence, where there was proof tending to sustain it."[1] Said the Kansas Supreme Court: "The main object of special questions is to bring out the various facts separately, in order to enable the court to apply the law correctly, and to guard against any misapplication of the law by the jury. It is matter of common knowledge, that a jury, influenced by a general feeling that one side ought to recover, will bring in a verdict accordingly, where at the same time it will find a certain fact to have been proved, which in law is an insuperable barrier to a recovery in accord with the general verdict. And this does not imply intentional dishonesty in the jury, or a failure on the part of the court to instruct correctly, but rather a disposition to jump at results upon a general theory of right and wrong, instead of patiently grasping, arranging and considering details. Scarcely any jury will, when questioned as to a single separate fact, respond that it exists, without some sufficient evidence of its existence. Its response will as a rule be correct, if direct, and if not correct, then evasive and equivocal."[2] In a Wisconsin case it was said that, "by requiring the jury to pass separately and specifically upon each controverted question of fact material to the issue, a more careful and methodical consideration of the testimony by the jury may be secured, and the precise grounds upon which the judgment is based will be disclosed."[3] This is similar to the statement of the object of such a statute, made by the Michigan Supreme Court, which was, to obtain an explanation of the general verdict[4] and to have the rights of the parties spread of record.[5]

[1] Buntin *v.* Rose, 16 Ind. 209, 210.

[2] Morrow *v.* Commissioners, 21 Kan. 484, 503.

[3] Davis *v.* Town of Farmington, 42 Wis. 425, 432. See Dorsey *v.* Construction Co., 42 Wis. 583, 603.

[4] Hendrickson *v.* Walker, 32 Mich. 68.

[5] Durfee *v.* Abbott, 50 Mich. 479.

In New York it was said that "the object of the provision in regard to special findings was to enable the court to leave the case to the jury generally, but to control their general verdict by findings which would render a second trial unnecessary in cases where no exceptions were taken, or rather to prevent the necessity of exceptions to the charge. If, in such cases, the court instruct the jury to find for either party, provided they find in a certain way upon certain questions of fact, such instruction would be subject to exceptions, and error in any of them would send the case back for a new trial. The result would be the same on special findings, as if the court on trial had charged as might be determined by itself, on more mature reflection and argument when application is made for judgment, it ought to have charged; or if there was no room on the evidence to submit such questions to the jury, the general verdict rendered might be allowed to stand. The general verdict, as regards the particular questions submitted, becomes a mere matter of form. It is, in fact, merely a mode of having exceptions to the charge argued and carefully decided on a fuller examination than can be given them on the trial, without the necessity of a new trial in case of a mistake." [1]

§ 2671. **Practice in Courts of Chancery.** — The practice under these statutes essentially differs from the practice in courts of chancery, of submitting certain questions of fact to a jury for decision; for then it is entirely optional with the court to submit the question, how and to what extent it shall be submitted, and when found whether or not it will be bound by the finding. With interrogatories under the statute, as we shall see, it is largely compulsory with the court to grant a proper request for their submission.[2]

[1] Moss *v.* Priest, 19 Abb. Pr. (N. Y.) 314, 317; *s. c.* 1 Robt. (N. Y.) 632. See Partridge *v.* Gilbert, 3 Duer (N. Y.), 184; Dempsey *v.* Mayor &c., 10 Daly (N. Y.), 417.

[2] Taylor *v.* Collins, 51 Wis. 123; Will of Carroll, 50 Wis. 437; Pence *v.* Garrison, 93 Ind. 345; Jennings *v.* Durham, 101 Ind. 391; Platter *v.* Commissioners &c., 103 Ind. 360; Ikerd *v.* Beavers, 106 Ind. 483.

§ **2672. Submission Compulsory.** — It will be observed that in some of the statutes the word "shall" is used in connection with the court's duty to submit interrogatories to the jury, upon request; while in others "must," and still in others "may," is used in the same connection. In those States where the word "may" is used, it is held to be discretionary with the trial court to submit interrogatories, however proper, and however opportunely they may be requested.[1] But where the word "shall" has been used, the obligation upon the court to make the submission, when those asked are in proper form, and the request is made at the proper time, is compulsory; and to refuse it is undoubtedly such error as will reverse the case, unless the error is cured in some way by the action of the court.[2] But where it appeared on appeal that the request was denied, not as a matter of discretion, but because the court supposed it had no power to grant it, it was held error.[3]

§ **2673. Court of its own Motion may Submit.** — But the court does not require a request to be made by either party to put it into motion; for it may of its own motion submit interrogatories to the jury, which will have the same effect as if requested.[4] An abuse of the discretion is sufficient to reverse the judgment.[5]

§ **2674. When to Request.** — Some of the statutes fix the time when the request must be made; others do not. In Indi-

[1] Dempsey *v.* Mayor &c. 10 Daly (N. Y.), 417; Cole *v.* Crawford, 69 Tex. 124; *s. c.* 5 S. W. Rep. 646; McLean *v.* Burbank, 12 Minn. 530; Swift *v.* Mulkey, 14 Ore. 59; *s. c.* 12 Pac. Rep. 76; City of Topeka *v.* Tuttle, 5 Kan. 311, 323; Hairgrove *v.* Millington, 8 Kan. 480. See Schatz *v.* Pfeil, 56 Wis. 429; Lufkins *v.* Collins (Idaho), 10 Pac. Rep. 300.

[2] Bent *v.* Philbrick, 16 Kan. 191; Wichita &c. R. Co. *v.* Feehheimer, 36 Kan. 45; *s. c.* 12 Pac. Rep. 362; Johnson *v.* Husband, 22 Kan. 277; Farnsworth *v.* Coots, 46 Mich. 117; Clark *v.* Missouri &c. R. Co., 35 Kan. 350; *s. c.* 11 Pac. Rep. 1341; City of Wyandotte *v.* Gibson, 25 Kan. 236; Clegg *v.* Waterbury, 88 Ind. 21; Boots *v.* Griffith, 97 Ind. 241; Williamson *v.* Yingling, 80 Ind. 379.

[3] Jaspers *v.* Lano, 17 Minn. 296.

[4] Weatherly *v.* Higgins, 6 Ind. 73; Killian *v.* Eigenmann, 57 Ind. 480; Louisville &c. R. W. Co. *v.* Worley, 107 Ind. 320; Barstow *v.* Sprague, 40 N. H. 27; Johnson *v.* Haverhill, 35 N. H. 74.

[5] Killian *v.* Eigenmann, 57 Ind 480.

ana, where no time for the request is fixed, it is held not error to refuse the request, when made while instructing the jury,[1] or while the argument is progressing,[2] or where the opposite attorney has not seen them until the close of his argument;[3] and a rule of court requiring them to be submitted before the argument begins is valid.[4] The court is not bound to call for them, nor request them to be handed up at the proper time.[5] But in all these instances, if the court sees fit to submit the requests, although made out of season, it may do so without error.[6] In New York it is said that the request must be made before the case is begun;[7] but this is unreasonable. In Iowa the statute provides that the interrogatories must be submitted to the opposite party before the argument begins;[8] but in other respects the practice is similar to the Indiana practice.[9] After verdict it is too late to make the request.[10] Upon appeal or writ of error, it must affirmatively appear that a request was made at a proper time, a refusal announced, and an exception taken to the refusal at the time thereof, in order to present such action as erroneous.[11] A general verdict cannot cure the refusal of the request.[12]

§ **2675. How Request is Made.** — The request may be made orally or in writing, accompanying it with written interrogatories upon those points upon which special findings are desired. Unless so made, the court may disregard it.

[1] Malady *v.* McEnary, 30 Ind. 273; Truitt *v.* Truitt, 37 Ind. 514.

[2] Glasgow *v.* Hobbs, 52 Ind. 239; Fleetwood *v.* Dorsey Machine Co., 95 Ind. 491; Pavey *v.* American Ins. Co., 56 Wis. 221.

[3] Wabash &c. R. Co. *v.* Tretts, 96 Ind. 450.

[4] Ollam *v.* Shaw, 27 Ind. 388.

[5] Miller *v.* Voss, 40 Ind. 307. A request is indispensable to make the refusal error. Kalckhoff *v.* Zoehrlaut, 43 Wis. 373.

[6] Fleetwood *v.* Dorsey Machine Co., 95 Ind. 491.

[7] Moss *v.* Priest, 19 Abb. Pr. (N. Y.) 314; *s. c.* 1 Rob. (N. Y.) 632.

[8] Crosby *v.* Hungerford, 59 Iowa, 712. This does not apply to the court's interrogatories. Clark *v.* Ralls, 71 Ia. 189; *s c.* 32 N. W. Rep. 327.

[9] Hopper *v.* Moore, 42 Iowa, 563; Burleson *v.* Burleson, 28 Tex. 383.

[10] Hairgrove *v.* Millington, 8 Kan. 480; Lambert *v.* McFarland, 7 Nev. 159.

[11] Ward *v.* Busack, 46 Wis. 407.

[12] Davis *v.* Farmington, 42 Wis. 425.

§ **2676. Request must be Conditional.** — The rule is, with a possible exception in Wisconsin, that an unconditional request cannot be successfully insisted upon; it is only in the event a general verdict is returned, that interrogatories are allowed.[1] But if the court unconditionally direct the jury to return answers, a return of them with a general verdict renders the error unavailable.[2]

§ **2677. Answers without General Verdict.** — If the jury, either under instructions or not, should return answers to the interrogatories without returning a general verdict, they cannot be considered, and are a nullity, requiring a new trial to be granted;[3] unless the findings of facts are numerous and explicit enough to constitute a special verdict.[4] This latter is a very common practice in Wisconsin, the special findings covering all the issues and facts.[5]

§ **2678. Additional Interrogatories.** — It often happens that those asked by the opposite party or those submitted by the court, do not cover the exact ground desired by a party, or are not specific enough; in all such events such party should frame and present for submission one covering the point he desires brought out.[6]

§ **2679. Directing Verdict: Demurrer to Evidence: Nonsuit.** — Whenever the court directs the verdict, it is not error to refuse to submit any interrogatory, or, if submitted, not to require an answer.[7] So, if there is a demurrer to the evidence,

[1] Louisville &c. R. Co. *v.* Worley, 107 Ind. 320; Killian *v.* Eigenmann, 57 Ind. 480; Taylor *v.* Burk, 91 Ind. 252; Hadley *v.* Hadley, 82 Ind. 75; Adams *v.* Holmes, 48 Ind. 299; Hopkins *v.* Stanley, 43 Ind. 553; Schultz *v.* Cremer, 59 Iowa, 182.

[2] Woollen *v.* Whitacre, 91 Ind. 502.

[3] Pea *v.* Pea, 35 Ind. 387; Paine *v.* Lake Erie &c. R Co., 31 Ind. 283.

[4] *Ibid.*; Eudaly *v.* Eudaly, 37 Ind. 440; McIlvain *v.* State, 80 Ind. 69; Woollen *v.* Whitacre, 91 Ind. 502.

[5] Hutchinson *v.* Chicago &c. R. Co., 41 Wis. 541, 552; Coleman *v.* St. Paul &c. R. Co. (Minn.), 36 N. W. Rep. 638; Eldred *v.* Oconto Co., 33 Wis. 133; Johnson *v.* Ashland Lumber Co., 47 Wis. 326.

[6] Bradley *v.* Bradley, 45 Ind. 67.

[7] Miller *v.* White River School Tp., 101 Ind. 503.

interrogatories should not be submitted to assess the damages; [1] nor in case a nonsuit is ordered.[2]

§ **2680. Record of Submission.** — On appeal, if interrogatories and answers thereto appear in the record, it will be presumed that the court submitted such interrogatories to them, without a formal statement to that effect.[3]

§ **2681. Form of Interrogatory.** — Many loose questions are often submitted to a jury which can have no effect upon the general verdict, which ever way it may be returned. The object of these special findings is, not only to secure a more useful and minute examination of the component parts necessary to a general verdict, but either to confirm or antagonize that verdict, which ever way it may be returned. An interrogatory, therefore, the answer to which will in no way control the general verdict, should not be submitted.[4] They should be limited "to material and controverted questions of fact." [5] "Each question submitted should be limited to a single, direct and material controverted issue or fact, and in such a way that the answer will necessarily be positive, direct and intelligible." [6] Facts not put in issue by the pleadings need not be found.[7] It is no objection to a question that it is leading; [8] it is rather to be desired.[9] The form should be such that it can be answered positively.[10] The particular form in which it shall go to the jury is always under the control

[1] City of Indianapolis *v.* Lawyer, 38 Ind. 348.

[2] Furlong *v.* Garrett, 44 Wis. 111.

[3] Frank *v.* Grimes, 105 Ind. 347, overruling all former cases on this point, holding that it must affirmatively appear that they were submitted.

[4] Miner *v.* Vedder (Mich.), 33 N. W. Rep. 47; Campbell *v.* Frankem, 65 Ind. 501; American Co. *v.* Bradford, 27 Cal. 360; Brooker *v.* Weber, 41 Ind. 426; Allen *v.* Davison, 16 Ind. 416.

[5] Davis *v.* Town of Farmington, 42 Wis. 425; Cotzhausen *v.* Simon, 47 Wis. 103; Singer Mfg. Co. *v.* Sammons, 49 Wis. 316.

[6] Jewell *v.* Chicago &c. R. Co., 54 Wis. 610.

[7] Eberhardt *v.* Sanger, 51 Wis. 72; Toulman *v.* Swain, 47 Mich. 82; Hart Mfg. Co. *v.* Mann's Boudoir Car Co. (Mich.), 32 N. W. Rep. 820.

[8] Rice *v.* Rice, 6 Ind. 100.

[9] Harriman *v.* Queen Ins. Co., 49 Wis. 71.

[10] Murray *v.* Abbot, 61 Wis. 198; Rosser *v.* Barnes, 16 Ind. 502.

of the court, and it is not bound to submit one in the exact form requested. If it in substance covers the one requested and obtains a finding of facts substantially what the one presented would have done, it is sufficient.[1] Nor is the court bound to submit a general question, calling for the finding of no specific fact,[2] nor an inconclusive one,[3] nor one calling for a finding upon an uncontroverted point.[4] They should be "so framed as severally to present distinctly to the mind of the jury, a single material fact involved in the issue."[5] A party has no right to make the court his mouth-piece in submitting questions. The court has the power to revise them, to strike out repetitions or questions calling for immaterial facts, to change and re-arrange them and to add others, so that they clearly and briefly, in natural order, present the questions which are desired or necessary, to bring out the facts sought.[6] One assuming the material facts in issue should not be submitted.[7]

§ 2682. **An objectionable Practice.** — Courts have found occasion to censure attorneys for presenting a vast number of interrogatories to be submitted; and *nisi prius* courts come in for their share of the censure also. It is an abuse that is fraught with evil; for it tends to bewilder the jury rather than aid them. One court said: "We are inclined to limit, rather than improperly to extend, the practice of propounding so many interrogatories to the jury."[8] In Wisconsin, where the practice of submitting enough interrogatories to constitute a special verdict obtains, to a great extent, the appellate court said: "From our knowledge of the nature of the special verdicts which have come under the consideration of this court, we believe we are justified

[1] Ward *v.* Busack, 46 Wis. 407.

[2] Atchison &c. R. Co. *v.* Plunkett, 25 Kan. 188.

[3] Dickerson *v.* Dickerson, 50 Mich. 37; Michigan Paneling &c. Co. *v.* Parsell, 38 Mich. 475; Banner Tobacco &c. *v.* Jenison, 48 Mich. 459.

[4] Schrubbe *v.* Connell, 69 Miss. 476; *s. c.* 34 N. W. Rep. 503.

[5] Rosser *v.* Barnes, 16 Ind. 502; City of Wyandotte *v.* Gibson, 25 Kan. 236.

[6] Missouri Pac. R. Co. *v.* Holley, 30 Kan. 465.

[7] Elliott *v.* Reynolds, 16 Pac. Rep. 698; *s. c.* 38 Kan. 274.

[8] City of Indianapolis *v.* Lawyer, 38 Ind. 348–371.

in saying that the tendency of some of the profession, in making use of the law which requires that a special verdict shall be rendered whenever demanded, to abuse it by demanding that the jury shall answer an infinite series of questions, the object and tendency of which is to confuse, embarrass and confound the jury, instead of eliciting the facts upon which the rights of the parties depend, needs the restraining hand of the judges presiding at the circuits; and that this court will take pleasure in sustaining such judges in every proper effort to make a special verdict a concise statement of the real facts at issue in the case."[1]

§ **2683. Criminal Case.** — The statutes concerning special findings do not apply to criminal cases.[2]

§ **2684. Objection to Form.**— If a question is objectionable, in form or substance, it must be objected to, by the party desiring to object to it, at the time it is submitted to the jury; for if not objected to then, it cannot be done so afterwards.[3] If the court overrule the objection, an exception must be taken, and the objection and exception preserved in a bill of exceptions, if it is desired to present the matter on appeal.

§ **2685. Jury must Answer.**— The jury must, in the event they agree on a general verdict, answer the questions fully and without evasion;[4] and the court cannot say to them that, if there is such a lack of evidence as to any fact to which an interrogatory is directed that they cannot determine the affirmative or negative, they may so answer;[5] or, if the evidence is evenly balanced, they may respond that they do not know.[6] It has been held, at vari-

[1] Ward *v.* Busack, 46 Wis. 407, 411.

[2] State *v.* Ridley, 48 Iowa, 370; People *v.* Marion, 29 Mich. 32.

[3] Gerhardt *v.* Swaty, 57 Wis. 24; Brooker *v.* Weber, 41 Ind. 426; Manny *v.* Griswold, 21 Minn. 506; Dupont *v.* Starring, 42 Mich. 492.

[4] Summers *v.* Greathouse, 87 Ind. 205; Buntin *v.* Rose, 16 Ind. 209; Maxwell *v.* Boyne, 36 Ind. 120; First National Bank *v.* Peck, 8 Kan. 660; Dyer *v.* Taylor (Ark.), 7 S. W. Rep. 258.

[5] Maxwell *v.* Boyne, 36 Ind. 120; Atchison &c. R. Co. *v.* Cone, 15 Pac. Rep. 499; *s. c.* 37 Kan. 567; Crane *v.* Reeder, 25 Mich. 304.

[6] Buntin *v.* Rose, 16 Ind. 209.

ance with some of the cases cited, that they must answer questions covering facts admitted, for the reason that a party has a right to have the facts spread of record, as in a special verdict.[1] The latter cannot take the place of special finding.[2] A failure of the court to require an interrogatory to be answered has the same effect as refusing to submit it,[3] and is error; but not if it cannot affect the verdict and this error is against the party asking it.[4] So, a failure to find a fact which is inferable from those found is not error.[5] Said the court in Indiana: "The jury were bound to answer all such interrogatories as the evidence enabled them to do, and to state, in response to such as they were unable to answer from the evidence, their inability to answer them. Where there is evidence supplying information sufficient to enable the jury to answer interrogatories, it is the duty of the court to require answers, and not to permit the jury to evade answering. The practice of allowing juries to make a general report that they cannot answer a series of interrogatories is one that cannot be sustained upon principle or authority."[6] If an interrogatory is not answered, a failure to object to the jury's discharge without answering it is a waiver of a right to an answer. If the motion to require an answer is overruled, an exception must be taken.

§ 2686. When Jury Excused from Answering. — A failure to agree upon a general verdict will excuse the jury from answering the interrogatories;[7] and if made cannot be recorded.[8] Of course, if they cannot agree upon an answer, even though they have upon a general verdict, they will be discharged without returning the verdict. If a special verdict has been demanded, interrogatories cannot be insisted upon.[9]

[1] Durfee *v.* Abbott, 50 Mich. 479.

[2] Leavenworth &c. R. Co. *v.* Rice, 10 Kan. 426.

[3] City of Wyandotte *v.* Gibson, 25 Kan. 236.

[4] Johnson *v.* Continental Ins. Co., 39 Mich. 33.

[5] Jones *v.* Foster, 30 N. W. Rep. 697; *s. c.* 67 Wis. 296.

[6] Summers *v.* Greathouse, 87 Ind. 205, 207.

[7] Leffel *v.* Leffel, 35 Ind. 76.

[8] *Ibid.*; Hardin *v.* Branner, 25 Ia. 364.

[9] Rosser *v.* Barnes, 16 Ind. 502; Chapin *v.* Clapp, 29 Ind. 614.

§ 2687. **Amendment: Fuller Answer.** — If a jury misapprehend an interrogatory, and answer to the contrary of that they intended, they may be sent back, before discharge, to amend their answer.[1] On a failure of the jury to answer certain interrogatories the court explained them, directed them to answer them fully, "even if it required a re-examination of the whole case, and had the effect to change their verdict." This action was held not erroneous.[2] If a party desire more specific answers, he must make a motion to send back the jury for that purpose, or he will waive his right.[3] In one case the interrogatories were returned unanswered, and the fact was not discovered until after the verdict was entered in the minutes and confirmed; on motion, the jury were sent back to answer, being left untrammeled to return whatever general verdict they saw fit.[4] If the objection had not been made, the error in not answering would have been waived.[5] Yet the court cannot coerce a jury to the extent of compelling answers when they cannot agree, no more than it can compel a verdict under like circumstances; nor compel them to return answers that will be consistent with their general verdict.[6] A failure, however, to require answers to immaterial interrogatories is not error in the court.[7] If there be a finding of damages upon a good paragraph, it is not error to fail to find on a bad one; [8] nor is it error to require an answer, if the point in the interrogatory is covered by another; [9] nor to compel a specific answer, when answered evasively, to an evasive

[1] Columbus &c. R. Co. *v.* Powell, 40 Ind. 37; Rush *v.* Pedigo, 63 Ind. 479.

[2] Hyatt *v.* Clements, 65 Ind. 12; Rush *v.* Pedigo, 63 Ind. 479.

[3] Bradley *v.* Bradley, 45 Ind. 67; Barkow *v.* Sanger, 47 Wis. 500; Kansas Pacific R. Co. *v.* Pointer, 14 Kan. 37; Hazard Powder Co. *v.* Viergutz, 6 Kan. 471; Fick *v.* Mulholland, 48 Wis. 413; Long *v.* Duncan, 10 Kan. 294; Vater *v.* Lewis, 36 Ind. 288.

[4] Tarbox *v.* Gotzian, 20 Minn. 139.

[5] Brown *v.* Central Pac. R. Co., 12 Pac. Rep. 512. See this case reversed on a rehearing, 72 Cal. 523; Long *v.* Duncan, 10 Kan. 294; Vater *v.* Lewis, 36 Ind. 288; Bradley *v.* Bradley, 45 Ind. 67.

[6] Blesch *v.* Chicago &c. R. Co., 48 Wis. 168.

[7] Noaker *v.* Morey, 30 Ind. 103.

[8] Indianapolis &c. R. Co. *v.* McCaffrey, 62 Ind. 552; Byram *v.* Galbraith, 75 Ind. 134.

[9] Warden *v.* Reser, 58 Kan. 86; *s. c* 16 Pac. Rep. 60.

question.[1] A failure to make or attempt to have an interrogatory answered specifically will be taken as an admission that, if so answered, the facts would injure the party complaining of it.[2]

§ **2688. Withdrawing Interrogatories.** — Where it is obligatory upon the court to submit interrogatories when properly requested, they cannot be withdrawn by the court without the consent of both parties.[3] But if the interrogatories are not pertinent and material the error is unavailing, if it is error at all, and it must so appear on appeal, by bringing up those withdrawn, with the evidence applicable to them.[4] If it is discretionary with the court to submit interrogatories, it may withdraw them.[5]

§ **2689. Signed by Foreman.** — If a statute require a foreman to sign the verdict, he must also sign the answer to the interrogatories, for the statute also applies to them;[6] but if they, or any one of them, are received without objection though unsigned, the error is waived.[7] Usually such answer is signed.[8] Oral questions and answers are no part of the record.[9]

§ **2690. Part of Record.** — Most of the statutes make the interrogatories and answers part of the record without a bill of exceptions, and for this purpose a bill is not necessary.[10]

§ **2691. Inconsistent with General Verdict.** — The object of these special findings has been already stated. If they are inconsistent with the general verdict, the latter falls and they control. In such an event the judgment must be based upon them.

[1] Urbanck *v.* Chicago &c. R. Co., 47 Wis. 59.

[2] Kansas Pacific R. Co. *v.* Pointer, 14 Kan. 37.

[3] Summers *v.* Greathouse, 87 Ind. 205; Otter Creek Coal Co. *v.* Raney, 34 Ind. 329; McClaren *v.* Indianapolis &c. R. Co., 34 Ind. 319; Sage *v.* Brown, 34 Ind. 464.

[4] Groscop *v.* Rainier, 111 Ind. 361.

[5] Moss *v.* Priest, 19 Abb. Pr. (N. Y.) 314; *s. c.* 1 Rob. (N. Y.) 632.

[6] Sage *v.* Brown, 34 Ind. 465.

[7] Vater *v.* Lewis, 36 Ind. 288.

[8] Sage *v.* Brown, 34 Ind. 465.

[9] Moss *v.* Priest, 19 Abb. Pr. (N. Y.) 314.

[10] Salander *v.* Lockwood, 66 Ind. 285.

The word "inconsistent," it has been declared, "does not mean that the special findings are inconsistent with each other, nor does it mean that some of the special findings are inconsistent with the general verdict; but it means either that, taken as a whole, the special findings are inconsistent with the general verdict, or that the fact found in one or more of the answers to interrogatories excludes every conclusion that will authorize a recovery for the plaintiff."[1] This antagonism must appear on the face of the record.[2] "The special findings override the verdict only when both cannot stand, and the antagonism must be apparent upon the face of the record, beyond the possibility of being removed by any evidence legitimately admissible under the issue, before the court can be successfully called upon to direct judgment in favor of the party against whom a general verdict has been rendered."[3] In another case it was said: "It must be remembered that a special finding must be irreconcilably inconsistent with the general verdict, before the latter can be set aside and the former substituted in its place."[4] They cannot be stricken out because they are antagonistic to the verdict;[5] nor can the court say to the jury that they must make their special

[1] Indianapolis &c. R. Co. *v.* Stout, 53 Ind. 143, 148.

[2] *Ibid.;* Amidon *v.* Gaff, 24 Ind. 128.

[3] Amidon *v.* Gaff, 24 Ind. 128, 130.

[4] Woollen *v.* Wishmier, 70 Ind. 108. These quotations are supported by a vast array of cases. Lassiter *v.* Jackmon, 88 Ind. 118; Anderson *v.* Hubble, 93 Ind. 570; Croy *v.* Louisville &c. R. Co., 97 Ind. 126; Detroit &c. R. Co. *v.* Barton, 61 Ind. 293; Wiley *v.* Pavey, 61 Ind. 457; Indianapolis &c. R. Co. *v.* McCaffrey, 62 Ind. 552; Scheible *v.* Law, 65 Ind. 332; Salander *v.* Lockwood, 66 Ind. 285; Leese *v.* Clark, 20 Cal. 387; Lamb *v.* First Presb. Soc., 20 Ia. 127; Hardin *v.* Branner, 25 Ia. 364; Baird *v.* Chicago &c. R. Co., 55 Ia. 121; *s. c.* 7 N. W. Rep. 460; Gripton *v.* Thompson, 32 Kan. 367; Sims *v.* Mead, 29 Kan. 124; Hazard Powder Co. *v.* Viergutz, 6 Kan. 471; Lemke *v.* Chicago &c. R. Co., 39 Wis. 449; Haas *v.* Chicago &c. R. Co., 41 Wis. 44; Davis *v.* Town of Farmington, 42 Wis. 425; United States Trust Co. *v.* Harris, 2 Bosw. (N. Y.) 75; Ogg *v.* Shehan, 17 Neb. 323; *s. c.* 22 N. W. Rep. 556; Tobie *v.* Commrs. of Brown Co., 20 Kan. 14; Dupont *v.* Starring, 42 Mich. 492; Thomas *v.* Reynolds, 29 Kan. 304; Beckdolt *v.* Grand Rapids &c. R. Co., 113 Ind. 343; *s. c.* 15 N. E. Rep. 686; Bradbury *v.* Idaho &c. Co. (Idaho), 10 Pac. Rep. 620; Fick *v.* Chicago &c. R. Co., 68 Wis. 469; *s. c.* 32 N. W. Rep. 527; Butler *v.* Chicago &c. R. Co., 71 Ia. 206; *s. c.* 32 N. W. Rep. 262; Maple *v.* Vestal (Ind.), 16 N. E. Rep. 620.

[5] Dahl *v.* Milwaukee City R. Co., 27 N. W. Rep. 185.

findings consistent with the general verdict; [1] but where they returned answer only, it was held no error to direct them to incorporate a general verdict with the question and answer, and to tell them for whom the general verdict should be." [2]

§ 2692. Antagonistic to Each Other. — It frequently happens that the special findings contain clauses that are antagonistic to each other. In such an instance the court may disregard those parts which are antagonistic, or even, possibly, strike them out; [3] and if the remaining part is not sufficiently antagonistic to the general verdict, the motion for judgment should be overruled.[4] Such inconsistent findings destroy each other.[5] It is not error to say to a jury that they must make their answers *harmonize with each other*.[6] Such inconsistency, however, may very often be used effectively to obtain a new trial, as showing that the jury did not understand the case.[7] "Indirect, evasive, uncertain or unmeaning answers should never be received. And when none other can be drawn from a jury, the verdict should not stand for a moment." [8] In Kansas, it is said that if the antagonism is considerable, neither party is entitled to a judgment.[9] But this is not the rule in Indiana; for there the judgment will be rendered on the general verdict.

§ 2693. Rule of Interpretation: Presumption. — The court will not strain the language of the special findings to override

[1] Cole *v.* Boyd, 47 Mich. 98; People *v.* Murray, 52 Mich. 288; Usher *v.* Hiatt, 18 Kan. 195.

[2] Mooney *v.* Olsen, 22 Kan. 69.

[3] Comer *v.* Himes, 49 Ind. 482; Byram *v.* Galbraith, 75 Ind. 134; Burns *v.* North Chicago Rolling Mill Co., 60 Wis. 541; Cottrill *v.* Cramer, 59 Wis. 231.

[4] Williams *v.* Eikenberry, 22 Neb. 210; *s. c.* 34 N. W. Rep. 373; German Ins. Co. *v.* Smelker, 38 Kan. 285; *s. c.* 16 Pac. Rep. 735.

[5] Wabash R. Co. *v.* Savage, 110 Ind. 156; Baltimore &c. R. Co. *v.* Rowan, 104 Ind. 88.

[6] Hoppe *v.* Chicago &c. R. Co., 61 Wis. 357.

[7] Burns *v.* North Chicago Rolling Mill Co., 60 Wis. 541; Cottrill *v.* Cramer, 59 Wis. 231.

[8] Carroll *v.* Bohan, 43 Wis. 218; Chicago &c. R. Co. *v.* Townsdin, 38 Kan. 78; *s. c.* 15 Pac. Rep. 889; Davis *v.* Town of Farmington, 42 Wis. 425; Haas *v.* Chicago &c. R. Co., 41 Wis. 44.

[9] St. Louis &c. R. Co. *v.* Shoemaker, 38 Kan. 723; *s. c.* 17 Pac. Rep. 584; Shoemaker *v.* R. Co., 30 Kan. 359; *s. c.* 2 Pac. Rep. 517.

the general verdict.[1] If possible, they will be interpreted so as to support the verdict rather than overturn it.[2] No presumption will be made in their favor; "nor will they control the general verdict, unless they are invincibly antagonistic to it."[3]

§ **2694. Findings that may be Disregarded.** — Upon a motion to render judgment upon special findings, it often happens that there are some that may be disregarded. These are nearly always those that should not be submitted to the jury, chief among which are those that are not antagonistic to the general verdict. Those findings which are outside the issue may always be disregarded.[4] So may immaterial,[5] inconclusive findings;[6] those which draw legal conclusions only,[7] and those that are indefinite,[8] or which find only the evidence, and not the facts.[9]

§ **2695. Findings Construed as an Entirety.** — In construing the special findings, they are always considered as a

[1] Alhambra Addition Water Co. *v.* Richardson, 72 Cal. 598; *s. c.* 14 Pac. Rep. 379.

[2] Solomon R. Co. *v.* Jones, 34 Kan. 443; *s. c.* 8 Pac. Rep. 731.

[3] Ft. Wayne &c. R. Co. *v.* Beyerle, 110 Ind. 100; Redelsheimer *v.* Miller, 107 Ind. 485; Rice *v.* City of Evansville, 108 Ind. 7; City of Greenfield *v.* Moore, 113 Ind. 597; *s. c.* 15 N. E. Rep. 241; Cincinnati &c. R. Co. *v.* Clifford, 113 Ind. 460; *s. c.* 15 N. E. Rep. 524.

[4] Eberhardt *v.* Sanger, 51 Wis. 72; Manning *v.* Gasharie, 27 Ind. 399; Morse *v.* Morse, 25 Ind. 156; Bonham *v.* Iowa &c. Ins. Co., 25 Ia. 328; Sheahan *v.* Barry, 27 Mich. 217; Hamilton *v.* Shoaff, 99 Ind. 63; Northwestern &c. Ins. Co. *v.* Heimann, 93 Ind. 24; Trentman *v.* Wiley, 85 Ind. 33; City of Wyandotte *v.* White, 13 Kan. 191; First National Bank *v.* Peck, 8 Kan. 660; Kansas Pacific R. Co. *v.* Reynolds, 8 Kan. 623; Singer Mfg. Co. *v.* Sammons 49 Wis. 316.

[5] Mays *v.* Foster, 26 Kan. 518. A failure to answer such is not error. Finch *v.* Green, 16 Minn. 355; Toulman *v.* Swain, 47 Mich. 82; Pettibone *v.* Maclem, 45 Mich. 381.

[6] Dickerson *v.* Dickerson, 50 Mich. 37; Kansas Pacific R. Co. *v.* Reynolds, 8 Kan. 623; City of Wyandotte *v.* White, 13 Kan. 191, Frankenberg *v.* First Nat. Bank, 33 Mich. 46; Michigan &c. Co. *v.* Parsell, 38 Mich. 475; Swift *v.* Plessner, 39 Mich. 178; Banner Tobacco Co. *v.* Jenison, 48 Mich. 459.

[7] Beckdolt *v.* Grand Rapids &c. R. Co., 15 N. E. Rep. 686.

[8] Sanders *v.* Weelburg, 107 Ind. 266; McComas *v.* Haas, 107 Ind. 512; Day *v.* Henry, 104 Ind. 324; Adams *v.* Cosby, 48 Ind. 153; West *v.* Cavins, 74 Ind. 265; Porter *v.* Waltz, 108 Ind. 40.

[9] Louisville &c. R. Co. *v.* Wood, 113 Ind. 544; *s. c.* 14 N. E. Rep. 572; *s. c.* on rehearing, 113 Ind. 570.

whole.[1] One of a series cannot be singled out, and that one alone used to overthrow the general verdict, if, construed with the others, it is consistent with that verdict.[2]

§ **2696. Motion for Judgment.** — In order to obtain the advantage of special findings, a motion for a judgment upon them is necessary. The party having the general verdict need not make the motion; for judgment in his favor without the motion will be given. To preserve this motion no bill of exceptions is necessary; it is a part of the record without it, but an exception to the overruling or granting of it is essential.[3] The motion must be broad enough to cover all the findings, not a portion of them.[4] A motion "for the error [that] the parol contract referred to in said findings contradicts the record under which the defendant claims title to the land in controversy," was held to have been properly overruled, for lack of sufficiency.[5] This motion does not cut off a motion for a new trial;[6] nor does a motion for a new trial cut off this motion;[7] nor does a motion in arrest of judgment cut off this one.[8] Upon a motion for judgment upon the findings, no question can be entertained as to their inconsisteney with the evidence;[9] nor can the evidence be considered,[10] but only the pleadings and special findings.[11]

[1] Strecker *v.* Conn, 90 Ind. 469; Pennsylvania Co. *v.* Smith, 98 Ind. 42; Chamber *v.* Butcher, 82 Ind. 508; Growcock *v.* Hall, 82 Ind. 202; Bishop *v.* Redmond, 83 Ind. 157; Redelsheimer *v.* Miller, 107 Ind. 485; Davis *v.* Reamer, 105 Ind. 318; Baltimore &c. R. Co. *v.* Rowan, 104 Ind. 88.

[2] McClure *v.* McClure, 74 Ind. 108.

[3] Campbell *v.* Dutch, 36 Ind. 504; Tritlipo *v.* Lacy, 55 Ind. 287; Toledo &c. R. Co. *v.* Craft, 62 Ind. 395; Terre Haute &c. R. Co. *v.* Clark, 73 Ind. 168; Monroe *v.* Adams Express Co., 65 Ind. 60; Bartlett *v.* Pittsburg &c. R. Co., 94 Ind. 281; North-Western &c. Co. *v.* Blankenship, 94 Ind. 535.

[4] Byram *v.* Galbraith, 75 Ind. 134.

[5] Farley *v.* Eller, 40 Ind. 319.

[6] Nichols *v.* State, 65 Ind. 512; Brannon *v.* May, 42 Ind. 92; Indianapolis &c. R. Co. *v.* McCaffrey, 62 Ind. 552; Murray *v.* Phillips, 59 Ind. 56.

[7] Leslie *v.* Merrick, 99 Ind. 180.

[8] Lemke *v.* Chicago &c. R. Co., 39 Wis. 449.

[9] Murray *v.* Phillips, 59 Ind. 56.

[10] Pennsylvania Co. *v.* Smith, 98 Ind. 42; Cox *v.* Ratcliffe, 105 Ind. 374.

[11] Louthain *v.* Miller, 85 Ind. 161; Pittsburgh &c. R. Co. *v.* Martin, 82 Ind. 476; Shaffer *v.* Ryan, 84 Ind. 140.

§ 2697. **Examples of Insufficient Answers.** — It is no uncommon device for a jury to answer a question by saying, "We don't know," or the like. This was construed as no answer, and it was held that they should be required to answer positively.[1] In one case it was said that "it was their business to know, or to state that, from the evidence in the cause, they were unable to answer the question."[2] This ruling has been adhered to in many cases.[3] Yet such an answer was taken in one case as a simple denial;[4] and the answer "probably not" was likewise so taken.[5] Where the question was at what hour and minute an accident occurred to a train of cars, an answer that, "from the evidence adduced, we cannot so accurately answer," and the jury, on being remanded, answered: "From the nature of the question, we cannot so positively answer," — they were excused from answering further.[6] "We think," and "We have reason to believe," were held sufficient;[7] so is an answer, "The weight of the evidence justifies the jury in answering no;" and in the same case, where it was asked whether a certain person, prior to a day named, did not have a disease of the kidneys, for which he received medical treatment, and the jury answered, "He may have received medical treatment for that disease, but we believe if he did, he received treatment for a disease he did not have," — this was held sufficient, and equivalent to, "We believe he did not receive such treatment for a disease of the kidneys."[8] Where the question was, "What amount has he failed to account for?" and the answer, "In our judgment, $1,166," this was held sufficient, the words, "in our judgment," not rendering it uncertain; and yet in the same case the expression, "Can't say definitely," was held insufficient; and likewise, to the question, "Did the plaint-

[1] Buntin *v.* Rose, 16 Ind. 209; Maxwell *v.* Boyne, 36 Ind. 120.

[2] Sage *v.* Brown, 34 Ind. 464, 469.

[3] Leavenworth &c. R. Co. *v.* Jacobs, 17 Pac. Rep. 791; Baehler *v.* Consolidated Ranch Co., 31 Kan. 502; Morrow *v.* Com. of Saline Co., 21 Kan. 484; Darling *v.* West, 51 Ia. 259.

[4] Union Pacific R. Co. *v.* Shannon, 38 Kan. 476; *s. c.* 16 Pac. Rep. 836.

[5] Davis *v.* Guarnieri, 15 N. East. Rep. 350.

[6] Pittsburgh &c. R. Co. *v.* Williams, 74 Ind. 462.

[7] Martin *v.* Central Iowa R. Co., 59 Ia. 411.

[8] Mutual &c. Ins. Co. *v.* Cannon, 48 Ind. 264, 270.

iff sell 52,000 feet of oak lumber to the defendant during the year 1873?" the answer, "Yes, ash and oak."[1] So, it was held insufficient to say, "We think it was," "We think not," "We think she did," "We think they did."[2] It is error to say to the jury that they may answer, "Don't know;"[3] but not error to say to them that if there is no evidence they may so answer.[4] Where the question was, "Could the plaintiff have heard the whistle? If he had stopped his team, etc., could he have heard it?" — and the answer was, "He might or might not;" — this was held sufficient for such a question, it calling only for an opinion, not a fact.[5] Of course, in all these cases the motion should be to remand the jury in order that they might make their answer more specific.[6]

§ **2698. Venire de Novo.** — A motion for a *venire de novo* does not lie because the special findings are "irregular, indefinite, improper and uncertain." The proper course is to object to receiving the answer until made definite, and if the objection be overruled, to except and assign the action as a cause for a new trial.[7]

§ **2699. Curing error in Record.** — Intermediate errors may be cured by the special findings, — as by showing that an erroneous instruction did not mislead the jury, by their not placing their verdict upon the facts to which it was applicable, but upon another ground.[8] On a motion for judgment, the court is not

[1] Peters *v.* Lane, 55 Ind. 391.

[2] Hopkins *v.* Stanley, 43 Ind. 553.

[3] Union Pac. R. Co. *v.* Fray, 35 Kan. 700; *s. c.* 12 Pac. Rep. 98.

[4] Williamson *v.* Yingling, 80 Ind. 379; McLimans *v.* City of Lancaster, 63 Wis. 596; Kay *v.* Noll, 20 Neb. 380; *s. c.* 30 N. W. Rep. 269.

[5] Urbanck *v.* Chicago &c. R. Co., 47 Wis. 59.

[6] Bradley *v.* Bradley, 45 Ind. 67; Barkow *v.* Sanger, 47 Wis. 500; Arthur *v.* Wallace, 8 Kan. 267; Hazard Powder Co. *v.* Viergutz, 6 Kan. 471; Kansas Pac. R. Co. *v.* Pointer, 14 Kan. 37.

[7] West *v.* Cavins, 74 Ind. 265; Bedford &c. R. Co. *v.* Rainboldt, 99 Ind. 551; Pittsburgh &c. R. Co. *v.* Hixon, 110 Ind. 225; Ogle *v.* Dill, 61 Ind. 438; McElfresh *v.* Guard, 32 Ind. 408; Chicago &c. R. Co. *v.* Ostrander, 15 N. E. Rep. 227; Peters *v.* Lane, 55 Ind. 391; Carpenter *v.* Galloway, 73 Ind. 418.

[8] Lemmon *v.* Moore, 94 Ind. 40; Worley *v.* Moore, 97 Ind. 15; Cleveland &c. R. Co. *v.* Newell, 104 Ind. 264; *s. c.* 3 N. E. Rep. 836.

bound by its instructions; for, if erroneous, it may give judgment as the law is, although the instructions were not excepted to.[1] So, if the answer to interrogatories show that instructions refused could not have changed the verdict, the error committed in the refusal is cured.[2] So, if an error has been committed in overruling a demurrer to a bad paragraph of answer[3] (but not sustaining one),[4] it may be cured by showing that the verdict is not founded upon it, and if there is an essential omission in the complaint so that it would have been fatal on motion in arrest, the defect may be cured by a special finding covering the omission, and showing that proof of it was made.[5]

§ 2700. **Several Findings Inconsistent with General Verdict on one of Several Paragraphs of Complaint.** — If the special findings do not cover all the issues, but are not inconsistent with the general verdict for the plaintiff as to those issues not covered by them, the defendant is not entitled to a judgment, though such findings be inconsistent with the general verdict as to the issues covered by them. This may arise when there are several paragraphs of the complaint, and the interrogatories are confined exclusively to one or two of them, and show that the plaintiff is not entitled to recover thereon. Consequently they are not inconsistent with the general verdict, on the remaining paragraph, for the plaintiff. In such a case the findings do not exclude every conclusion that will authorize a recovery for the plaintiff.[6]

§ 2701. **New Trial.** — If the party against whom the special findings are found thinks they are not supported by the evidence, he should apply for a new trial, assigning that as a reason.[7]

[1] Baird *v.* Chicago &c. R. Co., 61 Iowa, 359; distinguishing Roberts *v.* Corbin, 28 Ia. 355.

[2] Kuhns *v.* Gates, 92 Ind. 66; Knowlton *v.* Milwaukee City R. Co., 59 Wis. 278; Harriman *v.* Queen Ins. Co., 49 Wis. 71.

[3] Burgett *v.* Teal, 91 Ind. 260; McComas *v.* Haas, 93 Ind. 276; Terrell *v.* Frazier, 79 Ind. 473; Olds *v.* Moderwell, 87 Ind. 582; Coffeen *v.* McCord, 83 Ind. 593.

[4] New *v.* Walker, 108 Ind. 365.

[5] Sohn *v.* Cambern, 106 Ind. 302.

[6] Toledo &c. R. Co. *v.* Milligan, 52 Ind. 505; Frazer *v.* Boss, 66 Ind. 1.

[7] Louisville &c. R. Co. *v.* Thompson, 107 Ind. 442; Murray *v.* Phillips, 59 Ind. 56; Blew *v.* Hoover, 36 Ind. 450.

This motion should apply to the general verdict also; for if that is not set aside the motion as to the special findings will be overruled.[1] A new trial cannot be claimed on the ground that the findings are in conflict with the verdict;[2] but, as we have elsewhere seen, the inconsistency can be looked into in order to ascertain if the jury clearly understood the evidence and instructions of the court. The motion for a new trial does not take the place of a motion for judgment on the findings.[3] The granting of a new trial not only sets aside the general verdict, but the special findings, although nothing as to the latter has been said in the motion.[4] If the evidence is sufficient to support the general verdict, the motion will be overruled, although insufficient as to the findings standing alone.[5] The refusal of a proper interrogatory must be assigned as a cause for a new trial;[6] and the same is true of a refusal to require them to be made specific.[7] If the interrogatories were immaterial, the motion should be overruled;[8] and so if covered by another;[9] or asking for evidence and not facts.[10] If it is urged as a cause for a new trial, that an interrogatory was in an improper form, the motion will not prevail, if a proper result was reached.[11] So, if the question prepared calls only for a conclusion of law.[12] In order to present the overruling of a motion for a judgment on the findings, a motion for that reason for a new trial is not necessary.[13] Where the findings were such that it could not be told whether or not they were antagonistic to the verdict, it was held that a new trial must be granted.[14]

[1] Ohio &c. R. Co. *v.* Selby, 47 Ind. 471.

[2] Byram *v.* Galbraith, 75 Ind. 134.

[3] Anderson *v.* Hubble, 93 Ind. 570.

[4] Fitzpatrick *v.* Papa, 89 Ind. 17; Hollenbeck *v.* Marshaltown, 62 Ia. 21.

[5] Indianapolis &c. R. Co. *v.* Stout, 53 Ind. 143.

[6] Astley *v.* Capron, 89 Ind. 167; Barnett *v.* Feary, 101 Ind. 95.

[7] Astley *v.* Capron, 89 Ind. 167.

[8] Liston *v.* Central Iowa R. Co., 70 Iowa, 714; *s. c.* 29 N. W. Rep. 445.

[9] Warden *v.* Reser, 38 Kan. 86; *s. c.* 16 Pac. Rep. 60; Watson *v.* Milwaukee &c. R. Co., 57 Wis. 332; Hart *v.* Red Cedar, 63 Wis. 634.

[10] Louisville &c. R. Co. *v.* Wood, 113 Ind. 544; *s. c.* 14 N. E. Rep. 572.

[11] Wausau Boom Co. *v.* Plumer, 49 Wis. 118.

[12] Chicago &c. R. Co. *v.* Ostrander, 15 N. E. Rep. 227.

[13] Horu *v.* Eberhart, 17 Ind. 118.

[14] Fish *v.* Chicago &c. R. Co. (Iowa), 38 N. W. Rep. 132.

§ **2702. Judgment on Appeal.** — If the trial court erred in overruling the motion for a judgment on the special findings, the judgment will be reversed with an order to sustain the motion and render a judgment thereon.[1] But if the motion has been made by the party desiring affirmative relief, the special findings must cover all the facts necessary for a special verdict.[2] If the special finding shows the verdict to be excessive, and the amount of the excess, the appellate court may order a *remittitur* to be entered, and affirm it as to the remainder.[3]

[1] Smith *v.* Zent, 77 Ind. 474.

[2] Croy *v.* Louisville &c. R. Co., 97 Ind. 126. See Newell *v.* Houlton, 22 Minn. 19; Phœnix Water Co. *v.* Fletcher, 23 Cal. 481; McDermott *v.* Higby, 23 Cal. 489.

[3] Skillen *v.* Jones, 44 Ind. 136; Shafer *v.* Smith, 63 Ind. 226; Frazer *v.* Boss, 66 Ind. 1; Rogers *v.* State, 99 Ind. 218.

TITLE IX.[1]

MOTIONS FOR NEW TRIAL.

CHAPTER LXXVIII. — OF THE MOTION IN GENERAL.
CHAPTER LXXIX. — TIME OF MAKING THE MOTION.
CHAPTER LXXX. — MANNER OF MAKING THE MOTION.

CHAPTER LXXVIII.

OF THE MOTION IN GENERAL.

SECTION
2707. Preliminary.
2708. The Motion Defined.
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2710. Office of the Motion.
2711. When Court may Grant a New Trial of its own Motion.
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2730. Effect of Filing the Motion.

[1] This title was contributed by Eugene McQuillin, Esq., of the St. Louis bar.

§ **2707. Preliminary.** — The purpose of this title is to present the principles governing *motions* for a new trial. The *grounds* for which new trials are granted and the granting of new trials are not considered.

§ **2708. The Motion Defined.** — A motion for a new trial may be defined to be an application by a party interested in the action for an order of court granting a re-trial or re-examination in the same court of an issue of fact, or some part or portion thereof, after verdict by a jury, report of referee, or a decision by the court.[1] It is an application for a re-trial of the facts of a case,[2] or an application for a re-examination of an issue of fact before a court, or jury, which has been tried at least once before the same court,[3] or an application for "a rehearing of the legal rights of the parties, upon disputed facts,"[4] or an application for a "re-examination of the issues in the same court,"[5] or, in a criminal case, it is an application for a "re-examination of the issues in the same court before another jury, after a verdict has been given."[6] A motion "to set aside and vacate the verdict of the jury," upon the ground that the verdict is not sustained by sufficient evidence, and is contrary to law, and also for alleged errors of law occurring at the trial, which does not in terms purport to be a motion for a new trial, but which is so treated by the parties, and the trial court, will be regarded as a motion for a new trial by the appellate court.[7]

§ **2709. How the Practice Regulated Generally.** — The origin of the motion for a new trial is of extremely ancient date, "concealed in the night of time," and consequently involved in

[1] Gen. Stat. Nev. (1885), § 3216; Prac. Act, § 194; Miller's Annot. Code, Iowa, 1886, § 2837.

[2] Zaleski *v.* Clark, 45 Conn. 401. The general nature and history of these motions in Connecticut is fully explained in this case, in a note, p. 405.

[3] Hilliard on New Trials, § 1.

[4] 2 Bouvier's Law Dict. tit. New Trials.

[5] Rev. Stat. Mont. (1888), p. 135, § 295; Comp. Laws of Kan. 1885, § 5042; Code of Civ. Proc., § 273.

[6] Miller's Annot. Code, Iowa, 1886, § 4487; Gen. Stat. Nev. (1885), § 3216.

[7] Hartley *v.* Chidester, 36 Kan. 363; *s. c.* 13 Pac. Rep. 578.

some obscurity.[1] In this country the practice pertaining to the motion is generally regulated by statute, and in each case, the practitioner will, of course, consult his own local practice act. But for the most part, these statutory provisions do not supersede, or conflict with, but merely explain or affirm the common-law rules; yet, in some instances, the rights of litigants, and the power of courts concerning these motions, are very much limited. The allowance of a motion for a new trial appears to be incidental to all courts acting upon the principles of the common law,[2] and statutory provisions only regulate, they being rather a limitation upon, than a grant of power to trial courts;[3] yet some decisions would seem to indicate that a court's prerogative in this respect emanates wholly from legislative authority.[4] In a majority of the practice acts of the various States of the Union, the grounds upon which a motion for a new trial may be made are expressly enumerated. And usually it is held that trial courts are confined to these grounds, although some decisions, invoking the more liberal principles of the common law, hold that the statutory grounds are not controlling, but rather that the whole matter of new trials addresses itself to the sound discretion of the trial court.[5] Some statutes omit this enumeration, and merely provide that a new trial may be granted where justice requires it,[6] or according to the usages and customs of courts,[7] or "for reasons for which new trials have been usually granted at common law."[8] However, very many of the statutory provisions are identically or substantially the same, and the various interpretations, while not in perfect accord, will be found not to differ in many material respects. The motion for a new trial is governed by the same rules in both criminal and civil cases,[9]

[1] 3 Bl. Com. 387, 388; Hilliard on New Trials (2d ed.), § 2; 2 Graham & Waterman on New Trials, 38, 39; 3 Stephen's Com. 625.

[2] Zaleski *v.* Clark, 45 Conn. 401, per Swift, C. J.

[3] Bartling *v.* Jamison, 44 Mo. 141; McNamara *v.* Minnesota &c. R. Co., 12 Minn. 388.

[4] Nesbit *v.* Hines, 17 Kan. 316.

[5] Zaleski *v.* Clark, 45 Conn. 404. See § 2711, *post*.

[6] 2 Mich. Ann. Stat. (1882), § 9576.

[7] Code of Ga. (1882), § 3712.

[8] Pub. Stat. R. I. 1882, ch. 221, § 3.

[9] Grayson *v.* Com., 6 Gratt. (Va.) 712, 723; Hilliard on New Trials (2d ed.), p. 114, § 2.

but, generally the courts appear more lenient to the accused, in the former class of cases. Whenever a difference exists it will be noted in the course of this title.

§ 2710. Office of the Motion. — A motion for a new trial is not a collateral motion, but is one directly connected with the judgment.[1] The office of the motion is to direct the mind of the trial court to the specific errors committed on the trial,[2] in order to bring such irregularities upon the record,[3] which would not otherwise appear;[4] as for misconduct of the jury, or of the prevailing party, or of the prosecuting witness, or for errors committed by the court in admitting or rejecting evidence, or in giving or refusing instructions,[5] or to correct questions of fact or a wrong verdict,[6] or to correct a special finding which is against the evidence.[7] The defense that another action is pending between the same parties, for the same cause of action, cannot be made for the first time in the motion;[8] nor can objection to the jurisdiction of the court in an action against a public officer:[9] nor can any questions not relied upon by answer or otherwise, and, in relation to which no instructions were asked or exceptions taken;[10] nor can a challenge to an array of jurors;[11] nor can objections to the admission of evidence.[12] A judgment overruling a demurrer, though erroneous, cannot be made the basis of a motion for a new trial.[13] A motion in arrest of judgment cannot take the place of a motion for a new trial;[14] for the usual office of

[1] New York &c. R. Co. *v.* Doane, 105 Ind. 92.

[2] Rohrer *v.* Brockhage, 15 Mo. App. 16, 25; Seifrath *v.* State, 35 Ark. 412.

[3] Werner *v.* State, 44 Ark. 127.

[4] McAllister *v.* Conn. Mut. Life Ins. Co., 78 Ky. 531, 533.

[5] Evans *v.* Lohr, 3 Ill. 511; Higgins *v.* Lee, 16 Ill. 493.

[6] Stoney *v.* Winterhalter (Pa.), 11 Atl. Rep. 611; Water Imp. Co. *v.* Gildersleeve (N. M.), 16 Pac. Rep. 278.

[7] Dodge *v.* Pope, 93 Ind. 480. See *post*, § 2712.

[8] Baier *v.* Berberich, 85 Mo. 50; *s. c.* 13 Mo. App. 587.

[9] Tullis *v.* Brawley, 2 Minn. 277, 287.

[10] Gordon *v.* Pitt, 3 Iowa, 385, 390.

[11] Vierling *v.* Stifel Brewing Co., 15 Mo. App. 125; Thomp. & Mer. on Jur., §§ 275, 295, 296.

[12] State *v.* Peak, 85 Mo. 190; State *v.* Blan, 69 Mo. 317; State *v.* Williams, 77 Mo. 310; State *v.* Burnett, 81 Mo. 119.

[13] Rogers *v.* Rogers (Ga.), 3 South. East. Rep. 451.

[14] McClerkin *v.* State, 20 Fla. 879; White *v.* Caldwell, 17 Mo. App. 691.

the former motion is to direct the attention of the trial court to substantial defects in the indictment, or to errors appearing on the face of the record proper.[1] It does not perform the office of calling the attention of the trial court to rulings which constitute matters of exceptions; and hence, it cannot reach such irregularities alleged to have occurred on the trial, as are required to be brought to the notice of the court by proof *aliunde*,[2] which object may be accomplished by a motion for a new trial.[3]

§ 2711. When Court may Grant a New Trial of its Own Motion. — As above stated, the object of a motion for a new trial being to direct the attention of the trial court to specific irregularities occurring at the trial,[4] it may be laid down, as a general rule, that, a re-trial will not be granted unless an application is made therefor by a party to the action; but there are instances where a trial court will, upon suggestion of counsel or otherwise, permit a re-examination of its own motion and in the absence of a request from either party. This doctrine is founded upon the principle that it is an inherent power in every court of general jurisdiction to correct an error which it may have committed, or which occurred on the trial, to the prejudice of either party, where no positive rule of law forbids it.[5] At common law courts possessed this power.[6] Accordingly, under the Missouri practice act, it has been held that a trial court may, of its own motion, grant a new trial, (1) "where the triers of fact shall have erred in a matter of law," or (2) "where the

[1] Gilstrap *v.* Felts, 50 Mo. 428; Burdsal *v.* Davies, 58 Mo. 138; Cox *v.* Moss, 53 Mo. 432; State *v.* Koerner, 51 Mo. 174; State *v.* Miller, 36 La. Ann. 158; State *v.* Chandler, 36 La. Ann. 177; State *v.* McGee, 36 La. Ann. 206.

[2] White *v.* Caldwell, 17 Mo. App. 691; Edgerly *v.* Emerson, 23 N. H. 555; *s. c.* 55 Am. Dec. 207; State *v.* George, 8 Ired. 324; *s. c.* 49 Am. Dec. 392; State *v.* Pete, 39 La. Ann. 1095; *s. c.* 3 Southern Rep. 284; State *v.* Miller, 36 La. Ann. 158.

[3] Applications for new trials are not favored: Berry *v.* State, 10 Ga. 512.

[4] See *ante*, § 2710.

[5] McCabe *v.* Lewis, 76 Mo. 301. *Contra*, Lloyd *v.* Brinck, 35 Tex. 1.

[6] Rex *v.* Atkinson, 5 T. R. 437, note *a*; Rex. *v.* Morris, 2 Burr. 1189; Rex *v.* Holt, 5 T. R. 438; Williams *v.* Circuit Court, 5 Mo. 248; State ex rel. *v.* Adams, 12 Mo. App. 436, 440; *s. c.* 84 Mo. 315; Richmond *v.* Wardlaw, 36 Mo. 313; Simpson *v.* Blunt, 42 Mo. 544.

jury shall be guilty of misbehavior," but for no other reasons.[1] In Louisiana it is held that a justice, like all other magistrates, has the right to grant a new trial, either on motion of the aggrieved party or *ex proprio motu*, where he considers his previous ruling erroneous.[2]

§ 2712. Motion Necessary to Preserve Errors in the Record for Review. — The motion is necessary to enable the court to correct such errors, occurring at the trial, as do not appear on the face of the record proper,[3] as where it is insisted that there is no evidence to support the verdict,[4] or that the verdict is against the law and evidence,[5] or that the evidence does not authorize the judgment,[6] or that there is an error in the verdict of the jury,[7] or where it is alleged that the court erred in matter of law, either in admitting or rejecting evidence,[8] or in

[1] State *v.* Adams, 84 Mo. 310; reversing *s. c.* 12 Mo. App. 436. The statute upon which this practice is founded is as follows: "Only one new trial shall be allowed to either party, except: 1st. Where the triers of fact shall have erred in a matter of law; 2nd. When the jury shall be guilty of misbehavior." Rev. Stat. Mo. 1879, § 3705. In construing this statute, the court, in the above case, said: "An error in matter of law is one which the court ought to have the right to correct, at any time during the term. For misconduct of the jury the court ought, also, to have the power to set aside the verdict, in order to maintain its own dignity, and to preserve the purity of the administration of justice. For the causes named in § 3705, the court of its own motion, may set aside the verdict. Its common-law power, in this respect is not abridged by the statute. On other grounds than those specified in that section, the court cannot, of its own motion, set aside the verdict."

[2] State *v.* McCrea (La.), 3 Southern Rep. 380. As to the power of a court to set aside a verdict and grant a new trial of its own motion after the expiration of the statutory time, see § 2739.

[3] McAllister *v.* Conn. Mut. L. Ins. Co., 76 Ky. 531, 533; Racer *v.* Baker, 113 Ind. 177; *s. c.* 11 West. Rep. 816; Harrington *v.* Latta (Neb.), 36. N. W. Rep. 364. See *ante*, § 2710.

[4] Byrne *v.* Minneapolis &c. R. Co., 29 Minn. 200.

[5] McCormick *v.* Miller, 19 Minn. 443; Thompson *v.* Myrick, 24 Minn. 4; Volmer *v.* Stagerman, 25 Minn. 234.

[6] Reichwald *v.* Gaylord, 73 Ill. 503; McClurkin *v.* Ewing, 42 Ill. 283; Pottle *v.* McWorter, 13 Ill. 454; Daniels *v.* Shields, 38 Ill. 197; City *v.* Babcock, 3 Wall. (U. S.) 240; Decker *v.* House, 30 Kan. 614.

[7] Brun *v.* Dumay, 2 Mo. 102; Montgomery *v.* Blair, 2 Mo. 190.

[8] Starner *v.* State, 61 Ind. 360; Rousseau *v.* Corey, 62 Ind. 250; Fowler *v.* Young, 19 Kan. 150; Racer *v.*

giving or refusing instructions,[1] or where it is alleged that there has been misconduct on the part of the jury,[2] or that the damages assessed are inadequate,[3] or excessive,[4] or, in a criminal case, for an alleged error because of the non-arraignment of the defendant.[5] The grounds upon which the motion is to be made are expressly enumerated in a majority of the practice acts of the various States, and include generally such errors in the mode of trial as do not otherwise appear on the record, but which are proper matters of exception.[6] In each case the practitioner should consult his own State statute. And when no motion for a new trial is made in the trial court, to correct such errors, most of the decisions hold that they are deemed to have been waived, and that the appellate court will refuse to review them.[7] In

Baker, 113 Ind. 177; *s. c.* 11 West. Rep. 816; Bass *v.* Elliott, 105 Ind. 517; Crume *v.* Wilson, 104 Ind. 583; Meranda *v.* Spurlin, 100 Ind. 380; Neff *v.* Reed, 98 Ind. 341.

[1] Young *v.* King, 33 Ark. 745; Evans *v.* Lohr, 3 Ill. 511; Higgins *v.* Lee, 16 Ill. 495.

[2] Berry *v.* DeWitt (C. C. U. S. S. D. N. Y.), 27 Fed. Rep. 723.

[3] Mackison *v.* Clegg, 95 Ind. 373.

[4] Ringle *v.* First Nat. Bank, 107 Ind. 426, 430.

[5] Shoffner *v.* State, 93 Ind. 519; Billings *v.* State, 107 Ind. 54, 57.

[6] Bishop *v.* Ransom, 39 Mo. 417; Beauchamp *v.* Saginaw M. Co., 50 Mich. 163; Stoney *v.* Winterhalter, 11 Atl. Rep. 611.

[7] McClurkin *v.* Ewing, 42 Ill. 283; Daniels *v.* Shields, 38 Ill. 197; Pottle *v.* McWorter, 13 Ill. 454; Reichwald *v.* Gaylord, 73 Ill. 503; McGee *v.* Robbins, 58 Ind. 463; Cobb *v.* Krutz, 40 Ind. 323; McKinney *v.* Shaw &c. Co., 51 Ind. 219; Holesapple *v.* Fawbush, 51 Ind. 494; New York &c. R. Co. *v.* Doane, 105 Ind. 92. "A party has no abstract, inherent right to a new trial. He has a right because, and so far only as the statute gives it to him. It prescribes the way to obtain it. If he fails to pursue this mode he loses the benefit of any errors on the trial, and is concluded as to all matters occurring at the trial." Nesbit *v.* Hines, 17 Kan. 316; Grubler *v.* Ryus, 23 Kan. 195; Pratt *v.* Kelley, 24 Kan. 111; Wilson *v.* Kestler, 34 Kan. 61; Buettinger *v.* Hurley, 34 Kan. 585; City of Atchison *v.* Byrnes, 22 Kan. 65; Cropsey *v.* Wiggenhorn, 3 Neb. 108; Wells *v.* Preston, 3 Neb. 444; Cruts *v.* Wray, 19 Neb. 581; Singleton *v.* Boyle, 4 Neb. 414; Horacek *v.* Keebler, 5 Neb. 356; Manning *v.* Cunningham, 21 Neb. 288; Light *v.* Kennard, 11 Neb. 130; Russell *v.* State, 13 Neb. 68; Stanton County *v.* Canfield, 10 Neb. 390; Walrath *v.* State, 8 Neb. 88; Hosford *v.* Stone, 6 Neb. 381; Horbach *v.* Miller, 4 Neb. 43; Joiner *v.* Van Alstyne, 30 N. W. Rep. 944; *s. c.* 20 Neb. 578; State *v.* Phares, 24 W. Va. 657; Danks *v.* Rodeheaver, 26 W. Va. 274; Riddle *v.* Core, 21 W. Va. 530; Shrewsburg *v.* Miller, 10 W. Va. 115; Vineyard *v.* Matney, 68 Mo. 105; Wetherall *v.* Harris, 51 Mo. 65; Kauffman *v.* Harrington, 23 Mo. App. 573;

New York, where the judgment has been rendered upon the verdict of the jury, the statute authorizes an appeal from the judgment upon questions of law only, and the party is precluded from obtaining a review upon the facts unless he has laid the foundation for such review by a motion for a new trial. In such case a motion for a new trial is an indispensable preliminary to a review upon questions of fact.[1] So, where facts are not stated in a special finding, they are deemed not proved by the party having the burden of proof, and the remedy for such imperfect finding is by motion for a new trial, in order to have the same reviewed, as the appellate court treats the statement of facts in the finding as containing all material facts;[2] likewise, where facts stated in a special finding are not warranted by proof.[3] Some cases hold that a motion is necessary in order to obtain a review of the decision of a referee, a mere exception to his report being insufficient;[4] while others hold that, in such case, the motion is not absolutely essential to the right to a review of the facts.[5] So, it has been held that the motion is not necessary where judgment is entered upon the award of arbitrators.[6] So, in Missouri, proceedings under the statute of wills is summary, and, the practice act not applying, no motion for new trial is necessary.[7]

Exchange Nat. Bank *v.* Allen, 68 Mo. 474; Hatcher *v.* Moore, 51 Mo. 115; Pogue *v.* State, 13 Mo. 444; Gruen *v.* Bamberger, 25 Mo. App. 89 (*contra*, Fine *v.* Rogers, 15 Mo. 315); Hill *v.* Alexander, 77 Mo. 296.

[1] Baylies on New Trials, 46; Questions reserved for the decision of Supreme Court under R. S. Ind. 1888, § 630, will not be considered, if such question arose upon trial of case, unless motion for new trial is made and exception taken to ruling of court thereon. Connor *v.* Town of Marion, 112 Ind. 517; *s. c.* 14 N. E. Rep. 488; Garver *v.* Daubenspeck, 22 Ind. 238; Love *v.* Carpenter, 30 Ind. 284; Starner *v.* State, 61 Ind. 360; Rousseau *v.* Corey, 62 Ind. 250.

[2] Dodge *v.* Pope, 93 Ind. 486; Crawford *v.* Powell, 101 Ind. 421; Quick *v.* Brenner, 101 Ind. 230; Indianapolis &c. R. Co. *v.* Bush, 101 Ind. 582; Quill *v.* Gullivan, 108 Ind. 235; Glantz *v.* South Bend, 106 Ind. 305; Talbert *v.* Berkshire Life Ins. Co., 80 Ind. 434; Ex parte Walls, 73 Ind. 95; Vannoy *v.* Duprez, 72 Ind. 26; Martin *v.* Cauble, 72 Ind. 67; Stropes *v.* Board &c., 72 Ind. 42; Graham *v.* State, 66 Ind. 386; *ante*, § 2701.

[3] Bartley *v.* Phillips (Ind.), 13 West. Rep. 792.

[4] Light *v.* Kennard, 11 Neb. 129, 130; Simpson *v.* Gregg, 5 Neb. 237.

[5] Baylies on New Trials, 45; N. Y. Code Civ. Proc., § 1346, subd. I.

[6] Graves *v.* Scoville, 17 Neb. 593.

[7] Wetherall *v.* Harris, 51 Mo. 65.

§ 2713. Necessity of Motion Where Trial is by Court without Jury. — As to the necessity of the motion where there is a trial by court without a jury, the decisions are not in harmony. It has been held that an appellate court will not review a case on the ground of insufficiency of evidence, unless the question is first presented to the trial court in a motion for a new trial,[1] and it is also as necessary where there is an agreed statement of facts, as where the facts are proved by witnesses.[2] This rule has also been applied to a case in the nature of a bill inequity.[3] On the other hand, there are courts which hold that the motion is not an indispensable preliminary to warrant a review,[4] as proper exceptions to the finding and judgment will raise the question of the sufficiency of the evidence on an appeal or writ of error.[5] The reason supporting this view is that the trial court, in arriving at its finding of facts, distinctly and directly passes upon the sufficiency of the evidence, and there is no reason why it should be required to pass upon them a second time to entitle a party to review its action in the appellate court.[6]

[1] Bills *v.* Stanton, 69 Ill. 51, 55; Helm *v.* Coffey, 80 Ky. 176; Seibel *v.* Vaughan, 69 Ill. 257, 260; Snell *v.* Trustees M. E. Church, 58 Ill. 290; Barnes *v.* Barber, 6 Ill. 401; Reichwald *v.* Gaylord, 73 Ill. 503; Choate *v.* Hathaway, 73 Ill. 518; Nimmo *v.* Kuykendall, 85 Ill. 576; Obermier *v.* Core, 25 Ark. 562.

[2] Smith *v.* Hollis, 46 Ark. 17, 21; Gardner *v.* Miller, 21 Ark. 398; Walker *v.* Swiggart, 21 Ark. 404; King *v.* Little Rock, 26 Ark. 479.

[3] Spangler *v.* Brown, 26 Ohio St. 389; S. & C.'s R. S. Ohio, p. 1155, § 4.

[4] Baylies on New Trials, p. 45; N. Y. Code Civ. Proc., § 1346.

[5] Hyde Park *v.* Cornell, 4 Bradw. (Ill.) 602. See Metcalf *v.* Fouts, 27 Ill. 114; Mahoney *v.* Davis, 44 Ill. 291; Jones *v.* Buffum, 50 Ill. 277; D. M. Force Mfg. Co. *v.* Horton, 74 Ill. 310; Starr & C. R. S. Ill. (1885), ch. 110, § 61; Davis *v.* Scripps, 2 Mo 187.

[6] "The statute gives a party the right to make the motion below if he desires to do so, but does not require him to make it as a prerequisite to his right to have the question of the sufficiency of the evidence examined here." St. Paul Ins. Co. *v.* Allis, 24 Minn. 75, 76. "Substantially there is a perfect analogy between a decision by a chancellor on the facts embodied in the record, and a judgment by a common-law judge, on the facts spread upon the record by bill of exceptions; and we can perceive no consistent reason why we should require a motion for a new trial in either case, or in one and not in the other." Union Ins. Co. *v.* Groom, 1 Bush (Ky.), 289, 293. Intimation to the contrary in Humphreys *v.* Walton, 2 Bush (Ky.), 580, is merely *obiter*

§ 2714. **Statutes Dispensing with the Motion.** — There are statutes which provide that the appellate court may review and reverse on appeal any judgment or order of the trial court, although no motion for a new trial was made in the latter court.[1] Yet these statutes are usually limited by a provision to the effect that "a judgment or order shall not be reversed for an error which can be corrected *on motion* in an inferior court, until such motion has been made there and overruled."[2] These statutory enactments exist in Iowa, and in that State the latter provision is held to apply only to such errors as, without the motion, would not be called to the attention of the trial court, as the former statute renders it unnecessary except in these instances.[3] Hence, under these statutes, exceptions must be preserved at the trial, to authorize a review,[4] and the necessity of the motion being made below to correct errors, etc.,[5] is not removed by a provision making a motion for a new trial unnecessary to secure a review in the appellate court.[6] But errors of law committed by the trial judge may be reviewed without the motion.[7]

§ 2715. **Not Necessary where Errors Appear on Face of Record.** — As above indicated, where material errors appear on the face of the record proper, and do not grow out of matters on the

dictum. *Ib*. In equity cases no motion is necessary on an appeal from final order or judgment, but if taken on error to Supreme Court, the same procedure must be had as in an action at law. Swansen *v*. Swansen, 12 Neb. 210. After rehearing is had, an appeal may be taken without a motion for a new trial having intervened. State ex rel. *v*. St. Louis, 1 Mo. App. 503, 505.

[1] Miller's Annot. Code, Iowa, 1886, § 3169. The act authorizes the Supreme Court to treat the case as if a motion had been made and entered, and may be regarded as a standing rule in all cases. Coffin *v*. City Council, 26 Iowa, 515.

[2] Miller's Annot. Code, Iowa, § 3168.

[3] Brown *v*. Rose, 55 Iowa, 734; Drefahl *v*. Tuttle, 42 Iowa, 177; Presnall *v*. Herbert, 34 Iowa, 539.

[4] Root *v*. Illinois &c. R. Co., 29 Iowa, 102; Eason *v*. Gester, 31 Iowa, 475; Beems *v*. Chicago &c. R. Co., 58 Iowa, 150; Coats *v*. Galena &c. R. Co., 18 Iowa, 277.

[5] Miller's Annot. Code, Iowa, § 3168.

[6] Wester *v*. Cedar Rapids &c. R. Co., 27 Iowa, 315.

[7] Delvee *v*. Boardman, 20 Iowa, 446; Presnall *v*. Herbert, 34 Iowa, 539.

trial, the appellate court will consider the appeal, in the absence of the motion in the trial court.[1] Errors of law that may be taken advantage of by a motion in arrest of judgment, or by a writ of error,[2]—as the question of the jurisdiction of the trial court to hear and determine the cause;[3] or where there is an error[5] in a pleading,[4] as where the petition shows no cause of action; or where the court has merely construed the pleadings;[5] or where the whole cause is decided upon demurrer, and judgment is rendered thereon;[6] or where errors appear upon the face of the judgment;[7] or where a verdict is so defective that it will not sustain a judgment;[8] or where error is alleged in an order of the trial court, adjudging an execution void for irregularity and directing payment to defendant of money arising from the proceeds of sale;[9]

[1] Benton *v.* Lindell, 10 Mo. 557; Pratt *v.* Rogers, 5 Mo. 53; Carr *v.* Edwards, 1 Mo. 137; Finney *v.* State, 9 Mo. 634; Peltz *v.* Eichele, 62 Mo. 171; McIntire *v.* McIntire, 80 Mo. 470; Ancell *v.* Cape Girardeau, 48 Mo. 80; Hannibal &c. R. Co. *v.* Mahoney, 42 Mo. 467; Bagby *v.* Emberson, 79 Mo. 139; Funkhouser *v.* Mallen, 62 Mo. 555; Hempstead *v.* Stone, 2 Mo. 65; Bevin *v.* Powell, 83 Mo. 365; *s. c.* 11 Mo. App. 216; Rankin *v.* Lawton, 17 Mo. App. 574; Lewis *v.* Moxey, 9 Mo. App. 597; Busche *v.* Ravens, 10 Mo. App. 579; Smith *v.* Hollis, 46 Ark. 17, 21; Steck *v.* Maher, 26 Ark. 536; Ward *v.* Carlton, 26 Ark. 662; Worthington *v.* Welch, 27 Ark. 464; Union County *v.* Smith, 34 Ark. 684; Douglass *v.* Flynn, 43 Ark. 398; Badgett *v.* Jordan, 32 Ark. 154. "An error at law, in the rendition of a judgment, perceptible from the record, without any reference to the proceedings on the trial, as shown by the bill of exceptions, does not require a motion for new trial." Percifull *v.* Platt, 36 Ark. 461. "It is not the province of such a motion for a new trial to bring upon the record irregularities that occur in the course of a trial. The facts constituting the error complained of, together with the exceptions to the ruling of the court, should be made to appear by bill of exceptions, and the motion for a new trial can serve no other purpose than to assign the ruling or action of the court as error." Werner *v.* State, 44 Ark. 127.

[2] State *v.* Marshall, 36 Mo. 400; Newlove *v.* Woodward, 9 Neb. 502, 504.

[3] Hannibal &c. R. Co. *v.* Mahoney, 42 Mo. 467; Henderson *v.* Henderson, 55 Mo. 534.

[4] State to use, &c. *v.* Phares, 24 W. Va. 657, 662.

[5] O'Donohue *v.* Hendrix, 13 Neb. 255; Reid *v.* Griffith, 63 Mo. 545.

[6] O'Connor *v.* Koch, 56 Mo. 253. Judgment overruling demurrer, though erroneous, cannot be made the basis of motion for new trial. Rogers *v.* Rogers (Ga.), 3 S. E. Rep. 451.

[7] Union Co. *v.* Smith, 34 Ark. 684, 686.

[8] Oney *v.* Clendennin, 28 W. Va. 34, 44.

[9] Slagel *v.* Murdock, 65 Mo. 522.

or where the trial court has ruled upon a plea in abatement;[1] — do not require a motion for a new trial.

§ 2716. **Not necessary to save Ruling of Trial Court on Motions.** — In accordance with the principles of the common-law practice, it has been held that the appellate court will review the decisions of the trial court upon motions, although no motion for a new trial is made,[2] — as in the disposition of a motion to vacate the judgment.[3] And although this rule has been held not to apply to a motion to set aside an execution,[4] yet it is applied to a motion to exclude the plaintiff's evidence and dismiss the writ on the ground that the petition failed to state a cause of action,[5] where the motions and exceptions are preserved of record by a bill of exceptions, so that the errors of the court appear upon the record.[6]

§ 2717. **Necessity of in Criminal Cases.** — These rules apply with equal force to criminal cases.[7] But, by statute in Texas and Arizona, where a defendant has failed to move for a new trial, he is nevertheless entitled, if he appeals, to have a statement of the facts certified and sent up with the record.[8]

§ 2718. **Who may Make the Motion: General Rule.** — It may be stated as a general rule that no one but a party to the action or proceeding is entitled to make an application for a new trial.[9] Hence, in an action against an agent for acts done as such agent, the principal cannot make the motion, without the consent of his agent.[10] So, one not a party to the record of judgment cannot

[1] Bohanan *v.* State, 15 Neb. 212.

[2] Parker *v.* Waugh, 34 Mo. 340; Bruce *v.* Vogel, 38 Mo. 100.

[3] McDonald *v.* Cooper &c. Co., 32 Kan. 61.

[4] Bishop *v.* Ransom, 39 Mo. 417. See Banks *v.* Lades, 39 Mo. 406.

[5] Butler *v.* Lawson, 72 Mo. 227.

[6] O'Connor *v.* Koch, 56 Mo. 253.

[7] State *v.* Suttin, 22 W. Va. 771; State *v.* Hall, 26 W. Va. 236, 238; State *v.* Marshall, 36 Mo. 400.

[8] Willson's Texas Penal Code, 1888, art. 784; Rev. Stat. Ariz. 1887, par. 1763.

[9] Rogers *v.* Hoenig, 46 Wis. 361; Central &c. R. Co. *v.* Craig, 59 Ga. 185; Estate of Aveline, 53 Cal. 259. The Missouri statute provides that the court shall grant a new trial, etc., "on motion of the proper party." Rev. Stat. 1879, § 3704.

[10] Rogers *v.* Hoenig, 46 Wis. 361.

apply for a new trial, though such stranger has become a subsequent purchaser of lands upon which the judgment has become a lien.[1] Where the application is made after the term of court at which the judgment was rendered, all persons should be made parties that were parties to the original action.[2]

§ 2719. **The "Party Aggrieved."** — Many statutes provide that "the party aggrieved" is the proper one to move for a new trial,[3] and it follows that he must be a party to the action or proceeding; for ordinarily one who is not a party to a cause cannot, in a legal sense, be aggrieved or affected by a decision or judgment therein. Any party against whom a verdict has been rendered, or a judgment entered is "aggrieved," and entitled to present the motion. The mere existence of the verdict or judgment against him, although no actual injury has resulted therefrom, is sufficient to make him a "party aggrieved." A party to a cause may be "aggrieved," although there be a verdict in his favor, if it be for an inadequate sum;[4] or he may be aggrieved where the finding of facts is against him, but the conclusions of law and judgment are erroneously in his favor.[5] It is believed that the interpretation given to the words "party aggrieved," in construing statutory provisions as to appeals, should, by analogy, apply to motions for new trial. In appeals the general test of whether or not a party is aggrieved, is this: Is there a judgment against him?[6] The fact that the judgment is void does not change the rule.[7]

§ 2720. **In Cases of Joint Judgments.** — Where there is a joint judgment rendered against two parties, either may make the application for a new trial.[8] So, where there is a joint finding

[1] Packard *v.* Smith, 9 Wis. 184. See Ward *v.* Clark, 6 Wis. 509; Haner's Appeal, 5 Watts & S. (Pa.) 473.

[2] Carver *v.* Compton, 51 Ind. 451.

[3] Comp. Laws of Kan. 1885, § 4116; Rev. Stat. Idaho, 1887, § 4439; Cal. Code Civ. Proc., § 657; Miller's Annot. Code, Iowa, § 2837.

[4] Mariam *v.* Dougherty, 46 Cal. 26, 29.

[5] Brady *v.* Feisil, 54 Cal. 181.

[6] Adams *v.* Woods, 8 Cal. 315; 2 Hayne on New Trials, § 203, p. 613.

[7] Livermore *v.* Campbell, 52 Cal. 75; Bond *v.* Pacheco, 30 Cal. 533.

[8] Palmer *v.* Kennedy, 7 J. J. Marsh. (Ky.) 498, 500.

against two defendants, the evidence being insufficient as to one, either may present the application, both being entitled to a new trial.[1] Under a statute providing that judgment may be rendered for or against one or more of several defendants; or which authorizes the court, when practicable, to determine the ultimate rights of the parties on each side, as between themselves, and give judgment accordingly, where two joint and several obligors on a promissory note, unite in their answer, and make the same defense, and the verdict of the jury is against both, either party may make the motion, and the court may grant a new trial as to one, and not as to both of the defendants.[2] The same rule applies as to a judgment against two joint tort feasors.[3] On motion to distribute money, where several independent claimants compete for the fund, and the whole is awarded to one party, a portion of the defeated parties may move for a new trial, without making the others parties to the motion. The successful claimant and the custodian of the funds, are the only necessary parties besides the movers.[4]

§ **2721. Joint Motions.** — A joint motion for a new trial is allowed. But such a motion cannot be made unless all the parties joining therein are entitled to make it.[5] Thus, where the finding and judgment are in favor of one defendant and against the other, a joint motion will not avail either of them.[6] And the assignment, to be available, must be well made, as to all the parties joining in the motion.[7]

§ **2722. In Criminal Cases.** — In criminal prosecutions, the State is not entitled to move for a new trial, this right belonging

[1] Sperry *v.* Dickinson, 82 Ind. 132, 138.

[2] Gordon *v.* Pitt, 3 Iowa, 385.

[3] Tenpenning *v.* Gallup, 8 Iowa, 75; Heffner *v.* Moyst, 40 Ohio St. 112, 113; Hayden *v.* Woods, 16 Neb. 306.

[4] London *v.* Coleman, 59 Ga. 653.

[5] Feeney *v.* Mazelin, 87 Ind. 226, 230; First Nat. Bk. *v.* Colten, 61 Ind. 153. Same rule applies to joint demurrer. Estep *v.* Burke, 19 Ind. 87; Teter *v.* Hinders, 19 Ind. 93.

[6] Robertson *v.* Garshwiler, 81 Ind. 463.

[7] Boyd *v.* Anderson, 102 Ind. 217, 221; Wolfe *v.* Kable, 107 Ill. 565; Sperry *v.* Dickinson, 82 Ind. 132, 138.

exclusively to the accused.[1] A proceeding by information for the condemnation of intoxicating liquor, kept for illegal sale, is in its nature criminal, and precludes the State from making a motion for a new trial.[2]

§ 2723. In Real and Mixed Actions.— In actions for recovery of real estate, no one not concluded by the judgment is entitled to make the motion. It is limited to the party against whom the judgment is rendered, his heirs, assigns and representatives,[3] or one claiming under such party.[4] A purchaser at a foreclosure sale is an assignee, within the meaning of a statute authorizing the vacation of a judgment in ejectment and the granting of a new trial "upon the application of the party against whom it was rendered, his heir, devisee or assignee."[5] So, a lessee of a leasehold for a term of years, in an action to recover possession, is entitled to present the motion.[6] But a motion made by an attorney who is not shown to have any authority, upon behalf of a party whose interest appears doubtful, in an action of ejectment, on a consent judgment, will be denied.[7]

[1] Howell's Annot. Mich. Stat. 1882, § 9576; Comp. Stat. Neb. (1887), Cr. Code, § 490; 2 R. S. Ohio (1880), § 7350; Rev. Stat. Wis. § 4719; Comp. Law Kan. 1885, § 4981; Cr. Proc., § 210; 1 Starr & C. Ill. Stat. Cr Code, ch. 38, par. 497; Rev. Stat. Ariz. 1887 (Penal Code), par. 1756; 1 Rev. Stat. Mo. 1877, § 1965; Willson's Texas Code Cr. Proc. (1888), art. 776; Miller's Annot. Code, Iowa, 1886, § 4490.

[2] State *v.* Certain Intoxicating Liquors &c., 40 Iowa, 95. A search and seizure proceeding under Maine liquor laws is a criminal case within meaning of R. S. Me. 1883, ch. 77, § 82; State *v.* Liquors &c. (Me.), 12 Atl. Rep. 794; State *v.* Robinson, 49 Me. 285.

[3] Hunter *v.* Chrisman, 70 Ind. 439. See Shuman *v.* Gavin, 15 Ind. 93; Shucraft *v.* Davidson, 19 Ind. 98; Bender *v.* Sherwood, 21 Ind. 167; Zimmerman *v.* Marchland, 23 Ind. 474; Moore *v.* Seaton, 31 Ind. 11; Truitt *v.* Truitt, 37 Ind. 514; Starr & C. Stat. Ill., ch. 45, par. 35; 1 Rev. Stat. Ind. 1888, § 1064; Indiana &c. R. Co. *v.* McBroom, 103 Ind. 310; 2 Howell's Annot. Stat. Mich., § 7822; Gilman *v.* Wayne Cir. Judge, 21 Mich. 372. Right to, upon payment of costs and damages is absolute. Dennison *v.* Genesee Cir. Judge, 37 Mich. 285; Forsyth *v.* Van Winkle, 9 Fed. Rep. 247.

[4] Miller's Annot. Code, Iowa, 1886, § 3268; Williamson *v.* Wachenheim, 62 Iowa, 196.

[5] Howell *v.* Leavitt, 90 N. Y. 238.

[6] Campbell *v.* Hunt, 104 Ind. 210.

[7] Sacia *v.* O'Connor, 58 How. Pr. (N. Y.) 420.

§ 2724. Court in which the Motion Should be Made. — All courts of general common-law jurisdiction may entertain a motion for a new trial, in respect of trials conducted therein, whether the power is given by statute or not; the statutory provisions being rather a limitation upon, than a grant of power.[1] This rule has been maintained for more than two centuries. But courts of inferior or limited jurisdiction cannot, in the absence of express statutory grant, thus control their verdicts or judgments.[2] Accordingly, it has been held that probate,[3] and other inferior courts possess no power in this respect.[4] This power is conferred upon justices of the peace in many States;[5] but it is usually limited to nonsuits and judgments by default.[6] Where the right is not expressly given by statute, a justice is not warranted in hearing the motion. The legislature of a State cannot, in ordinary cases between individuals, grant a new trial,[7] but may do so where final judgment has been rendered in favor of the State.[8] In the absence of statutory regulations, it may be stated, as a general rule, that the application for a new trial should be addressed to the judge who tried the cause. Statutes so providing exist in many States.[9] Under the Massachussetts statute, the Supreme Judicial Court of that State is authorized to grant a

[1] Com. *v.* McElhaney, 111 Mass. 439; Com. *v.* Green, 17 Mass. 515.

[2] Pub. Stat. Mass. 1882, ch. 153, § 6; ch. 167, § 70; ch. 214, § 28; Borrowscale *v.* Bosworth, 98 Mass. 34; Commonwealth *v.* Scott, 123 Mass. 418. The Common Pleas Courts of Rhode Island cannot grant: Brayton *v.* Dexter (R. I.), 12 Atl. Rep. 132.

[3] Bartling *v.* Jamison, 44 Mo. 141.

[4] People *v.* Justices of Chenango, 2 Caines Cas. (N. Y.) 319. See Hayne's New Trials, § 6.

[5] See *post*, § 2736; Comp. Law Kan. 1885, § 4665; Code Civ. Proc., § 110; Kerner *v.* Petigo, 25 Kan. 625; Comp. Stat. Neb. 1883, p. 852, Code Civ. Proc., § 983; Cal. Code Crim. Proc., § 1451; Rev. Stat. Ariz. 1887, par. 1447; 2 Rev. Stat. W. Va., ch. 110, § 74; Ark. Dig. 1884, § 4071, 4072; Holton *v.* Greenwell, 4 Dana (Ky.), 633.

[6] Downing *v.* Garner, 1 Mo. 751; Cason *v.* Tate, 8 Mo. 45; Fenton *v.* Russell, 6 Mo. 143; 1 R. S. Mo. 1879, sec. 2949. In Nebraska a justice cannot grant except for fraud, partiality or undue means. State *v.* King (Neb.), 37 N. W. Rep. 310; Templin *v.* Snyder, 6 Neb. 491; Cox *v.* Tyler, 6 Neb. 297.

[7] Davis *v.* Pres. &c. of Menasha, 21 Wis. 491.

[8] Calkins *v.* State, 21 Wis. 501; People *v.* Frisbie, 26 Cal. 135.

[9] Code W. Va. 1887, ch. 131, § 15; Lowe *v.* Foulke, 103 Ill. 58.

new trial after sentence of death has been passed and a warrant issued by the governor and council for its execution.[1] Some statutes confer upon a special judge the same authority to entertain the motion as the regular judge.[2] Where a trial court is composed of several judges, the application should be made to the one who heard the case. He cannot refuse to hear it, or transfer the cause and motion to any one of his colleagues for final disposition.[3] There are instances where the motion may be made before a judge other than the one who tried the case,—as where a judge dies, or resigns, or where his term has expired, in either of which events his successor may hear the motion.[4]

§ 2725. Waiver of Right to Make the Motion. — A party may waive a future contingent right, as well as one which he presently has; hence a party may, either by stipulation before trial,[5] or by acts, waive his right to make a motion for a new trial, either in a civil[6] or criminal case.[7] It has been held that the right to make the motion upon the ground of the admission and exclusion of evidence is waived by presenting a demurrer thereto;[8] the contrary has also been held.[9] So, where the motion is put upon the ground of improper conduct of the jury, it must appear that the mover called the attention of the trial court to the same at the time it was discovered, or as soon thereafter as

[1] Pub. Stats. (1882), ch. 214, § 28; Commonwealth *v.* McElhaney, 111 Mass. 439. In this case, it is said: "This court, by virtue of its general jurisdiction, and independently of any special authority conferred upon it by statute, had the power to grant new trials, even in capital cases. Com. *v.* Green, 17 Mass. 515. But whether an inferior court was authorized to grant anew trial on the merits in any case, civil or criminal, was at least doubtful. Bac. Abr., Trial L.; 13 East, 416, note. The King *v.* Mayor of Oxford, 3 Nev. & Man. 877; People *v.* Justices of Chenango, 1 Johns. Cas. (N. Y.) 179; *s. c.* 2 Caine's Cas. (N. Y.) 319.

[2] Rev. Stat. W. Va., ch. 36, § 21.

[3] Voullaire *v.* Voullaire, 45 Mo. 602.

[4] Life Ins. Co. *v.* Wilson, 8 Pet. (U. S.) 291; Code W. Va. 1887, ch. 50, § 115. May be made before judge other than the one who tried the case: Chicago &c. R. Co. *v.* Marseilles, 107 Ill. 313.

[5] Ladd *v.* Hildebrant, 27 Wis. 135.

[6] Hackley *v.* Muskegon Cir. Judge, 58 Mich. 454.

[7] State *v.* Hall, 26 W. Va. 236, 238.

[8] Stockwell *v.* State, 101 Ind. 1; Ruddell *v.* Tyner, 87 Ind. 529.

[9] Missouri &c. R. Co. *v.* Goodrich, 38 Kan. 224; *s. c.* 16 Pac. Rep. 439.

the course of proceedings would permit, or he will be held to have waived it, unless it be a matter which he could not waive, or which could not have been obviated by directing the mind of the court to it.[1] The knowledge of counsel of such matters is the knowledge of the client.[2] It may be laid down, as a general proposition, that all errors or supposed errors occurring at the hearing, upon which a motion for a new trial may be based, and which require exceptions in order to preserve the same in the record for review, are waived unless properly excepted to. In actions for the recovery of real property, in which, by the statutes of some of the States, one new trial is granted, as of course, upon the mere application of the defeated party, the right to make the motion is not waived because the petition sets up a claim for *mesne* profits, or because an equitable defense and a claim for equitable relief is set up.[3] Where a notice of intention to move for a new trial is required, a failure to file it in time is a waiver of the right to move for a new trial.[4] So, a failure to move for a new trial within the statutory time, is ordinarily regarded as a waiver. So, neglect to prepare and serve a proper statement of the case within the statutory time (where this preliminary is required), is a waiver of the right to move for a new trial.[5] Taking an appeal from the judgment is a waiver of the right to present the motion.[6]

§ **2726. Effect of Other Motions.** — The motion for a new trial may be made after a previous motion to set aside the judgment has been denied.[7] So, a motion for judgment on special

[1] Flesher *v.* Hale, 22 W. Va. 45, 48; Dilworth *v.* Com., 12 Gratt. (Va.) 689; Coleman *v.* Moody, 4 Hen. & M. (Va.) 1; Dower *v.* Church, 21 W. Va. 23; Fox *v.* Hazelton, 10 Pick. (Mass.) 275; Oleson *v.* Meader, 40 Iowa, 662; Lee *v.* McLeod, 15 Nev. 158; State *v.* Tuller, 34 Conn. 280; Dolloff *v.* Stimpson, 33 Me. 546; Martin *v.* Tidwell, 36 Ga. 332; Parks *v.* State, 4 Ohio St. 234; State *v.* Daniels, 44 N. H. 383.

[2] Russell *v.* Quinn, 114 Mass. 103; Fessenden *v.* Sager, 53 Me. 531; Parker *v.* State, 55 Miss. 414; Cox *v.* People, 80 N. Y. 500.

[3] Cheesebrough *v.* Parker, 25 Kan. 566.

[4] Cooney *v.* Furlong, 66 Cal. 520.

[5] Cooney *v.* Furlong, 66 Cal. 520; Campbell *v.* Jones, 41 Cal. 515; Thompson *v.* Lynch, 43 Cal. 482; Stoyell *v.* Cole, 19 Cal. 602.

[6] Corbett *v.* Swift, 6 Nev. 194.

[7] Hayden *v.* Johnson, 59 Ga. 105.

findings, *non obstante veredicto*, does not preclude a motion for a new trial.[1] It has been held that a motion for a new trial and a motion for judgment, notwithstanding the verdict, are not inconsistent, but may stand together.[2] It has also been held that a *motion in arrest* of judgment and a motion for a new trial may be pending at the same time,[3] that they may both be made successively in the same case, and that it is not material which is made first;[4] while, on the other hand, it is held that the motion for a new trial should be made[5] first; for, it is said that, according to the strict rules of practice, a motion in arrest of judgment is a waiver of a motion for a new trial.[6] Hence, where a party files both motions, and has the motion in arrest disposed of, and permits judgment to be rendered without directing the attention of the court to the other motion, he will be held to have waived it.[7] In Missouri, a motion for a new trial cannot be made after a motion in arrest has been filed and overruled, as the latter mo-

[1] Chicago &c. R. Co. *v.* Dimick, 96 Ill. 42; Indianapolis &c. R. Co. *v.* McCaffrey, 62 Ind. 552; Brannon *v.* May, 42 Ind. 92; Stone *v.* Hawkeye Ins. Co., 68 Ia. 737; Nixon *v.* Downey, 49 Ia. 166, distinguished.

[2] Fisk *v.* Henarie, 14 Ore. 29; *s. c.* 13 Pac. Rep. 760. See Nixon *v.* Downey, 49 Ia. 166.

[3] Habersham *v.* Wetter, 59 Ga. 11.

[4] Jewell *v.* Blanford, 7 Dana (Ky.), 473.

[5] Hall *v.* Nees, 27 Ill. 411.

[6] Candler *v.* Hammond, 23 Ga. 493, 496. The court said: "Whether a motion for a new trial can be made in the courts of England, after an unsuccessful motion in arrest of judgment, is more a matter of practice than a legal rule. The practice is different in the different courts. In the Court of Exchequer, a motion in arrest of judgment was refused because it was not made within the first four days of the term, next after the trial of the cause, and because it was made after a rule *nisi* for a new trial had been disposed of. Lane *v.* Crockett, 7 Price, 566. In the King's Bench a motion in arrest of judgment may be made at any time before judgment entered up, and even after a rule for a new trial has been discharged. 1 Sellon's Pract. 497; Common Pleas same, *Ib.* 482. * * * The practice is somewhat different in relation to motions for new trial." Sellon's Practice of K. B. and C. P., says that motion in arrest of judgment may be made after a motion for new trial, but not *vice versa*. "In extraordinary cases, however, it has been held that a motion for a new trial will be entertained after a motion in arrest of judgment." Tidd's Prac. 913.

[7] The decision seems to rest upon the ground of delay in failing to call up the motion for a new trial. Hall *v.* Nees, 27 Ill. 411.

tion presupposes and admits the verdict to be right; [1] but where both motions are filed on the same day, and the motion for a new trial is first disposed of, the latter may be considered on appeal.[2] And where both motions were filed on the same day and acted upon at the same time, the presumption is that they were disposed of in the proper order.[3]

§ 2727. Number of New Trials: In Personal Actions. — It has been held that, after an adverse decision of a motion for a new trial, the moving party has no right to file another motion,[4] for the matters embraced in the motion have become *res adjudicata*.[5] While a second motion cannot be made on the same ground, it is held that it may be made on a different ground, not known or knowable until the original motion was ruled upon,[6] or where good reasons are shown for not incorporating the ground in the first motion.[7] Most of the statutes limit the number of new trials that may be had. The California Civil Code authorizes but one motion.[8] In Illinois,[9] Indiana,[10] Mississippi,[11] Missouri,[12] Tennessee,[13] Texas,[14] Virginia,[15] and West Virginia,[16]

[1] Craig *v.* Mississippi Mills, 12 Mo. App. 585; Carrington *v.* Hancock, 23 Mo. App. 299; McComas *v.* State, 11 Mo. 116.

[2] Farmers' Bank *v.* Bayliss, 41 Mo. 275, 286.

[3] Water Imp. Co. *v.* Gildersleeve (N. M.), 16 Pac. Rep. 278.

[4] Thompson *v.* Lynch, 43 Cal. 482, Coombs *v.* Hibberd, 43 Cal. 453.

[5] Rogers *v.* Hoenig, 46 Wis. 361; Second Ward Bk. *v.* Upman, 14 Wis. 596; Cothren *v.* Connaughton, 24 Wis. 134; Kabe *v.* Eagle, 25 Wis. 108; Moll *v.* Benckler, 28 Wis. 611. Provision that motion may be renewed inserted in order, gives party right to reconsideration. Branger *v.* Buttrick, 28 Wis. 450.

[6] White *v.* Perkins, 16 Ind. 358; Bryorly *v.* Clark, 48 Tex. 345; Malone *v.* Hopkins, 49 Ga. 221; Ga. Code (1882), § 3721.

[7] Hughes *v.* M'Gee, 1 A. K. Marsh. (Ky.) 29. See 1 Graham and Waterman on N. T., p. 537, *et seq.*

[8] Dorland *v.* Cunningham, 66 Cal. 484.

[9] 2 Starr & Curtiss' Annot. Stat., p. 1818, par. 57.

[10] Charles *v.* Malott, 65 Ind. 184. Two new trials on ground of newly discovered evidence only, in very rare cases and by making an unusually strong and satisfactory case: Hines *v.* Driver, 100 Ind. 315.

[11] Rev. Code Miss. 1880, § 1719; Bowers *v.* Ross, 55 Miss. 213.

[12] R. S. 1879 Mo., § 3705; Humbert *v.* Eckert, 7 Mo. 259.

[13] Code of Tenn. 1884, § 3835.

[14] 1 Sayle's Tex. Civil Stat., art 1370.

[15] Code Va. 1887, § 3392.

[16] Code W. Va. 1887, ch. 131, § 15; Watterson *v.* Moore, 23 W. Va. 404.

not more than two new trials to the same party in the same cause is allowed.[1] In Texas the statute is qualified as follows: "Except when the jury have been guilty of some misconduct, or have erred in matter of law;[2] and in that State it is held to be an error of law that the jury have been misled by the charge of the court.[3] In Missouri it is held that the statute does not limit the number of new trials that may be had on the grounds (1) of errors of law of the trial court, in giving or refusing instructions or in admitting or excluding evidence, (2) where the jury errs in a matter of law, or (3) where the jury are guilty of misconduct.[4] Where the jury, after being properly instructed, misconceive or entirely disregard the charge, or where they follow erroneous instructions, they err in matter of law.[5] And the Tennessee statute is construed to permit a third trial where (1) there is error in the court's charge to the jury, or (2) where the court erred in admitting or rejecting evidence, or (3) where the jury have been guilty of misconduct.[6] But in

Although one or more of the verdicts necessitating the new trials, was caused by the misconduct or mistake of the court. Watterson *v.* Moore, 23 W. Va. 404.

[1] In Nevada in criminal cases, only two new trials allowed on ground alone that the verdict is contrary to law or evidence: Crim. Prac. Act Nev., § 428. Gen. Stat. 1885, § 4308.

[2] Rains *v.* Hood, 23 Tex. 555.

[3] Austin *v.* Talk, 20 Tex. 164. Austin *v.* Talk, 26 Tex. 127, or that the verdict is without evidence to support it. Gibson *v.* Hill, 23 Tex. 77; Randall *v.* Collins, 58 Tex. 231.

[4] State *v.* Horner, 86 Mo. 71, reversing *s. c.* 10 Mo. App. 307. The same statute was formerly construed not to allow a second motion for errors of law of the court, because "errors of the court on questions of law may be readily reviewed and corrected by writ of error or appeal:" Hill *v.* Wilkins, 4 Mo. App. 86, 88. When court gives improper instructions, and the verdict is justified by the facts and law, a second new trial cannot be awarded: State ex rel. *v.* Adams, 76 Mo. 605, 609; Boyce *v.* Smith, 16 Mo. 317; Hill *v.* Deaver, 7 Mo. 57.

[5] State ex rel. *v.* Adams, 76 Mo. 609; Hill *v.* Deaver, 7 Mo. 57; Pratte *v.* The Judge, 12 Mo. 194; Boyce *v.* Smith, 16 Mo. 317; Wright *v.* Adams, 12 Mo. App. 376. See Milliken *v.* Ross, 9 Fed. Rep. 855; 4 Wood C. C. (U. S.) 69; Johnson *v.* Wilson, 1 Pinney (Wis.), 65; Swinnerton *v.* Stafford, 3 Taunt. 232; Fowler *v.* Ins. Co., 7 Wend. (N. Y.) 270.

[6] Burton *v.* Gray, 10 Lea (Tenn.), 580, 582; Whitemore *v.* Haroldson, 2 Lea (Tenn.), 313; East Tennessee &c. R. Co. *v.* Hackney, 1 Head (Tenn.), 169; Turner *v.* Ross, 1 Humph. (Tenn.) 16, 19; Ferrell *v.* Alder, 2 Swan (Tenn.), 77; Trott *v.* West, Meigs (Tenn.), 163; Caruthers *v.* Crockett, 7 Lea (Tenn.), 91, 98.

that State it is held (contrary to the Missouri rule) that a refusal of the jury to regard the charge of the court is not such misbehavior as will authorize a third motion for a new trial.[1] In Illinois it is held that the statute does not operate to restrain the trial court from granting any number of new trials for errors of law, but only from granting to the same party more than two new trials upon the ground of the verdict being against the evidence.[2] The statute only applies where a trial is had, and does not apply to a case of nonsuit.[3] In Tennessee and Indiana this statutory prohibition is held to apply to the Supreme Court,[4] but in Illinois and Mississippi it is held to apply only to trial courts,[5] and in Michigan it is held that a new trial granted by the Supreme Court on a writ of error is not a new trial within the meaning of the statute.[6] So, in Mississippi it is held that the statute does not apply to cases where special exceptions are taken to the ruling of the court upon questions of law, and made during the trial, upon which alone the judgment is reversed by the Supreme Court and a *venire de novo* awarded.[7]

§ 2728. In Real Actions. — In real actions in some of the States of the Union either party is entitled to apply for one new trial, as of right, without showing cause.[8] In Illinois two applications may be made by either party.[9] The first application may be made without showing cause,[10] but the second is within the discretion of the trial court.[11] In Iowa "only one such new

[1] *Id.*

[2] Silshe *v.* Lucas, 53 Ill. 479.

[3] People *v.* St. Clair Cir. Judge, 37 Mich. 131.

[4] Knoxville Iron Co. *v.* Dobson, 15 Lea (Tenn.), 410; Headrick *v.* Wisehart, 57 Ind. 129; Shirts *v.* Irons, 47 Ind. 445.

[5] Illinois &c. R. Co. *v.* Patterson, 93 Ill. 290; Wildy *v.* Bonney, 35 Miss. 77.

[6] Dennison *v.* Genesee Cir. Judge, 37 Mich. 285.

[7] Wildy *v.* Bonney, 35 Miss. 77; Garnett *v.* Kirksman, 33 Miss. 389; Ray *v.* McCary, 26 Miss. 404.

[8] Provision binding on U. S. courts sitting in California: Equator Co. *v.* Hall, 106 U. S. 86.

[9] 1 Starr. & Curtiss' Annot. Stat. Ill., ch. 45, par. 35.

[10] Lowe *v.* Foulke, 103 Ill. 58; Chamberlin *v.* McCarty, 63 Ill. 262; Shackleford *v.* Bailey, 35 Ill. 387; Emmons *v.* Bishop, 14 Ill. 152.

[11] Vance *v.* Schuyler, 6 Ill. 160; Riggs *v.* Savage, 9 Ill. 129.

trial may be granted" (not one to either party as many statutes provide);[1] in Michigan not more than two,[2] and in Wisconsin, but one, without cause.[3]

§ 2729. Amendment of the Motion. — Ordinarily a motion for a new trial cannot be amended by adding new grounds.[4] In Georgia the motion may be amended so as to include a ground that has arisen since the making of the original motion;[5] and where the motion is continued from time to time by order of court, it may be amended at any time before final disposition.[6] But whether the motion can be amended in the court below after judgment on writ of error reversing the grant of a new trial, even before remitter is entered, is not settled.[7] Where a new trial is granted on an agreed state of facts by the trial court and overruled by the Supreme Court, the movant may amend the motion before the judgment of the Supreme Court is made the judgment of the court below, by showing that the facts were agreed to under a mistake as to their truth.[8] The Missouri statute does not authorize the filing of a supplemental motion after the expiration of the statutory time.[9] In an early Iowa case it was held that, on a ground other than that of newly discovered evidence, a motion, filed within the statutory time, might be amended by leave of court, at any time *during the term* at which the trial was had, the amendment being *germane* to the grounds

[1] Miller's Annot. Code 1886, § 3268. See Beckman *v.* Richardson, 28 Kan. 648.

[2] 2 Howell's Annot. Stat. Mich. (1882), § 7822.

[3] Boland *v.* Gillett, 44 Wis. 329.

[4] Powell *v.* Howell, 21 Ga. 214, 216.

[5] In extraordinary cases to be judged by the court in its discretion. Moore *v.* Ulm, 34 Ga. 365; Snelling *v.* Darrell, 17 Ga. 141. *Contra*, Riggins *v.* Brown, 12 Ga. 271. Motion is made amendable by statute: Ga. Code, § 3503; Power *v.* Savannah &c. R. Co., 56 Ga. 471, 474; Ford *v.* Holmes, 61 Ga. 419; Vanover *v.* Turner, 41 Ga. 577. In Gano *v.* Wells, 36 Kan. 688, 692, an amendment was allowed, but nothing said about the propriety of it. The brief of the evidence is amendable at the hearing: Doggett *v.* Simms (Ga.), 4 S. E. Rep. 909.

[6] Girardey *v.* Bessman, 62 Ga. 654, 659. So as to perfect brief of testimony: Hamilton *v.* Conyers, 25 Ga. 158.

[7] Slater *v.* Manes, 54 Ga. 671, 672.

[8] Daniel *v.* Foster, 49 Ga. 303.

[9] R. S. Mo. 1879, § 1967; State *v.* Brooks, 92 Mo. 542.

set out in the original motion.[1] And in a very recent case in that State it is held that an amendment of a motion on the ground of newly discovered evidence filed more than three days after verdict (statutory time), but during the term, may be considered, as the law does not require the motion on this ground to be filed within three days.[2] But in that State an amended petition for a new trial, filed after the expiration of the statutory time, setting out new grounds, cannot be considered.[3] It has been seen that a notice of intention to move for a new trial cannot be amended after the expiration of the statutory time, for the reason that to permit it would be in effect to extend the time prescribed by statute. By analogy this rule should be applied to the motion itself, and the reason supporting it appears to be the foundation of the Iowa cases.

§ 2730. Effect of Filing the Motion.— As a general rule, the filing of a motion for a new trial is a waiver of all exceptions previously taken and not expressly embodied in it;[4] though the contrary rule has been announced.[5] A motion for a new trial is not a waiver of a writ of error.[6] A rule making it such is effective only by requiring the party to make the waiver a matter of record before the hearing of the motion.[7] A pending motion for a new trial, seasonably filed, keeps the cause in the trial court, and, so long as it remains undisposed of, there can be no final judgment, within the meaning of the statute regulating appeals.[8] At common law the motion for a new trial suspended the judgment

[1] Snowden *v.* Craig, 20 Iowa, 477. *A priori*, this rule should apply to a motion made on the grounds of newly discovered evidence, as, where good cause is shown, the motion on this ground may be made after term.

[2] Van Horn *v.* Redmon, 67 Iowa, 689. See Spears *v.* Mt. Ayr, 66 Iowa, 721.

[3] Harnett *v.* Harnett, 59 Iowa, 401.

[4] Johnson *v.* State, 43 Ark. 391, 393.

[5] United States *v.* Dashiel, 4 Wall. (U. S.) 182.

[6] Brown *v.* Evans, 18 Fed. Rep. 56.

[7] United States *v.* Hodge, 6 How. (U. S.) 279.

[8] Brown *v.* Evans, 18 Fed. Rep. 56; Louisville C. Works *v.* Commonwealth, 8 Bush (Ky.), 181; New York &c. R. Co. *v.* Doane, 105 Ind. 92. But a motion filed out of time, without leave of court, will not carry case over to next term. Taylor *v.* Genail, 10 Mo. App. 250.

and all its effects until it was disposed of. This rule has been adopted in Kentucky[1] and Illinois;[2] but in the latter State a motion after judgment will not have this effect.[3] In this country this rule of the common law has been generally supplanted by statutory provisions; and, in order to obtain a stay of execution, the proceedings prescribed by statute must be strictly pursued, as the pendency of the motion does not *per se* stay the execution. Where a stay is desired, an order of court to that effect should be obtained. The power of courts to temporarily stay the issuing of execution, is exercised in an almost infinite variety of circumstances, to the end that justice may be administered.[4]

[1] Suspends judgment for every purpose: Turner *v.* Booker, 2 Dana (Ky.), 335; Wright *v.* Haddock, 7 Dana (Ky.), 254; Reynolds *v.* Horine, 13 B. Mon. (Ky.) 235. But a motion to set aside an order overruling a motion for a new trial does not: Louisville Rock Line Co. *v.* Kerr, 78 Ky. 12, 14.

[2] People *v.* Gary, 105 Ill. 264; Hearson *v.* Graudine, 87 Ill. 115.

[3] Parr *v.* Van Horne, 40 Ill. 122.

[4] Church *v.* Goodin, 22 Kan. 527; People ex rel. Carpenter *v.* Loucks, 28 Cal. 68; Eaton *v.* Caldwell, 3 Minn. 134. "A rule *nisi* for a new trial shall not operate as a *supersedeas*, unless so ordered by the court." Court may demand security, etc.: Ga. Code (1882), § 3724.

CHAPTER LXXIX.

TIME OF MAKING THE MOTION.

SECTION
2735. In General.
2736. Statutory Provisions: Civil Cases.
2737. When the Motion may be Made after Statutory Time: Statutory Exceptions: Grounds Discovered after Term.
2738. "Unavoidably Prevented:" "Extraordinary Cases."
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§ 2735. In General. — At common law and in chancery, the time of making the motion was matter of practice, controlled by rule of court. It remains so, unless the statute has regulated the practice. But where the statute has not, and the court has no rule upon the subject, it is largely within the discretion of the judge before whom the motion is made, to decide in each instance, whether or not it is made in time.[1] Where the motion is made before trial it presents no question and cannot be considered.[2] Thus, in a trial without a jury where findings are requested and judgment is entered before they are made, it is merely provisional, and will not be deemed perfected so that a new trial can be based upon it until the findings are complete.[3] But after a trial and decision upon the main issue, the motion should be presented, although subsidiary matters (*e.g.*, an accounting) are reserved for future disposition.[4]

§ 2736. Statutory Provisions: Civil Cases. — In Georgia the application for a new trial, except in "extraordinary cases," must be made during the term at which the trial was had.[5] In Florida

[1] Conklin *v.* Hinds, 16 Minn. 457, 467.

[2] Ikerd *v.* Beavers, 106 Ind. 483, 492; Pence *v.* Garrison, 93 Ind. 345.

[3] O'Blinskie *v.* Judge of Kent Circuit, 34 Mich. 62.

[4] Ashton *v.* Thompson, 28 Minn. 330.

[5] Ga. Code, 1882, § 3719.

it cannot be made after the trial term.[1] In Illinois it must be made during the trial and before final judgment is entered.[2] In Tennessee it must be made during the term.[3] In Indiana it may be made at any time during the term, unless the cause is discovered afterwards,[4] "and if the verdict or decision be rendered on the last day of the session of any court, or on the last day of any term, then, on the first day of the next term of such court, whether general, special, or adjourned."[5] In Arizona and Texas it must be within two days thereafter, if the term of court shall continue so long; if not, then before the end of the term;[6] and in Arkansas,[7] Iowa,[8] Kansas,[9] Kentucky,[10] Nebraska[11] and

[1] McClellan's Dig. Fla. (1881), ch. 88, § 1; Palatka &c. R. Co. *v.* State (Fla.), 3 South. Rep. 158.

[2] Starr & Curtiss Annot. Stat. Ill. (1885), ch. 110, par. 57; Campbell *v.* Conover, 26 Ill. 64. In time if made at term though judgment on special findings of jury has been entered at previous term and set aside on appeal: Chicago &c. R. Co. *v.* Dimick, 96 Ill. 42.

[3] Code of Tenn. 1884, § 3832.

[4] Smith *v.* Little, 67 Ind. 549.

[5] 1 R. S. Ind. 1888, § 561; Dodge *v.* Pope, 93 Ind. 480. In proper case, motion for new trial may be filed after the entry of judgment. Cox *v.* Baker, 113 Ind. 62; *s. c.* 14 N. E. Rep. 740; Hinkle *v.* Margerum, 50 Ind. 240; Beals *v.* Beals, 20 Ind. 163. On ground of disqualification of jury, must be made before verdict — too late after. Held waived, though disqualification wholly unknown to party at time jury sworn, under practice of drawing jurors in Federal courts: Brewer *v.* Jacobs, 22 Fed. Rep. 217, 233. In partition made at term at which finding was made or verdict was rendered, except in the civil cases by consent. Jones *v.* Jones, 91 Ind. 72, 76; 1 R. S. Ind. 1888, § 561. "Decision," as used in § 561, means "finding." Christy *v.* Smith, 80 Ind. 573; Wilson *v.* Vance, 55 Ind. 394. Also applies to partition suits: 1 R. S. Ind. 1888, § 1188.

[6] Ariz. Rev. Stat. (1887), par. 836; 1 Sayles' Tex. Civil Stat. (1888), art. 1371. In Texas it may be made within two days after the execution of a writ of inquiry: Edwards *v.* James, 13 Tex. 52; Roseboro *v.* Thompson, 1 App. C. Civ., § 19.

[7] Ark. Dig. (1884), § 5153; Nichols *v.* Shearon, 49 Ark. 75; *s. c.* 4 S. W. Rep. 167.

[8] Miller's Code, Iowa, 1886, § 2838; Stiles *v.* Est. of Botkin, 30 Iowa, 60. The fact that the court is not in session for a few days after verdict, in the midst of the term, will not prolong the time for filing such motion. Ewaldt *v.* Farlow, 62 Iowa, 212.

[9] Comp. Laws Kan. 1885, § 4118.

[10] Harris *v.* Ray, 15 B. Mon. (Ky.) 628, 631; Long *v.* Hughes, 1 Duv. (Ky.) 387; White *v.* Crutcher, 1 Bush (Ky.), 472; Humphreys *v.* Walton, 2 Bush (Ky.), 581. Prior to Code, § 342, motion could have been made at any time during term: Grant *v.* Shelton, 3 B. Mon. (Ky.) 420.

[11] Comp. Stat. Neb. 1887, p. 779; Code Civ. Proc., § 316; Wells, Fargo & Co. *v.* Preston, 3 Neb. 444. Statute is mandatory: Fox *v.* Meacham, 6 Neb. 530.

Ohio,[1] it must be within three days thereafter, unless the party is "unavoidably prevented" (this exception does not appear in the Iowa statute), except upon the ground of newly discovered evidence. This same limitation as to time exists in Massachusetts, where the motion is made for errors of the court in matters of law.[2] In Missouri the motion must be made "within four days after the trial, if the term shall continue so long, and if not, then before the end of the term."[3] In California, the motion must be made as soon as practicable after the completion of the moving papers, or if the motion is made upon the minutes of the court, as soon as practicable after the notice is filed.[4] In Idaho and Nevada the application shall be made at the earliest period practicable after filing the affidavit and statement.[5] In Minnesota there is no statutory limit as to time, except where the motion is made upon the minutes, when it must be made during the trial term; but in that State it is held (1) that the motion must be made before judgment, if the party have a "reasonable opportunity" to make it; (2) but if not, he may make it afterwards, within the time for taking an appeal from the judgment; (3) yet the party must use due diligence, or he will lose his right to move; and (4) these rules apply whether the cause is tried by a jury, a referee, or the court.[6] In Alabama, the party may apply for a re-trial at any time within four months after the rendition of the judgment, upon the ground of surprise, accident, mistake or fraud;[7] but in condemnation proceedings the new trial must be applied for "within ten days after the assessment but not afterwards."[8] In Oregon the motion must be

[1] Laws of Ohio, 1880, § 5307; Markward *v.* Doriat, 21 Ohio St. 637.

[2] Pub. Stat. Mass. 1882, ch. 153, § 9.

[3] 1 R. S. Mo. 1879, § 3707; Moran *v.* January, 52 Mo. 523; Honey *v.* Honey, 18 Mo. 466.

[4] Cal. Code Civil Proc., § 660; 1 Hayne on New Trials, § 164.

[5] Stevens *v.* N. W. Stage Co., 1 Idaho (N. S.), 694; Nev. Practice Act, § 198; Gen. Stat. Nev. 1885, § 3220.

[6] Kimball *v.* Palmerlee, 29 Minn. 302; Groh *v.* Bassett, 7 Minn. 325; Cochrane *v.* Halsey, 25 Minn. 52. In Wisconsin the motion cannot be made on the judge's minutes after the trial term. Dunbar *v.* Hollinshead, 10 Wis. 505; Prentiss *v.* Danaher, 20 Wis. 311; Gaus *v.* Harmison, 44 Wis. 323; Whitney *v.* Karner, 44 Wis. 563.

[7] Laws of Ala. 1886, § 2872.

[8] Laws of Ala. 1876, § 3593.

made at the trial term, and within one day after the rendition of the verdict or decision,[1] unless the decision is rendered in vacation upon trial by the court, when it must be filed within twenty days from the date of the decision; except where the next regular term commences within less than twenty days, then such motion shall be filed upon the first day of such term.[2] In Michigan, in condemnation proceedings, the new trial must be applied for "within two days after rendition of verdict."[3] By statute of many States a justice of the peace is permitted to entertain a motion for a new trial, under limitations, where it is made within the prescribed time. Many of these provisions will be found in the foot-notes.[4] Where the motion is filed after the statutory time it is too late,[5] and should be overruled, unless it comes within a statutory exception.[6]

[1] 1 Hill's Annot. Laws Oregon, 1887, § 236.

[2] *Ib.*, § 237.

[3] 1 Howell's Stat. Mich. 1882, p. 1299, § 11.

[4] *Arkansas.* — Within ten days after judgment, in trial by justice, but not by jury. Ark. Dig. 1884, §§ 4071, 4072. *Kansas.* — Within five days after decision or verdict. Com. Laws Kan. 1885, § 4665; Kerner *v.* Petigo, 25 Kan. 652; Woodward *v.* Trask Fish Co., 38 Kan. 284; *s. c.* 16 Pac. Rep. 456. *Nebraska.* — Within four days after entering judgment. Comp. Laws Neb. 1887, p. 643; Code Civ. Proc., § 983. *South Carolina.* — Within five days after judgment. Code S. C., §§ 87, 88; Lawrence *v.* Isear (S. C.), 3 S. E. Rep. 222; Abrams *v.* Carlisle, 18 S. C. 245. *Texas.* — Within five days after rendition of judgment. 1 Sayles' Stat. Tex. 1888, art. 1624.

[5] Soper *v.* Medberry, 24 Kan. 128; Evansville *v.* Martin, 103 Ind. 206; Patterson *v.* Jack, 59 Iowa, 633; Deering *v.* Johnson, 33 Minn. 97; Conklin *v.* Hinds, 16 Minn. 411, 457; Kimball *v.* Palmerlee, 29 Minn. 302.

[6] Error to grant motion after lapse of time in absence of showing that he was "unavoidably prevented" (statute exception). Osborne *v.* Hamilton, 29 Kas. 1, 4; Odell *v.* Sargent, 3 Kas. 80; McDonald *v.* Cooper, 32 Kas. 60; Mitchell *v.* Milhoan, 11 Kas. 617; Nesbit *v.* Hines, 17 Kas. 316; Fowler *v.* Young, 19 Kas. 150; Soper *v.* Medberry, 24 Kas. 128; Campbell *v.* Conover, 26 Ill. 64; Boardman *v.* Beckwith, 18 Iowa, 292; Clinton Nat. Bk. *v.* Graves, 48 Iowa, 228, 230; Patterson *v.* Jack, 59 Iowa, 632. Delay to file motion for new trial until after statutory time because motion for judgment upon special findings of jury remains undisposed of, fatal. City of Osborne *v.* Hamilton, 29 Kan. 1; Civil Code, § 308. Defendant was convicted and moved in arrest of judgment, case went to Supreme Court on a certificate of a division of opinion. After decision of that court defendant moved in Circuit Court for new trial. *Held*, too late. United States *v.* Simmons, 14 Blatch. C. C. 473.

§ 2737. When the Motion may be Made after Statutory Time: Statutory Exceptions: Grounds Discovered After Term. — Most of the statutes permit the motion to be filed after the trial term, where, by reasonable diligence, the grounds upon which the motion is based could not be discovered during the term. Thus, in Alabama, where a release or discharge is claimed upon any writing which is lost or mislaid (and where the party is unable to prove it by secondary evidence), but which is found after the term, a re-trial may be had at any time within two years after judgment.[1] In Arkansas,[2] Indiana,[3] Iowa,[4] Kansas,[5] Kentucky,[6] and Ohio,[7] where the ground is discovered after the trial term, the motion must be made "not later than the second term after discovery;" but in Arkansas no application shall be made "more than three years after the final judgment was rendered."[8] In Indiana,[9] Iowa,[10] Nebraska,[11] Ohio,[12] and Wisconsin,[13] no application shall be made more than one year after final judgment.[14] Under most of the statutes, the motion may be made, on the ground of newly discovered evidence, after the trial term; yet the limitations just stated usually apply to this as to other grounds discovered after term. The application must show

[1] Laws of Ala. 1886, § 2871.

[2] Ark. Dig. 1884, § 5155.

[3] Rev. Stat. Ind. 1888, § 563.

[4] Miller's Annot. Code, Iowa, 1886, § 3155. Ground discovered so near the close of the term that application cannot be made at that term, may be made at the following one. Alger *v.* Merritt, 16 Ia. 121.

[5] Comp. Laws Kan. 1885, § 4120.

[6] Civil Code Ky., § 344.

[7] Laws of Ohio, 1880, § 5309.

[8] Ark. Dig. 1884, § 5155.

[9] Rev. Stats. 1888, § 563; Roush *v.* Layton, 51 Ind. 106.

[10] Miller's Code, 1886, § 3155; Gray *v.* Coan, 48 Ia. 424; Bond *v.* Epley, 48 Ia. 600.

[11] Comp. Stat. Neb. 1887, p. 780, § 318.

[12] Laws of Ohio, 1880, § 5309.

[13] Rev. Stat. Wis. 1878, § 2879; Smith *v.* Smith, 51 Wis. 665.

[14] In Georgia, where the application is made after adjournment of court, "some good reason must be shown why the motion was not made during the term, which shall be judged by the court." Ga. Code, § 3721. In South Carolina, where the action was to recover personal property, and the verdict was so vague and indefinite that it did not identify the property, the motion may be made at the third term, more than a year after trial, notwithstanding provisions of the Code, § 289, requiring the motion to be made at the trial term or the next. Eason *v.* Miller, 18 S. C. 381.

diligence.[1] And it has been held that a new trial will be granted on this ground after the affirmance of judgment on appeal.[2]

§ 2738. [Continued.] "Unavoidably Prevented:" "Extraordinary Case."—When the party is "unavoidably prevented" from filing the motion within the prescribed time, many statutes permit it to be made afterwards.[3] The words "unavoidably prevented" are equivalent in meaning to circumstances beyond the control of the moving party, and do not excuse mere neglect.[4] Where this reason is alleged for not making the motion sooner, it must distinctly appear that intervening circumstances were clearly beyond the mover's control. Under the practice of most of the States, when this cause is shown, the motion may be presented *after the term;* yet in Nebraska the statute is construed to mean that the motion may be made after the expiration of the statutory three days, but not after the trial term.[5] In Georgia, in an "extraordinary case," where the ends of justice require it, and the cause is still within the control of the court, a rule *nisi* may be moved after the expiration of the term at which the trial was had, but there shall be but one such extraordinary motion made or allowed.[6] And under such circumstances,

[1] Alger *v.* Merritt, 16 Ia. 121; Stuckslager *v.* McKee, 40 Ia. 212; First Nat. Bk. *v.* Murdough, 40 Ia. 26; Miller *v.* Albaugh, 24 Ia. 128; Stinanan *v.* Beath, 36 Ia. 73; Rooh *v.* Brewster (Iowa), 36 N. W. Rep. 649; Greenwalt *v.* Tucker, 10 Fed. Rep. 884; Civil Code of Ky., § 344; Scott *v.* Scott, 82 Ky. 328; Rev. Stat. Wis. 1878, § 2879: Smith *v.* Smith, 51 Wis. 665. Equity will grant after court of law ceases to have power, when: Hoskins *v.* Hattenback, 14 Ia. 314; Johnson *v.* Lyon, 14 Ia. 434; Dixon *v.* Graham, 16 Ia. 310; McGregor *v.* Gardner, 16 Ia. 538.

[2] Sheffield *v.* Mullin, 28 Minn. 251. See Tucker *v.* White, 27 How. Pr. (N. Y.) 97; *s. c.* 28 How. Pr. (N. Y.) 78; Blydenburg *v.* Johnson, 9 Abb. Pr. (N. S.) (N. Y.) 459; Tracey *v.* Altmyer, 46 N. Y. 598; Spanagel *v.* Dellinger, 38 Cal. 278; Johnson *v.* Paul, 23 Minn. 46.

[3] Fudge *v.* St. Louis &c. R. Co., 31 Kan. 146; Hemme *v.* School Dist., 30 Kan. 377.

[4] Roggencamp *v.* Dobbs, 15 Neb. 620.

[5] Ex parte Holmes, 21 Neb. 324, 327; *s. c.* 32 N. W. Rep. 71. See State *v.* Hughes, 35 Kan. 632; *s. c.* 12 Pac. Rep. 28; Commonwealth *v.* Weymouth, 2 Allen (Mass.), 144; State *v.* Dougherty, 70 Iowa, 439; *s. c.* 30 N. W. Rep. 685.

[6] Ga. Code 1882, § 3721; Candler *v.* Hammond, 23 Ga. 493, 497; Graddy *v.* Hightower, 1 Ga. 253.

the motion may be made before a judge in vacation.[1] In a criminal case, where an attorney abandons his client because his fees are not paid, this is not an extraordinary ground.[2]

§ 2739. **Extension of Time.** — The time for making the motion may be extended (1) by the court, (2) by consent of the parties, and (3) by waiver of the parties. (1.) It has been held that the statutory provisions as to time are directory merely, and the court may, within its discretion, grant an extension,[3] or may entertain a motion filed after the expiration of the statutory time.[4] Other cases hold that the statute is imperative, and that the court possesses no power to grant an extension beyond the term, without the agreement or consent of the parties, either express or implied.[5] The Massachusetts statutes permit the court to allow further time.[6] We have seen that, ordinarily, the court has no power to entertain the motion after the lapse of the prescribed time; but it has been held that, upon suggestion of counsel or otherwise, the court may, of its own motion, where substantial justice requires it, grant a new trial after such time.[7] (2.) Parties are sometimes permitted to agree upon an extension of time,[8] but in such cases time is of the essence of the agreement,

[1] Spann *v.* Clark, 47 Ga. 369, 373.

[2] Cobb *v.* State (Ga.), 3 S. E. Rep. 628.

[3] McLaughlin *v.* Upton, 2 N. Y. 27; Comp. Laws N. Y., § 308, p. 72; Gomer *v.* Chaffe, 5 Colo. 383; see *post*, § 2740, Criminal Cases.

[4] Aldridge *v.* Mardoff, 32 Tex. 205; Maloy *v.* State, 33 Tex. 599; Gill *v.* Rogers, 37 Tex. 628; Linn *v.* Le Compte, 47 Tex. 440; George *v.* Taylor, 55 Tex. 97; Davis *v.* Zumwalt, 1 App. Civ. C., § 597; Lance *v.* Bonnell, 105 Pa. St. 46; De Paus *v.* Kaiser (Ga.), 3 S. E. Rep. 25.

[5] Krutz *v.* Craig, 53 Ind. 561; Wilson *v.* Vance, 55 Ind. 394; Cutsinger *v.* Nebeker, 58 Ind. 401; McNiel *v.* Farneman, 37 Ind. 203; Whaley *v.* Gleason, 40 Ind. 405; Hinkle *v.* Margerum, 50 Ind. 240; Greenup *v.* Crooks, 50 Ind. 410. "But when a trial is pending at the close of the term, the court may progress with it until it is concluded, and the additional time thus required will be held to be within the legal term." Krutz *v.* Craig, 53 Ind. 571.

[6] Pub. Stat. Mass. 1882, ch. 153, § 9.

[7] 2 Tidd's Prac. 820; Doug. 171, 797; State ex rel. *v.* Knight, 46 Mo. 84, State ex rel. *v.* Rombauer, 44 Mo. 590; Williams *v.* Circuit Court, 5 Mo. 248; 253.

[8] Wilson *v.* Vance, 55 Ind. 394; Beems *v.* Chicago &c. R. Co., 58 Iowa, 150, 152, 153; Eckel *v.* Walker, 48 Iowa, 225; Jones *v.* Jones, 91 Ind. 72, 76.

and an excuse for delay should amount to providential cause or it will be disregarded.[1] When the cause is continued on plaintiff's motion for a new trial, it is not too late for defendant to move for a new trial, at the succeeding term.[2] So, a party may waive the statutory time. Thus, where the parties appear at a subsequent term and leave is granted one of the parties to file a motion for a new trial, without objection of the opposite party, the provision of the statute as to time is thereby waived.[3]

§ 2740. In Criminal Cases. — The motion in criminal cases may be made at any time during the trial term, in Georgia,[4] Michigan,[5] and Texas (for good cause shown).[6] In Massachusetts[7] and Wisconsin,[8] if not made at the trial term, it may be made at any time within one year thereafter. The motion must be made at the trial term and "before judgment," in Arizona,[9] Arkansas (unless the judgment is postponed to another term),[10] California,[11] Indiana,[12] Iowa,[13] Kansas,[14] Missouri,[15] Nevada,[16] and New York (except in case of sentence of death).[17] In Montana, within ten days after rendition of the verdict.[18] In Illinois it should be made at the first opportunity after verdict, and when a delay occurs, the cause thereof should be distinctly stated in the affidavits

[1] The Western &c. R. Co. *v.* Johnson, 59 Ga. 626.

[2] Constantine *v.* Foster, 57 Ill. 36.

[3] Northcutt *v.* Buckles, 60 Ind. 577.

[4] Smith *v.* State, 64 Ga. 439.

[5] "If not made at trial term, it may be made at the next term thereafter." 2 Howell's Annot. Stat. Mich., § 9576; People *v.* Marble, 38 Mich. 309.

[6] Wilson's Texas Penal Code, 1888, art. 779.

[7] Pub. Stat. Mass. 1882, ch. 214, § 28.

[8] R. S. Wis., § 4719.

[9] R. S. Ariz. 1887 (Pen. Code), par. 1764.

[10] Ark. Dig., 1884, § 2296.

[11] Deering's Annot. Penal Code Cal., § 1182, People *v.* Sing Lum, 61 Cal. 538.

[12] R. S. Ind. 1888, § 1842; Burke *v.* State, 72 Ind. 392; Calvert *v.* State, 91 Ind. 473.

[13] Miller's Annot. Code, Iowa, 1886, § 4490; State *v.* Bixley, 39 Iowa, 465.

[14] Comp. Laws Kan. 1885, § 5045.

[15] 1 R. S. Mo. 1879, § 1967. Notwithstanding the statute, it is the practice in Missouri for the clerk to enter the judgment at once, without waiting for the time to expire within which a motion for a new trial may be made.

[16] Gen. Stat. Nev. 1885, § 4309, 4499.

[17] N. Y. Code Crim. Proc., § 466; People *v.* Bradner, 107 N. Y. 1; *s. c.* 13 N. E. Rep. 87.

[18] R. S. Mont. 1888, 3rd div., § 355.

upon which the application is founded.[1] Many statutes provide that the motion shall be made within a specified number of days after verdict. Thus, in Texas the motion must be presented within two days after conviction, and if the court adjourns before that time it must be before adjournment; but, in case of felony, for good cause shown the court may allow it to be made at any time before the adjournment of the term at which the conviction was had.[2] In Nebraska it must be presented within three days after verdict, unless, "unavoidably prevented;"[3] in Florida[4] and Missouri,[5] within four days after the return of verdict; and in Idaho, it may be made, before or after judgment, "within ten days after verdict," unless the court or judge extends the time.[6] Many of the criminal statutes make exceptions, as was observed in the civil statutes, and permit the motion to be filed after the prescribed time, on grounds discovered after the term; the most usual being that of newly discovered evidence.[7] And also where a defendant is "unavoidably prevented" from presenting his motion within the prescribed time, here, as in civil cases, by provision of a few statutes, he may do so afterwards.[8] A few States permit the court to extend the time,[9] but in such case facts should be given showing the necessity of the delay and that there is a substantial reason in the interest of justice.[10] In Maine, the motion was allowed on the ground of the prejudice of a juror, after an order was received from the Supreme Court, overruling the defendant's exceptions.[11] In exceptional cases, the motion has been allowed when filed after sentence has been passed upon the accused.[12] In Massachusetts it is held that the Supreme Judicial

[1] Cochlin *v.* People, 93 Ill. 410.

[2] Wilson's Texas Penal Code, 1888, § 779.

[3] Comp. Stat. Neb. 1887, Cr. Code, § 491; Bradshaw *v.* State, 19 Neb. 644; *s. c.* 28 N. W. Rep. 323; Ex parte Holmes, 21 Neb. 324; *s. c.* 32 N. W. Rep. 69.

[4] Laws of Fla., McClellan's Dig. 1881, p. 453, § 1.

[5] 1 R. S. Mo. 1879, § 1967. This limitation is constitutional: Brooks *v.* Missouri, 124 U. S. 394; *s. c.* 8 S. C. Rep. 443.

[6] R. S. Idaho, 1887, § 7953.

[7] Comp. Stat. Neb. 1887, Cr. Code, § 491.

[8] *Ib.*, Ex parte Holmes, 21 Neb. 324.

[9] R. S. Idaho, 1887, § 7953.

[10] Bulliner *v.* People, 95 Ill. 395.

[11] State *v.* Gilman, 70 Me. 329.

[12] But during trial term. Smith *v.* State, 64 Ga. 439. Good reason shown: State *v.* Robinson, 20 W. Va. 713, 760.

Court may grant a new trial, in a capital case, after sentence of death has been passed and a warrant issued by the governor for its execution.[1]

§ 2741. **In Real Actions.** — In real actions the statutes vary from six months to three years, from the date of final judgment, as to the time in which the motion for a new trial should be made, but in such cases it is always granted as a matter of right, without any cause being shown.[2] In these actions the motion may be made, although an appeal or writ of error has been taken from the judgment, which remains undisposed of.[3]

§ 2742. **Computation of the Time.** — It is held that the proper method of computing time, where an act is to be performed within a particular period from or after a specified day,

Supplemental motion, on grounds after final judgment: Dennis *v.* State, 103 Ind. 142.

[1] Commonwealth *v.* McElhaney, 111 Mass. 439. But see United States *v.* Simmons, 14 Blatchf. C. C. (U. S.) 473. Lord Mansfield said in Rex *v.* Atkinson, 5 T R 437, *note*, that, after expiration of time allowed for making it, "no motion could be made for a new trial, but that, if it came out incidentally from the report that it was proper, the court might grant one." Also, same judge remarked: "If the court conceive a doubt that justice is not done, it is never too late to grant a new trial, but not on the application of the party." Grose, J., in King *v.* Holt, 5 T. R. 446, said: "Though the rule be settled that, after the first four days the defendant cannot move for a new trial, whenever the court have seen of themselves, or it has appeared to them on the suggestion of counsel, that the defendant has been improperly convicted, they always have interposed to prevent judgment from being passed on an innocent man."

[2] *Illinois, Indiana, Iowa and Wisconsin.*— Within one year after judgment. 1 Starr & Curtiss Ill. Stat., ch. 45, par. 35; Pugh *v.* Reat, 107 Ill. 440; Rev. Stat. Ind. 1888, § 1064; Indiana &c. R. Co. *v.* McBroom, 103 Ind. 310; Miller's Annot. Code, Iowa, 1886, § 3268; Rev. Stats. Wis., § 3092; Hazeltine *v.* Stimpson, 61 Wis. 427. *Minnesota.* —Within six months after written notice of judgment: Stat. of Minn. 1881, ch. 75, § 11, as Amend. 1881, ch. 71, § 1. *Michigan.* — Within three years after first judgment, and two years after second judgment. 2 Howell's Annot. Stat., § 7822. *Kansas.* — Doster *v.* Sterling, 33 Kan. 381.

[3] Indiana &c. R. Co. *v.* McBroom, 103 Ind. 310; Gibson *v.* Manly, 15 Ill. 140. Under the Wisconsin statute a judgment in ejectment is not considered rendered, within the meaning of the law requiring the application to be made "within one year from the rendition thereof," until the costs are taxed and inserted therein. Hazeltine *v.* Stimpson, 61 Wis. 427.

is to exclude the day named and include the day on which the act is to be done;[1] but under the Kentucky code it is held that the day upon which the verdict or decision is rendered must be computed.[2] In computing time, "when the computation is to be made from an *act done*, the day on which the *act was done* must be included;" but "the rule is held to be otherwise when the computation is from the day itself."[3] Where the statute provides that it shall be a specified time after verdict or judgment, the time begins to run from the day the verdict was rendered or the judgment entered, and not from the last day of the trial term,[4] nor from the date of affirmance in the appellate court, upon appeal[5] or writ of error.[6] The time during the pendency of an appeal is not excluded.[7] So, where the court takes a recess during the term, such recess is not to be excluded in determining the time.[8] Sunday is not to be counted in estimating the statutory days. As to transactions in court Sunday is *non dies*.[9] The days are to be juridical days — court days — on which minutes are kept.[10]

[1] Pugh *v.* Reat, 107 Ill. 440; Ewing *v.* Bailey, 5 Ill. 420; People *v.* Hatch, 33 Ill. 14; Roan *v.* Rohrer, 72 Ill. 582; Ins. Co. *v.* Palmer, 81 Ill. 88.

[2] White *v.* Crutcher, 1 Bush (Ky.), 472.

[3] White *v.* Crutcher, 1 Bush (Ky.), 472; Chiles *v.* Smith, 13 B. Mon. 460; Batman *v.* Megowan, 1 Metc. (Ky.) 548; Long *v.* Hughes, 1 Duv. (Ky.) 387.

[4] Emmons *v.* Bishop, 14 Ill. 152.

[5] Gray *v.* Coan, 48 Iowa, 424; Bond *v.* Epley, 48 Iowa, 600.

[6] Chautauqua Co. Bk. *v.* White, 23 N. Y. 347. In Missouri the time begins to run after trial, and not after final judgment. Rhorer *v.* Brockhage, 15 Mo. App. 16.

[7] Jacks *v.* Adair, 33 Ark. 161; Gibson *v.* Manly, 15 Ill. 140.

[8] Ewaldt *v.* Farlow, 62 Iowa, 212.

[9] National Bank *v.* Williams, 46 Mo. 17; Lewis *v.* Schwenn, 15 Mo. App. 342, 346; Cattell *v.* Dispatch Pub. Co., 88 Mo. 356; *s. c.* 15 Mo. App. 587; Hales *v.* Owen, 2 Salk. 625; Rex *v.* Elkins, 4 Burr. 2130; Thayer *v.* Felt, 4 Pick. (Mass.) 354; Anon., 2 Hill (N. Y.), 375.

[10] Clerks' Savings Bk. *v.* Thomas, 2 Mo. App. 367.

CHAPTER LXXX.

MANNER OF MAKING THE MOTION.

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§ **2746. In General.**—The motion shall be directed against the decision.[1] A motion in compliance with the statute is entitled to be determined upon its merits; hence a rule of court imposing additional requirements to those named in the statute (as demanding a bill of exceptions before hearing, etc.), is inconsistent with the statute and cannot stand.[2] In a partition proceeding, where the motion is duly made after the order of partition and sale, a renewal of the motion is unnecessary subsequent to the order confirming the sale.[3] Ordinarily, the motion should be made to the whole case and for a new trial generally. Thus, a motion by a party, upon "his

[1] Sawyer *v.* Sargent, 65 Cal. 259. See Martin *v.* Matfield, 49 Cal. 42.

[2] Emery *v.* Emery, 54 Iowa, 106.

[3] Rhorer *v.* Brockhage, 15 Mo. App. 16.

paragraph of counter-claim and set-off," although this was the only pleading upon which issues were made, raised no question.[1] So, where a case embraces a cause of action in which a new trial, as of right is allowable, but which proceeds to judgment upon a *substantive* cause of action in which a new trial as of right is not allowable, a motion for a new trial, as of right, is improperly made.[2] Likewise, where two causes of action are improperly joined, where a new trial as of right is permitted in one, but not in the other.[3] Under certain circumstances, the motion may be directed to part of the case only. Thus, the rights of parties upon a promissory note may be adjusted as between themselves, in an action against them by the holder of the note and the motion made upon that issue.[4] So, in a petition embracing several counts, it may be made as to one count thereof, where it can be done without danger or confusion, but usually this will not be allowed.[5] And in an action for divorce, where the issue involves title to real estate, in which the judgment adjudges title in one of the parties, the other party is entitled to move for a new trial upon this issue, but not upon the divorce issue.[6]

§ **2747. Preliminary Steps.** — In England the first step towards a new trial is in the form of a motion to show cause why a new trial should not be granted.[7] In this country the mode of

[1] Johnson *v.* McCulloch, 89 Ind. 270, to whole case; Morris *v.* State, 1 Blackf. (Ind.) 37; Mills *v.* State, 52 Ind. 187; Veatch *v.* State, 60 Ind. 291; Ex parte Bradley, 48 Ind. 548; Richter *v.* Koster, 45 Ind. 440. But see Houston *v.* Bruner, 39 Ind. 376.

[2] Bradford *v.* School Town of Marion, 107 Ind. 280.

[3] Butler University *v.* Conrad, 94 Ind. 353.

[4] Houston *v.* Bruner, 39 Ind. 376.

[5] Woodward *v.* Horst, 10 Iowa, 120; Bond *v.* Wabash &c. R. Co., 67 Iowa, 712.

[6] Schmitt *v.* Schmitt, 32 Minn. 130; Lake *v.* Bender, 18 Nev. 361.

[7] Vernon *v.* Haukey, 2 T. R. 113; Hilliard on New Trials (2d ed.), § 16. It is stated by Blackstone that, prior to 1655, a practice took rise in the Common Pleas of England, of granting new trials upon the mere certificate of the judge, unfortified by any report of the evidence that the verdict had passed against his opinion; though Chief Justice Rolle refused to adopt that practice in the Court of King's Bench. But very early in the reign of Charles II., new trials were granted upon *affidavit*. 3 Bl. Com. 388; Hil-

presenting the motion is regulated by the statutes of the various States of the Union. Many particularly specify the method; others state it generally; while others, as has already been seen, leave it to be determined by the rules of the common law. By a majority of the practice acts, the first step is the presentation of the motion to the trial court. A few States require the costs of the trial to be paid as a condition to make the motion;[1] but, this is not the rule in ordinary causes, yet in real actions, where a new trial is granted as a matter of right, the statutes usually so provide. Analogous to the English practice, in Connecticut the court is required to grant a rule to show cause, etc.[2] Likewise, in Georgia, a rule *nisi*, to show cause — why a new trial should not be granted, is the preliminary step,[3] but such rule may be moved for without previous notice.[4] In Wisconsin a sufficient affidavit of merit must accompany the application.[5] A motion for leave to make a motion for a new trial is one unknown to the law and a nullity.[6]

§ **2748. Notice of the Motion.** — Ordinarily, the statutes do not require notice of the motion to be given to the adverse party, and it is generally held that this is not a necessary, or even proper, preliminary step,[7] unless the motion is made after the term at which the trial was had, when notice is required as well as in ordinary actions.[8] Filing the motion is regarded as sufficient notice. By the practice of many courts, it must be duly entered upon the motion docket, which entry operates as constructive notice.[9] In Wisconsin, the motion, with the papers upon which it is founded, must be served upon the opposite party.[10]

liard on New Trials, § 2 (2d ed.); 2 Graham & Waterman on N. T., pp. 38, 39; 3 Stephen's Com. 625.

[1] Dawson *v.* Shillock, 29 Minn. 189; Pugh *v.* Reat, 107 Ill. 440.

[2] Gen. Stat. Conn., ch. XV., Prac. Act, tit. 19, §§ 5, 6.

[3] Spence *v.* Holman, 30 Ga. 646.

[4] Gauldin *v.* Crawford, 30 Ga. 674; Powell *v.* Howell, 21 Ga. 214, 216.

[5] Mowry *v.* Hill, 11 Wis. 146.

[6] Odell *v.* Sargent, 3 Kan. 80.

[7] Werner *v.* Edmiston, 24 Kan. 147.

[8] See § 2764.

[9] Filed in court and entered upon the motion docket is notice. Ariz. Rev. Stat. 1887, par. 923.

[10] McWilliams *v.* Bannister, 42 Wis. 301, 305.

In States where a justice of the peace is authorized to entertain the motion, frequently there are to be found provisions necessitating notice.[1]

§ 2749. Notice of Intention: (*a.*) Time of Filing and Serving. — In California,[2] Idaho,[3] Montana[4] and Nevada,[5] the mover is required to file with the clerk and serve upon the adverse party, within a prescribed time after notice of the decision, a notice of intention that he will move for a new trial, designating the grounds upon which the motion will be made. This motion is insufficient if given before the decision is rendered, as there is no party "aggrieved" within the meaning of the law.[6] The mover may wait for notice in writing of the decision from the adverse party before giving notice of intention, and he is entitled to such notice, although he was present in court when the decision was rendered, and waived findings, and asked for a stay of proceedings on the judgment.[7] The notice of intention must be served within the statutory time, or the court loses its jurisdiction,[8] which cannot be restored by an order allowing the

[1] Ark. Dig. 1884, §§ 4071, 4072; Barons *v.* Anderson, 37 Kan. 399; *s. c.* 15 Pac. Rep. 226; Texas Civ. Stat. (Sayle's ed.), art. 1624.

[2] Cal. Code Civil Proc., § 659; Coveny *v.* Hale, 49 Cal. 552; 1 Haynes' N. T., § 12.

[3] Rev. Stat. Idaho 1887, § 4441; Stevens *v.* N. W. Stage Co., 1 Idaho (N. s.), 604.

[4] Rev. Stat. Mont. 1888, § 355, pt. 3d.

[5] Robinson *v.* Benson, 19 Nev. 331; *s. c.* 10 Pac. Rep. 441.

[6] Cal. Code Civ. Proc., §§ 657, 659; Dominguez *v.* Mascotti (Cal.), 15 Pac. Rep. 773; Mahoney *v.* Caperton, 15 Cal. 313; Bates *v.* Gage, 49 Cal. 126; Hinds *v.* Gage, 56 Cal. 487; Spottiswood *v.* Weir, 66 Cal. 529; *s. c.* 6 Pac. Rep. 381; Careaga *v.* Fernald, 66 Cal. 351.

[7] Biagi *v.* Howes, 66 Cal. 469. Applying for time in which to file notice and statement is not a waiver of notice of the decision required by laws of Utah of 1884, § 536. Burlock *v.* Shupe (Utah), 17 Pac. Rep. 19.

[8] Killip *v.* The Empire Mill Co., 2 Nev. 34; State *v.* First Nat. Bk., 4 Nev. 358. Notice of motion filed in clerk's office on eleventh day after notice of decision was served by mail, and the record showed that the distance between the place of deposit and the place of address of notice of decision was over seventy miles — held, under Cal. Code Civil Proc., § 1013, giving an extension of time in certain cases by mail, that the notice of the motion was filed in time. Sullivan *v.* Wallace, 73 Cal. 307; *s. c.* 14 Pac. Rep. 789. "Rules of court are but a means to accomplish the ends of justice, and

notice to be filed *nunc pro tunc*.[1] The court may, by order, extend the time for giving notice of intention, before the expiration of the statutory time, but to do so afterwards is in excess of jurisdiction and void.[2] In a case tried without a jury, the decision of the court is distinct from the findings, and the time within which notice of intention to move for a new trial must be given begins to run from the announcement of the judgment.[3]

§ **2750.** (*b.*) **Sufficiency of.** — The practice acts require the notice of intention to "designate the grounds upon which the motion will be made," and how it will be made.[4] It must be in writing in open court. Thus, a verbal notice out of court is insufficient.[5] A notice of intention to vacate the judgment is not a notice of intention to move for a new trial;[6] but the notice need not specify that the mover will ask that the former verdict or decision will be vacated.[7] "The order granting the new trial does of itself vacate the decision."[8] A notice of intention is not objectionable because it specifies that the motion will be made, not only upon the minutes of the court, but also upon a bill of exceptions and a statement of the case.[9]

it is always in the power of the court to suspend its own rules or to except a particular case from their operation, whenever the purposes of justice require it." Pickett *v.* Wallace, 54 Cal. 148; *Ibid.*

[1] Killip *v.* The Empire Mill Co., 2 Nev. 34.

[2] "The time ends with the period which the law allows for giving such notice; and when such time ends, to hold that the court or judge can extend it would be to affirm that the court or judge can dispense with the requirements of the statute." Clark *v.* Crane, 57 Cal. 629, 632. Order of court "that there be a stay of execution on the judgment in the case for a period of twenty days for the purpose of allowing the defendant to move for a new trial" is not an order extending the time for giving notice of intention to move for new trial. Stevens *v.* N. W. Stage Co., 1 Idaho (N. S.), 604.

[3] Robinson *v.* Benson, 19 Nev. 331; *s. c.* 10 Pac. Rep. 441; Emeric *v.* Alvarado, 64 Cal. 529.

[4] Deering's Codes, Civ. Proc. 1885, § 659; Rev. Stat. Mont. 1880, 1st div., § 298. Griswold *v.* Boley, 1 Mont. 545.

[5] Killip *v.* Empire Mill Co., 2 Nev. 34.

[6] Little *v.* Jacks, 67 Cal. 165.

[7] Heinlen *v.* Heilbron, 71 Cal. 557; *s. c.* 12 Pac. Rep. 673.

[8] Bauder *v.* Tyrrel, 59 Cal. 99; Fulton *v.* Hanna, 40 Cal. 278; Wittenbrock *v.* Belmer, 57 Cal. 12.

[9] Hart *v.* Kimball, 72 Cal. 283; *s. c.* 13 Pac. Rep. 852.

§ **2751.** (*c.*) **Amendments of.** — A notice of intention radically defective, cannot be amended after the time allowed by statute for giving the notice has expired.[1] Thus, where the notice states that the motion will be made upon a statement of the case, it cannot be amended so as to designate that it will be made for the same cause upon the minutes of the court.[2]

§ **2752. Enumeration of Methods.** — By the practice of the various States there are five methods by which a motion for a new trial may be made: 1, by mere application — the manner of making the ordinary motion; 2, upon affidavits; 3, upon the minutes of the court; 4, by bill of exceptions, and 5, on a statement of the case. In a majority of the States the first two modes only prevail. These methods will be considered in the order enumerated.

§ **2753. By an Ordinary Motion:** (*a.*) **Sufficieney in General.** — A majority of the practice acts require the motion to be in writing,[3] whether made in a civil or criminal case, while a few provide that in criminal cases it "may be in writing or oral;" but when oral the grounds upon which it is asked "shall be entered upon the minutes of the court."[4] In California, in

[1] "To allow a notice filed within statutory time, but which was radically defective, to be amended after the expiration of that time would be, in effect, to extend the time allowed by statute for the giving of such notices, which the courts have no power to do." Little *v.* Jacks, 67 Cal. 165.

[2] Cooney *v.* Furlong, 66 Cal. 520. See Le Roy *v.* Rassette, 32 Cal. 171; Bear River &c. Co. *v.* Boles, 24 Cal. 354; Ellsasser *v.* Hunter, 26 Cal. 279; Allen *v.* Hill, 16 Cal. 113; Thompson *v.* Lynch, 43 Cal. 482; Clark *v.* Crane, 57 Cal. 630.

[3] Ariz. Rev. Stat. 1887, par. 834; Ark. Dig. 1884, § 5154; Laws of Fla., McClellan's Dig. 1881, ch. 88, § 1; 1 Rev. Stat. Ind. 1888, §§ 562, 1842; Whaley *v.* Gleason, 40 Ind. 405; Shover *v.* Jones, 32 Ind. 141; Stevens *v.* Nevitt, 15 Ind. 224; Comp. Laws Kan. 1885, § 4119; Carroll's Ky. Civ. Code 1888, § 343; Reed *v.* Miller, 1 Bibb (Ky.), 142; McAllister *v.* Conn. Mut. Life Ins. Co., 78 Ky. 535; Pub. Stats. Mass. 1882, ch. 214, § 28; Rev. Stat. Mo. 1879, § 1965; Comp. Stat. Neb. 1887, pp. 779 and 954; Code Civ. Proc., § 317; Cr. Code, § 491; Rev. Stat Ohio, 1880, § 7351; 1 Tex. Civil Stat. (Sayle's ed.), art. 1369; 2 Howell's Annot. Mich. Stat. 1882, § 9576; Rev. Stat. Wis., § 4719.

[4] Ariz. Rev. Stat. 1887, Pen. Code, par. 1760.

criminal cases, the motion must be *viva voce*. The statute neither requires nor authorizes this motion to be made in writing.[1]

§ 2754. (*b*.) **Specifications of Errors**: (1.) **In General.**— The practice of many of the States requires that the motion shall particularly specify the reasons or grounds upon which it is made, so as to direct the attention of the trial court to the precise error complained of;[2] and it is provided in Arizona,[3] Missouri,[4] Oregon[5] and Texas,[6] that "no other grounds than those specified, shall be heard or considered." But in many States, in assigning the grounds, it is sufficient to assign the same in the language of the statute, without other or further particularity.[7] In Kentucky it is held that a general statement in the language of the statute is insufficient.[8] The grounds must be set forth with such cer-

[1] If desired the grounds of the motion and the ruling may be embodied in a bill of exceptions and can be reviewed here in no other way: People *v.* Ah Sam, 41 Cal. 645, 651. In criminal cases neither a statement nor the reporter's notes need be filed in support of the motion: People *v.* Fisher, 51 Cal. 319. It may be heard without a bill of exceptions: People *v.* Keyser, 53 Cal. 183.

[2] Rev. Stat. Ariz. 1887, Cr. Code, par. 1760; Hill *v.* Weisler, 49 Cal. 146; Coleman *v.* Gilmore, 49 Cal. 340; Laws of Fla., McClellan's Dig., 1881, ch. 88, § 1; Rooney *v.* Grant, 40 Ga. 191; 2 Starr & Curtiss' Annot. Stat. Ill., ch. 110, par. 57; Ottawa &c. R. Co. *v.* McMath, 91 Ill. 104; Putnam *v.* Hannibal &c. R. Co., 22 Mo. App. 589; Fox *v.* Young, 22 Mo. App. 386; Huppert *v.* Weisgerber, 25 Mo. App. 95; Marbourg *v.* Smith, 11 Kan. 554; Carroll's Civil Code Ky. 1888, § 340, subd. 8; Texas Penal Code, 1879, art. 780; Spencer *v.* Thistle, 13 Neb. 228; Jones *v.* Adams, 17 Nev. 84; Lamance *v.* Byrnes, 17 Nev. 197.

[3] Ariz. Rev. Stat. 1887, par. 834.

[4] General provision for all motions: 1 Rev. Stat. Mo., § 3557.

[5] 1 Hill's Annot. Laws Oregon, 1887, p. 325, § 238.

[6] 1 Sayles' Tex. Rev. Stat. 1888, art. 1369.

[7] Comp. Stat. Neb. 1887, Cr. Code, § 491; *Ibid.*, Code Civ. Proc., § 317; Walrath *v.* State, 8 Neb. 88. Many statutes contain similar provisions to the Missouri statute that all motions (whether for new trial or not) "must be accompanied by a written specification of the reasons upon which they are founded, and no reason not so specified shall be used in support of the motion." 1 Rev. Stat. Mo. 1879, § 3557. Motion was by mistake indorsed with an erroneous title. Held, that it should be treated as having been filed with proper title: Harris *v.* St. Louis &c. R. Co., 23 Mo. App. 328.

[8] Ohio &c. R. Co. *v.* Kuhn (Ky.), 5 S. W. Rep. 419.

tainty that it may be known by a person of good understanding what is relied upon.[1] The motion is sufficiently specific, if it clearly directs the court's attention to the points upon which the mover claims erroneous rulings were made, and indicates, with reasonable certainty, the particular ruling of which complaint is made.[2] A specification is a motion "because of errors of law occurring at the trial," in too general and will be disregarded.[3] Likewise specifications that there was "irregularity in the proceedings of the court,"[4] or "irregularities in the proceedings of the court by which defendants were prevented from having a fair trial,"[5] or that "the judgment of the court is contrary to law,"[6] or that "the court erred in its judgment,"[7] really mean nothing and are too indefinite to be of any avail. Where the grounds are not properly specified, affidavits will not be received in support of the motion,[8] the errors will be considered waived,[9] and the motion will be overruled.[10] An assignment that the finding of the court is contrary to law is sufficient to present the question that the trial was without arraignment or plea, where this appears from the record.[11] Where the new trial is asked on the ground of alleged fraud practiced by the successful party, the motion need not allege fraud in terms, but it is sufficient, if it sets out facts which in law constitute fraud.[12] An assignment that the verdict is not "sustained by sufficient evidence," or "is contrary to law," does not properly present the question of excessive damages.[13] The proper specification in an action for tort, where it is sought to present the question of excessive damages, is that

[1] Louisville &c. R. Co. *v.* McCoy, 81 Ky. 403.

[2] Irwin *v.* Smith, 72 Ind. 482.

[3] Meaux *v.* Meaux, 81 Ky. 475.

[4] Tomer *v.* Densmore, 8 Neb. 384.

[5] Lowrie *v.* France, 7 Neb. 192.

[6] Howcott *v.* Kilbourn, 44 Ark. 213; Ferguson *v.* Ehrenberg, 39 Ark. 420.

[7] Rhorer *v.* Brockhage, 15 Mo. App. 16, 25.

[8] Beal *v.* Stone, 22 Iowa, 447.

[9] Slater *v.* Sherman, 5 Bush (Ky.), 206; Louisville &c. R. Co. *v.* Mahony, 7 Bush (Ky.), 235; McLain *v.* Dibble, 13 Bush (Ky.), 297.

[10] Rooney *v.* Grant, 40 Ga. 191.

[11] Bowen *v.* State, 108 Ind. 411; Tindall *v.* State, 71 Ind. 314, Shoffner *v.* State, 93 Ind. 519.

[12] Lafever *v.* Stone, 55 Iowa, 49.

[13] Ray *v.* Thompson, 26 Mo. App. 431.

"the damages are excessive," [1] and in actions on contracts "the assessment of the amount of the recovery." [2]

§ **2755.** (2.) **Insufficient Evidence.** — Where the motion is made on the ground that the evidence is insufficient to support the verdict or judgment, or that the verdict and judgment are against the evidence, it has been held that the bill of exceptions accompanying the motion should embody all the evidence given at the trial.[3] Specifications that the evidence is insufficient to justify the judgment,[4] or that the finding was for the wrong party,[5] or "that the first finding is not sustained by the evidence," or "that the second finding is not sustained by the evidence" (with reference to the findings of the court), etc.,[6] — have been adjudged too general to present the question of the sufficiency of evidence. But it has been held that assignments "that the verdict is contrary to the evidence," [7] or "that the decision is not sustained by the evidence," [8] sufficiently presents a statutory cause "that the verdict or judgment is not sustained by the evidence." An assignment in the language of the statute, where it is so provided, is sufficient for this ground.

§ **2756.** (3.) **In Admitting and Excluding Evidence.**—Where the motion is made on the ground that errors were committed by the court in admitting improper evidence, or in excluding proper evidence, it must clearly designate or specify with reasonable certainty, such evidence.[9] It is not sufficient merely to refer to

[1] Lake Erie &c. R. Co. *v.* Acres, 108 Ind. 548; *s. c.* 9 N. E. Rep. 453; Dix *v.* Akers, 30 Ind. 431; Frank *v.* Kessler, 30 Ind. 8.

[2] Lake Erie &c. R. Co. *v.* Acres, 108 Ind. 548; *s. c.* 9 N. E. Rep. 453.

[3] Beal *v.* Stone, 22 Iowa, 447.

[4] Kelly *v.* Mack, 49 Cal. 523.

[5] Heine *v.* Morrison, 13 Mo. App. 577.

[6] Eddelbuttel *v.* Durrell, 55 Cal. 277.

[7] Collins *v.* Maghee, 32 Ind. 268.

[8] "Decision" as here used is synonymous with "finding," the difference being only technical: Weston *v.* Johnson, 48 Ind. 1.

[9] Reeves *v.* Plough, 41 Ind. 204; Grant *v.* Westfall, 57 Ind. 121; Coryell *v.* Stone, 62 Ind. 307; Galvin *v.* State, 64 Ind. 96; Evans *v.* State, 67 Ind. 68; Louisville &c. R. Co. *v.* Thompson, 107 Ind. 442; Sertel *v.* Graeter, 112 Ind. 117; *s. c.* 11 Western Rep. 234; Freitag *v.* Burk, 45 Ind. 38; Sparks *v.* Heritage, 45 Ind. 66; Rogers *v.* Rogers, 46 Ind. 1.

it as "the offer written in the evidence."[1] Assignments "that the court erred in admitting and excluding evidence,"[2] or that the "court erred in excluding material and competent evidence offered by defendant,"[3] or that "the court erred in refusing to admit legal testimony offered by plaintiff,"[4] — point to nothing and are too indefinite. But, as will be shown hereafter, the motion may refer to a bill of exceptions *previously* filed for a statement of the particular evidence, admitted or rejected, and if, by such reference, the particular evidence clearly and explicitly appears, it is sufficient to present the question;[5] *aliter*, if the reference is to a bill filed after the motion.[6]

§ **2757.** (4.) **In Instructions.** — It has been held that, where a new trial is asked upon the ground of alleged errors of the court in giving improper, or in refusing proper instructions, the bill of exceptions accompanying the motion should embody such instructions.[7] But here the same rule applies as that which governs the specification of the motion in the exclusion and rejection of evidence; and it is sufficient if the instructions to which objections are made, are clearly pointed out,[8] either by number or by some other appropriate method of identification.[9] Thus, an assignment that the court committed "error in refusing to give to the jury instructions numbered one to eleven, inclusive, asked by defendant," is sufficient.[10] Assignments that "the instructions given by the court to the jury are erroneous in this: that the same are contrary to law," and that "the court erred in instructing the jury,"[11] or "that error of law occurred at the

[1] McGee *v.* Robbins, 58 Ind. 463.

[2] Edmonds *v.* State, 34 Ark. 720.

[3] Parks *v.* Hill, 45 Ind. 172.

[4] Miller *v.* Lebanon Lodge, 88 Ind. 286. See Musselman *v.* Musselman, 44 Ind. 106.

[5] Elliott *v.* Russell, 92 Ind. 526.

[6] *Ib.*; North-W. Ins. Co. *v.* Hazelett, 105 Ind. 212; Harvey *v.* Huston, 94 Ind. 527; Cain *v.* Goda, 84 Ind. 209; Arbuckle *v.* Biederman, 94 Ind. 169.

[7] Beal *v.* Stone, 22 Iowa, 447.

[8] Grant *v.* Westfall, 57 Ind. 121; Reeves *v.* Plough, 41 Ind. 204.

[9] Weir *v.* Burlington &c. R. Co., 19 Neb. 212; Douglass *v.* Blankenship, 50 Ind. 160.

[10] Nofsinger *v.* Reynolds, 52 Ind. 218.

[11] Bartholomew *v.* Langsdale, 35 Ind. 278.

trial of the cause, which was excepted to at the time by the plaintiff, in this: that the court, in giving instructions to the jury, gave instructions contrary to law," have been held to be sufficiently specific to raise the question of the correctness of any instruction given.[1] An assignment simply that "the charge is erroneous" is clearly bad.[2] So, under an assignment of "errors of law occurring at the trial," the sufficiency of the instructions cannot be considered,[3] unless errors appear in the bill of exceptions.[4]

§ 2758. By Motion Supported by Affidavits: (*a.*) In General. — By the practice of a majority of the States, where the grounds of new trial are other than that the verdict or judgment are contrary to the law or evidence, or that the trial court erred in some matter of law, the motion must be supported by affidavit, unless it is made upon the minutes of the court, by bill of exceptions or a statement of the case, according to the practice of many States. The grounds usually enumerated are (1) irregularities; (2) misconduct of the jury or prevailing party (in criminal case the misconduct of the State's witnesses is generally named); (3) accident or surprise, which ordinary prudence could not have guarded against; and (4) newly discovered evidence, material to the party applying which he could not, with reasonable diligence, have discovered and produced at the trial. Many States include all the grounds, others only part of them.[5] In

[1] Dawson *v.* Coffman, 28 Ind. 220. See Horton *v.* Wilson, 25 Ind. 316. *Contra,* Robinson *v.* Hadley, 14 Ind. 417; Elliott *v.* Woodward, 18 Ind. 183; Snodgrass *v.* Hunt, 15 Ind. 274; Horne *v.* Williams, 23 Ind. 37.

[2] Darnell *v.* State, 15 Tex. App. 70.

[3] Hastings &c. R. Co. *v.* Ingalls, 15 Neb. 123.

[4] Cleveland Paper Co. *v.* Banks, 15 Neb. 20. See Weybright *v.* Fleming, 40 Ohio St. 52; Baker *v.* Pendergast, 32 Ohio St. 494.

[5] Ark. Dig. 1884, § 5154; Rev. Stat. Idaho, 1887, § 4440; Deering's Cal. Code Civ. Proc., § 658; Rev. Stat. Ind. 1888, § 562; Miller's Annot. Code Iowa, § 2838; Patterson *v.* Jack, 59 Iowa, 632; Comp. Laws Kan. 1885, § 4116; Sloane *v.* Sloane, 2 Metc. (Ky.) 341; Comp. Stat. Neb. 1887, Code Civ. Proc. 317; Gen. Stat. Nev. 1885, § 3218; Prac. Act Nev., § 196; State *v.* Stanley, 4 Nev. 71; in Ohio by affidavits or depositions: R. S. Ohio, 1880, § 5308; 1 Hill's Annot. Laws of Oregon, 1887, p. 325, § 238. For N. Y. Practice, see Baylies on N. T. 523. *California* — See 1 Hayne, N. T., § 135, *et seq.;* 3 Estee's Pl. (3d ed.), § 4854.

the absence of statutes requiring affidavits in support of the motion, by the practice of many States, they are held necessary. Thus, in Missouri the statute does not provide for affidavits,[1] yet, as matter of practice in that State, they are always demanded where the motion is based upon newly discovered evidence.[2] In the United States courts it is not necessary that the motion be heard on a settled case, although the State practice requires it.[3] The recollection of the court may be aided by affidavits and briefs of counsel.[4]

§ 2759. (*b.*) **Sufficiency of Motion.** — What has been said heretofore as to the sufficiency of the ordinary motion[5] applies where the motion is made upon affidavits. Where the motion is made upon affidavits, on the ground of accident or surprise, they must show that the mover could not, by reason of the alleged accident or surprise, with reasonable diligence, properly defend the action.[6] Where the ground is misconduct of the jury, the motion must particularly state the nature of the alleged misconduct, when and where it occurred, give the names of the participating jurors,[7] or otherwise clearly identify them;[8] and it must also affirmatively allege that the mover and his counsel were

Wisconsin — Upon grounds of newly discovered evidence, the motion may be heard without bill of exceptions, upon affidavits and the papers in the action; if also based upon evidence or part of it, taken on the trial, the notice of motion may so state, and it shall be sufficient if the judge's minutes, or a transcribed copy of the phonographic reporter's minutes be present for reference at the hearing of the motion. But judge may direct that a bill of exceptions be settled for the hearing, and may continue hearing till such bill is settled. Rev. Stat. Wis. 1878, § 2879.

[1] Leonard *v.* Schuler, 34 Mo. 475.

[2] Howland *v.* Reeves, 25 Mo. App. 458.

[3] "That rule is established as a means of preparing for a review of the action of the trial court on the motion in some appellate court. In the courts of the United States no writ of error lies to the action of a court in granting or overruling a motion for a new trial; such a statement is therefore useless." Per Mr. Justice Miller in Haynes *v.* Chicago &c. R. Co. (C. C. D. Minn.), 23 Fed. Rep. 18.

[4] Chandler *v.* Thompson (C. C. U. S. W. D. N. C.), 30 Fed. Rep. 38.

[5] *Ante*, § 2753.

[6] Richards *v.* Nuckolls, 19 Iowa, 555.

[7] Lenox *v.* Knox &c. R. Co., 62 Me. 322.

[8] Harper *v.* State ex rel., 101 Ind. 109.

ignorant of such misconduct until after the trial.[1] Where the ground is newly discovered evidence, it must affirmatively appear by the motion that diligence was exerted to obtain the same for use at the trial.[2] Reasonable diligence is sufficient.[3] In some States, where it is considered sufficient to allege the ground in the language of the statute, the facts constituting the diligence need not be set out in the motion.[4] Others hold that what was done to produce the testimony at the trial is matter of evidence, and may be stated in the accompanying affidavits.[5] An allegation that the party "diligently searched for the testimony to establish the defense" is sufficient.[6] The particular facts should be stated so that the court may judge whether the conclusions stated are supported by the facts.[7]

[1] Flesher *v.* Hale, 22 W. Va. 45, 50.

[2] Halliburton *v.* Johnson, 30 Ark. 723; Peterson *v.* Gresham, 25 Ark. 380; Reno *v.* Robertson, 48 Ind. 106; Stuckslager *v.* McKee, 40 Iowa, 212; First National Bk. *v.* Murdough, 40 Iowa, 26; Miller *v.* Albaugh, 24 Iowa, 128; Carson *v.* Henderson, 34 Kan. 406; Ewing *v.* M'Connell, 1 A. K. Mar. (Ky.) 188; Adams *v.* Ashby, 2 Bibb (Ky.), 287; Evans *v.* Christopherson, 24 Minn. 330; Laurel *v.* Bank, 25 Minn. 48; Roemmich *v.* Wamsganz, 8 Mo. App. 576; Howland *v.* Reeves, 25 Mo. App. 458; Williams *v.* State, 4 Tex. App. 255; Collins *v.* State, 6 Tex. App. 72; Snider *v.* Myers, 3 W. Va. 195; Moss *v.* Vroman, 5 Wis. 147, 149; People *v.* Howard (Cal.), 16 Pac. Rep. 394; Cleveland *v.* Sims, 69 Tex. 153; *s. c.* 6 S. W. Rep. 634.

[3] Stineman *v.* Beath, 36 Iowa, 73.

[4] Comp. Stat. Neb. 1887, Cr. Code, § 491; *Ibid.;* Code Civ. Proc., § 317; Walrath *v.* State, 8 Neb. 88.

[5] Woodman *v.* Dutton, 49 Iowa, 398. *Contra,* Cohol *v.* Allen, 37 Iowa, 449.

[6] Pinschower *v.* Hanks, 18 Nev. 99.

[7] *Ibid.;* Snider *v.* Myers, 3 W. Va. 195; Bailey *v.* Landingham, 52 Iowa, 415; Allen *v.* Bond, 112 Ind. 523; *s. c.* 14 N. East. Rep. 492. Newly discovered evidence insufficient in particular case in suit for divorce. Harnett *v.* Harnett, 59 Iowa, 401. As to the sufficiency of petition on ground made after the term, see § 2764, *After Term.* The following observations are pointed: "Motions of this kind ought to be received with great caution, because there are few cases tried, in which something new may not be hunted up, and because it tends very much to the introduction of perjury, to admit new evidence after the party who has lost the verdict has had an opportunity of discovering the points both of his adversary's strength and his own weakness." Moore *v.* Phila. Bk. (Pa.), 5 S. & R. 42. "It is infinitely better that a single person should suffer mischief than that every man should have it in his power, by keeping back part of his evidence and then swearing it was mislaid, to destroy verdicts and introduce new trials at his pleasure." "Applications for this cause are regarded with distrust and disfavor. The temptations are so

§ 2760. (c.) **The Affidavits: 1. Time of Filing.** — Where the statute prescribes the time of filing the affidavits, they must be filed within that period or they will be disregarded. In many States the time is limited by statute. Thus, in California[1] and Idaho[2] they must be filed within ten days after serving notice of intention to move for a new trial, or within such further time, not exceeding twenty days, as the court may by order grant. In others the time is prescribed by rule of court.[3] Frequently they are not filed until at the hearing of the motion,[4] and probably this is the practice generally. If they cannot be prepared within the time named, or for the hearing, the proper procedure is to ask for further time, or for a continuance of the hearing of the motion, which will usually be granted where good reasons appear therefor, it being considered in most States a matter of judicial discretion.[5] The statutes or the general practice permits *counter-affidavits* to be presented,[6] which, in California and Idaho, must be filed within ten days after the mover's affidavits are served.[7]

strong to make a favorable showing, after a defeat in an angry and bitter controversy involving considerable interests, and the circumstance that testimony has just been discovered, when it is too late to introduce it, so suspicious, that courts require the very strictest showing to be made of diligence and all other facts necessary to give effect to the claim." Baker *v.* Joseph, 16 Cal. 173, 180. "The law favors the diligent and punishes the sluggards. Its policy is to compel parties to be ready for trial and to try their causes at the time appointed, and to so try them as that all the evidence they can procure shall be introduced and the litigation finally terminated. A party who seeks to reopen the litigation on the ground that he has discovered new evidence must, for the reasons stated, be prepared to establish every essential element of such a case strongly, clearly and satisfactorily." Hines *v.* Driver, 100 Ind. 315, 321.

[1] Deering's Annot. Code Civ. Proc. Cal., § 659, par. 1; Harper *v.* Minor, 27 Cal. 108.

[2] Rev. Stat. Idaho, 1887, § 4441.

[3] Properly disregarded if not filed within time prescribed by rule of court: Carter *v.* Prior, 8 Mo. App. 577; Roemmich *v.* Wainsganz, 8 Mo. App. 576.

[4] Howland *v.* Reeves, 25 Mo. App. 458.

[5] Shipman *v.* State, 38 Ind. 549; Gibson *v.* State, 9 Ind. 264; Howland *v.* Reeves, 25 Mo. App. 458.

[6] Parker *v.* Hardy, 24 Pick. (Mass.) 246; Burr *v.* Palmer, 23 Vt. 244; McGavock *v.* Brown, 4 Humph. (Tenn.) 251; Pomeroy *v.* Ins. Co., 2 Caines (N. Y.), 260; 2 R. S. Ohio, 1880, § 5308; Finch *v.* Green, 16 Minn. 355; Burlingame *v.* Corwee (R. I.), 12 Atl. Rep. 234; *s. c.* 5 N. Eng. Rep. 664.

[7] Deering's Annot. Code Civ. Proc. Cal. 659, par, 1; R. S. Idaho. 1887, § 4441, par. 1.

§ 2761. (2.) **Sufficiency in General.** — Generally an affidavit made by the mover, if it contains sufficient facts, is all that is required; but where the facts are doubted, the court may require corroborative affidavits.[1] Thus, an affidavit by the mover that a juror was related to the adversary party, has been held sufficient.[2] But where there are several plaintiffs, an affidavit by one of them, who does not appear to have had the exclusive management of the case, is insufficient;[3] yet, if it is made by the one who controlled the case, it is sufficient.[4] Where the *cestui que trust* is better informed of the facts of the cause, having managed it, than the trustee, the affidavit should be made by him.[5] It may be stated, as a general proposition, that the affidavits, to be sufficient, should contain sufficient facts to warrant the granting of a new trial. Where the motion is based upon the ground of the absence of material witnesses, the affidavits should state what the witnesses would prove, and give good reasons for their non-appearance at the trial, and for not asking for a continuance of the case.[6] Where the application is made upon the ground of surprise, the surprise must be stated in detail in the affidavits. It is not sufficient to state it generally, but the facts constituting such surprise must fully appear. Thus, where the surprise is based on the statement of a witness, the affidavit should show that the witness, by previous statements, had deceived the party, and it should also show that the facts can be proved to be different from such witness' statements on trial.[7] And where the charge is that the cause was unexpectedly called for trial, the affidavit

[1] Ewing *v.* Price, 3 J. J. Marsh. (Ky.) 521; Baker *v.* Joseph, 16 Cal. 180; Arnold *v.* Skaggs, 35 Cal. 684. Where a rule of court requires that the motion must be made upon deposition taken on notice, *ex parte* affidavits offered in support of the motion will be rejected. Fowler *v.* Colten, 1 Pinney (Wis.), 331, 339; Pemberton *v.* Johnson, 113 Ind. 538; *s. c.* 15 N. E. Rep. 801.

[2] Dailey *v.* Gaines, 1 Dana (Ky.), 529.

[3] Holmes *v.* McKinney, 4 T. B. Mon. (Ky.) 5.

[4] South *v.* Thomas, 7 T. B. Mon (Ky.) 60.

[5] Finley *v.* Nancy Tyler, 3 T. B Mon. (Ky.) 402.

[6] Picket *v.* Richet, 2 Bibb (Ky.) 179; Jones *v.* Gaither, 3 A. K. Mar. (Ky.) 166; South *v.* Thomas, 7 T. B. Mon. (Ky.) 61; Bright *v.* Wilson, 7 B. Mon. (Ky.), 123.

[7] Theobald *v.* Hare, 8 B. Mon. (Ky.) 43.

must disclose an available defense.[1] So, on the ground of the rejection by the court of a deed, because of lack of proper authentication, the affidavit must show that this defect was not discovered until after the trial had commenced, and that such defect could be supplied.[2] So, on the sudden departure of a witness, the affidavits should fully disclose the facts to be proved by such witness.[3] So, because of the introduction of unexpected testimony, the affidavits should set forth the particular points of evidence, and also the means by which the mover expected to counteract it in another trial.[4] So, where it is put upon the ground of variance between the pleading and proof the affidavits must not only show that the party was misled, but also in what respect.[5]

§ 2762. (5.) **Newly Discovered Evidence.**—Without the requisite affidavit of the aggrieved party or his counsel, the motion on the ground of newly discovered evidence will not be considered.[6] The affidavit should state (1) that the applicant has been vigilant in preparing his cause for trial; (2) that new and material facts have been discovered since the trial, which could not by reasonable diligence have been produced at the trial, stating what the evidence is; (3) that such evidence will tend to prove facts, which were not directly in issue on the former trial, or were not then known or investigated by proof, or that it will produce a different result at a second trial; and (4) such affidavit should give the name or names of the witness or witnesses by whom such facts can be proved.[7] The affidavit must not only show that the

[1] Embry *v.* Devinney, 8 Dana (Ky.), 203.

[2] Hunt *v.* Owings, 4 T. B. Mon. (Ky.) 20.

[3] Reed *v.* Miller, 1 Bibb (Ky.), 142.

[4] Heath *v.* Conway, 1 Bibb (Ky.), 399; Smith *v.* Morrison, 3 A. K. Mar. (Ky.) 81.

[5] Shelton *v.* Durham, 76 Mo. 434; *s. c.* 7 Mo. App. 585.

[6] Weeks *v.* State (Ga.), 3 S. E. Rep. 323; Hughes *v.* People, 116 Ill. 330; *s. c.* 6 N. E. Rep. 55.

[7] Ewing *v.* McConnell, 1 A. K. Mar. (Ky.) 188; Adams *v.* Ashby, 2 Bibb (Ky.), 287; Ewing *v.* Price, 3 J. J. Mar. (Ky.) 522; Holmes *v.* McKinney, 4 T. B. Mon. (Ky.) 7; Varner *v.* Core, 20 W. Va. 472; Richardson *v.* Backus, 1 Johns. (N. Y.) 59; McCombs *v.* Chandler, 5 Harr. (Del.) 423; Sarah *v.* State, 28 Ga. 576; Fuller *v.* Harris, 29 Fed. Rep. 814; Burlingame *v.* Corwee (R. I.), 12 Atl. Rep. 234; *s. c.* 5 N. Eng. Rep. 664.

new evidence was discovered too late to have been used at the trial, but that it was of such a nature, or so concealed, that it could not have been, by the use of legal diligence, produced at the trial.[1] It is indispensable that it should contain *facts* showing diligence.[2] In other words, it should disclose what particular efforts the mover made to ascertain and produce the testimony.[3] Allegations that the party was "unable to produce the desired testimony," etc.,[4] or that he had used reasonable diligence to produce the same,[5] or that he could not by reasonable diligence obtain it,[6] — are fatally defective, being mere conclusions. His ability or inability to obtain it is a question of fact, for the court to determine from the proof submitted in support of the motion. So, an affidavit, that the party had made every effort to ascertain certain facts prior to the trial, by inquiries of several persons, but which does not give the names of the persons of whom such inquiries were made, does not show sufficient diligence.[7] Generally the existence of newly discovered evidence cannot be proved by the mere *ex parte* affidavit of the party or his counsel.[8] The affidavits of the witnesses who will testify to the alleged newly discovered facts must be produced, if possible, or their absence satisfactorily explained.[9] This is in

[1] Denny *v.* Wickliffe, 1 Metc. (Ky.) 224; Bronson *v.* Green, 2 Duv. (Ky.) 238.

[2] Root *v.* Brewster (Iowa), 36 N. W. Rep. 649; Greenwalt *v.* Tucker, 10 Fed. Rep. 884; Varner *v.* Core, 20 W. Va. 472; Poullain *v.* Poullain (Ga.), 4 S. E. Rep. 81; Madden *v.* Shapard, 3 Tex. 49, Suggs *v.* Anderson, 12 Ga. 461; Pleasant *v.* State, 13 Ark. 360; Faiar *v.* State, 3 How. (Miss.) 422; Smith *v.* Williams, 11 Kan. 104; Murphy *v.* State, 38 Ark. 514; Snider *v.* Myers, 3 W. Va. 195; Butler *v.* Vassault, 40 Cal. 74; Carson *v.* Cross, 11 Ia. 463; Moore's Exec. *v.* Mills, 69 Tex. 109; *s. c.* 5 S. W. Rep. 675.

[3] Burnley *v.* Rice, 21 Tex. 171; Edmiston *v.* Garrison, 18 Wis. 594.

[4] Heady *v.* Fishburn, 3 Neb. 263, 266.

[5] Boyd *v.* Sanford, 14 Kan. 280.

[6] Tomer *v.* Densmore, 8 Neb. 384.

[7] Smith *v.* Wagaman, 58 Ia. 11.

[8] Shields *v.* State, 45 Conn. 266; State *v.* Kellerman, 14 Kan. 135; Glascock *v.* Manor, 4 Tex. 7; State *v.* McLaughlin, 27 Mo. 111; White *v.* Wallen, 17 Ga. 106.

[9] Smith *v.* Cushing, 18 Wis. 295; Blood *v.* Whitman, 3 Pinney (Wis.), 54; Strader *v.* Goff, 6 W. Va. 257; Sheppard *v.* Sheppard, 10 N. J. L. 250; Mann *v.* Clifton, 3 Blackf. (Ind.) 304; Bright *v.* Wilson, 7 B. Mon. 122; Giles *v.* State, 6 Ga. 276; Suggs *v.* Anderson, 12 Ga. 461; Hare *v.* Sproul, 2 How. (Miss.) 772; Blood *v.* Whitman, 3 Chand. (Wis.) 54; Moore's Exec. *v.* Mills, 69 Tex. 109; *s. c.* 5 S. W. Rep. 675.

accordance with the well known rule of law that requires the best evidence of which the case is susceptible.[1] It also prevents prevarication, by binding the witnesses to state only what they are prepared to swear to at the trial. "Affidavits are required, as well that the statement may be made with proper deliberation, as that they may come supported by the solemn sanctions of a judicial oath."[2] Thus, the affidavit of the attorney of the mover that certain witnesses would testify in a particular manner is insufficient.[3] So, in criminal cases, affidavits by the accused, when uncorroborated, are ordinarily rejected, or are received with caution: alone, they are held to be insufficient.[4] But where the affidavit of the mover states that the witness is out of the State, and his affidavit cannot be procured, this is a sufficient excuse.[5]

§ 2763. **Other Methods.** — In California and other States, for grounds other than those upon affidavits, already stated, the motion for a new trial may be made at the option of the moving party, either (1) upon the minutes of the court, or (2) a bill of exceptions, or (3) a statement of the case.[6] The grounds generally embraced are (1) excessive damages, (2) insufficiency of evidence, (3) verdict against law, and (4) errors in law occurring at the trial.[7] When the motion is made upon the minutes, reference may be had to any depositions, documentary evidence, or to the phonographic

[1] Eddy *v.* Caldwell, 7 Minn. 225, 233.

[2] Dunbar *v.* Hollinshead, 10 Wis. 505.

[3] Keough *v.* McNitt, 6 Minn. 513; Arnold *v.* Skaggs, 35 Cal. 684.

[4] Runnells *v.* State, 28 Ark. 121; Jackson *v.* State, 29 Ark. 62; Robinson *v.* State, 33 Ark. 180; Campbell *v.* State, 38 Ark. 498.

[5] Smith *v.* Cushing, 18 Wis. 295. See Helms *v.* Chadbourne, 48 Wis. 690.

[6] Cal. Code Civ. Proc., § 658; 3 Estee's Pl. (3rd ed.), § 4854; Comp. Stat. Mont. 1888, p. 135, Code Civ. Proc., § 297. For other causes, may be, "at the option of the moving party" either (1) upon the records, and files in the action, (2) or the minutes of the court, or (3) a bill of exceptions, or (4) a statement of the case. Rev. Stat. Idaho, 1887, § 4440. Judge before whom issue is tried may, in his discretion entertain motion, to be made on his minutes, (1) on exceptions, (2) verdict contrary to law, (3) contrary to evidence, or (4) excessive or inadequate damages. Rev. Stat. Wis. 1878, § 2878; Stat. Minn. 1881, ch. 66, § 254, p. 747.

[7] 1 Hayne's N. T., § 162.

report of the testimony on file.[1] The methods of making the motion on a bill of exceptions[2] and upon a statement of the case are particularly pointed out by the statutes of the States where the practice exists. Many recent cases, illustrating the method by which a statement of the case is to be prepared, will be found in the foot-notes.[3]

[1] Cal. Code Civ. Proc., § 660. Where made on minutes of court must be at term at which trial took place: Dunbar *v.* Hollinshead, 10 Wis. 505, 508.

[2] Cal. Civil Code, §§ 658, 659; Hayne on New Trial, §§ 141, 142, 257–260; Stat. R. S. Idaho, 1887, § 4441; Stat. Minn. 1881, ch. 66, § 255; Marye *v.* Strouse, 5 Fed. Rep. 494, 498.

[3] *California.* — Deering's Annot. Code, Civil Proc., § 659; Du Brutz *v.* Jessup, 54 Cal. 118; Sullivan *v.* Wallace, 73 Cal. 307; *s. c.* 14 Pac. Rep. 789, 790; People *v.* Martin, 6 Cal. 477; Hayne, New Trial, § 146; Valentine *v.* Stewart, 15 Cal. 396; Young *v.* Rosenbaum, 39 Cal. 646; Chase *v.* Evoy, 58 Cal. 348; Biagi *v.* Howes, 66 Cal. 469; Frazer *v.* Superior Court, 62 Cal. 49. See People *v.* Getty, 49 Cal. 584; People *v.* Sprague, 53 Cal. 422; Bennett *v.* Hobro, 72 Cal. 178; *s. c.* 13 Pac. Rep. 473; Menk *v.* Home Mut. Ins. Co., 14 Pac. Rep. (Cal.), 837; Smith *v.* City of Stockton, 73 Cal. 204; *s. c.* 14 Pac. Rep. 675; Hayne, New Trials, § 160, p. 479; Pendergrass *v.* Cross (Cal.), 15 Pac. Rep. 63; Spencer *v.* Long, 39 Cal. 700. *Dakota.* — Golden Terra Mining Co. *v.* Smith, 2 Dak. 377. *Georgia.* — By brief of evidence: Turner *v.* Rawson, 5 Ga. 399; Dun *v.* Crozier, 17 Ga. 70; Candler *v.* Hammond, 23 Ga. 493, 499; Hamilton *v.* Conyers, 25 Ga. 158; Goodwyn *v.* Hightower, 30 Ga. 249; Vanover *v.* Turner, 41 Ga. 577; Middlebrooks *v.* Middlebrooks, 57 Ga. 193; Ford *v.* Holmes, 61 Ga. 419; Stone *v.* Taylor, 63 Ga. 309; Maynard *v.* Head (Ga.), 1 S. E. Rep. 273; Williams *v.* Central R. (Ga.), 3 S. E. Rep. 88. *Idaho.* — Stevens *v.* N. W. Stage Co., 1 Idaho (N. S.), 604. *Minnesota.* — Taylor *v.* Parker, 18 Minn. 79; Cook *v.* Finch, 19 Minn. 407. *Montana.* — Mont. Comp. Stat. 1888, div. 1, § 298; Raymond *v.* Thexton (Mont.), 17 Pac. Rep. 258; Griswold *v.* Boley, 1 Mont. 545. *Nevada.* — Gen. Stat. 1885, § 3219; Civil Prac. Act Nev., § 197; Howard *v.* Winters, 3 Nev. 539; Elder *v.* Frevert, 18 Nev. 278; Harrison *v.* Lockwood, 14 Nev. 263; Williams *v.* Rice, 13 Nev. 235; Clark *v.* Strouse, 11 Nev. 76; Earles *v.* Gilham (Nev.), 14 Pac. Rep. 586, 587; Elder *v.* Shaw, 12 Nev. 78; Caldwell *v.* Greely, 5 Nev. 258 (citing Sanchez *v.* McMahon, 35 Cal. 218); Vilhac *v.* Biven, 28 Cal. 409; Fleeson *v.* Savage M. Co., 3 Nev. 157; Ellis *v.* Central &c. R. Co., 5 Nev. 255; White *v.* White, 6 Nev. 20; Harrison *v.* Lockwood, 14 Nev. 263; Tull *v.* Anderson, 15 Nev. 426; Golden Fleece &c. Co. *v.* Cable &c. Co., 15 Nev. 450; Robinson *v.* Benson, 19 Nev. 331; *s. c.* 10 Pac. Rep. 441; Corbett *v.* Job, 5 Nev. 201; McWilliams *v.* Herschman, 5 Nev. 263; Meadow Val. &c. Co. *v.* Dodds, 6 Nev. 261; Sherman *v.* Shaw, 9 Nev. 148; Lamance *v.* Byrnes, 17 Nev. 201. *Texas.* — Proctor *v.* Wilcox, 4 S. W. Rep. 375; *s. c.* 68 Tex. 219. *Utah.* — Snow *v.* Crowe, 3 Utah, 172; *s. c.* 2 Pac. Rep. 209. *Wisconsin.* — Dunbar *v.* Hollinshead, 10 Wis. 505, 508.

§ **2764. Method when Motion made After Term.** — Where the application is not made until after the term at which the trial took place, it must be by petition or complaint, filed as in ordinary actions, upon which summons shall issue, notice to be given, etc. The facts stated in the petition are considered denied without answer.[1] As has been already seen, some good reason must appear why the application was not made during the term.[2] The allegations as to the exertion of diligence are substantially the same as those required in making the motion upon the ground of newly discovered evidence, already stated.[3] The petition should be entitled as in the original case,[4] and need only show the facts upon which a new trial is asked, as in the other cases.[5] It should state the testi-

[1] Twenty days' notice to be given: Ga. Code, 1882, § 3721; R. S. Ind. 1888, § 563. The Iowa statute, which is a good example of the statutes of other States, provides: "Where the grounds for a new trial could not with reasonable diligence have been discovered before, but are discovered after the term, at which the verdict, report of referee or decision was rendered or made, the application may be made by petition, filed as in other cases, not later than the second term after the discovery, on which notice shall be served and returned, and the defendant held to appear as in the original action. The facts stated in the petition, shall be considered as being denied without answer. The case shall be tried, as other cases, by ordinary proceedings, but no petition shall be filed more than one year after the final judgment was rendered." Miller's Annot. Code, 1886, § 3155; Alger *v.* Merritt, 16 Iowa, 121; First Nat. Bk. *v.* Murdough, 40 Iowa, 26; Gray *v.* Coan, 48 Iowa, 424; Bond *v.* Epley, 48 Iowa, 600; Eckel *v.* Walker, 48 Iowa, 225. Where the original proceeding was by attachment, notice of petition for new trial by plaintiff in original writ may be served in the same manner as the original notice in an attachment proceeding, *i.e.*, by personal service or publication on defendant without the State: Darrance *v.* Preston, 18 Iowa, 396; Comp. Law Kan. 1885, 4120; Civil Code Ky., § 344. Not required to be filed in open court: Scott *v.* Scott's Exc., 82 Ky. 328; Comp. Laws Neb. 1881, p. 573, § 318; Laws of Ohio, 1880, § 5309; R. S. Wis. 1878, § 2879; Smith *v.* Smith, 51 Wis. 665; Jones *v.* Evans, 28 Wis. 168; Carroll *v.* More, 30 Wis. 574; Carroll *v.* Hangartner, 66 Wis. 511, 512.

[2] Ga. Code, § 3721.

[3] Burlington &c. R. Co. *v.* Dobson, 17 Neb. 450; Nordam *v.* Stough, 50 Ind. 280; Woodman *v.* Dutton, 49 Iowa, 398. Allegation that the party "has learned since the term of the court and trial" of new evidence, insufficient: Axtell *v.* Warden, 7 Neb. 186.

[4] Hintrager *v.* Sumbargo, 54 Iowa, 604.

[5] Stineman *v.* Beath, 36 Iowa, 73.

mony, or its purport with such fullness as will show the nature of the case, and bring out clearly the points on which the rulings were given or refused, so that the court can see whether any error was committed which calls for correction.[1] Where the application is made upon the ground of newly discovered evidence, in addition to the allegation of diligence, the petition should state the issues and evidence of the former trial, together with the new evidence,[2] and it being an independent proceeding, a defective petition may be taken advantage of by demurrer.[3]

§ 2765. Real Actions. — In actions for the trial of title to real property, one new trial is in some States granted to the unsuccessful party as a matter of right, upon mere application, and generally payment of costs of the former suit is required. In these actions a new trial being a matter of course, the application is *ex parte*, and generally requires no notice;[4] though in a few States notice is necessary.[5] In many States these motions are governed by the same rules as motions in other cases, and are to be made "upon written grounds filed at the time of making the motion."[6] In others

[1] Barrows *v.* Keene, 15 R. I. 484; *s. c.* 8 Atl. Rep. 713. Petition charging that the attorney of defendant procured a change in the entry of the judgment after the record had been read and approved by the court, sufficient to set out fraud. Lafever *v.* Stone, 55 Iowa, 49. See Manwell *v.* Turner, 25 Kan. 426; Mehner *v.* Thieme, 15 Kan. 368; Hines *v.* Driver, 100 Ind. 315.

[2] Roush *v* Layton, 51 Ind. 106; Carver *v.* Compton, 51 Ind. 451; Blackburn *v.* Crowder, 110 Ind. 127; Toney *v.* Toney, 73 Ind. 34; Wall *v.* State ex rel., 80 Ind. 146; McCauley *v.* Murdock, 97 Ind. 229; Hines *v.* Driver, 100 Ind. 315; Skaggs *v.* State, 108 Ind. 53; Sanders *v.* Loy, 45 Ind. 229; Trustees *v.* Reynolds, 61 Ind. 104; Allen *v.* Gillum, 16 Ind. 234; McKee *v.* McDonald, 17 Ind. 518; Crawford *v.* Martin, 19 Ind. 370; Glidewell *v.* Daggy, 21 Ind. 95; Cox *v.* Hutchings, 21 Ind. 219; Pattison *v.* Wilson, 22 Ind. 358; House *v.* Wright, 22 Ind. 383; Huntington *v.* Drake, 24 Ind. 347; Freeman *v.* Bowman, 25 Ind. 236; Blackburn *v.* Crowder, 110 Ind. 127.

[3] Axtell *v.* Warden, 7 Neb. 186; Hines *v.* Driver, 100 Ind. 315; Sanders *v.* Loy, 45 Ind. 229.

[4] Haseltine *v.* Simpson, 61 Wis. 427; Rev. Stat. Wis., § 3092; 2 Tiff. & S. P. 428; 4 Wait's Pr. 595; 1 Whit. Pr. 352.

[5] Miller's Annot. Code Iowa 1886, § 3269; Doster *v.* Sterling, 33 Kan. 381. Stat. of Minn. 1881, p. 815, § 11.

[6] Clayton *v.* School Dist., 20 Kan. 256. The application must be made to court during term; filing petition with

the application may be either orally or in writing.[1] A new trial as of right has no application to an action of forcible entry and detainer, or to recover possession for mere non-payment of rent,[2] nor to an action to set aside a conveyance of real estate on the ground of fraud,[3] although there may be paragraphs in the bill seeking to quiet title or recover possession;[4] but it applies in a suit to revest title in an owner whose land has been obtained from him by fraud, and subsequently conveyed to a fraudulent grantee.[5] Where it affirmatively appears that the action is to enforce a lien, an application for a new trial as of right cannot succeed.[6] So, in ordinary suits for partition of real estate, where neither title nor right of possession is in question;[7] but in such a case, where the title is directly put in issue, an application for a new trial as of right may be made.[8]

clerk is not sufficient: Emmons *v.* Bishop, 14 Ill. 152. Unsuccessful party entitled to second trial, upon demand and notice made and given at any time during term. Demand is not required to be in writing, but notice thereof should be entered upon the journal of the clerk of court when the demand is made. A demand made in open court, immediately upon the rendition of the judgment, in the presence of the opposite party, is a substantial compliance with the statute, and the neglect or refusal of the clerk immediately to make entry thereof upon his journal will not defeat the rights of the party to another trial: Doster *v.* Sterling, 33 Kan. 381.

[1] R. S. Ind. 1881, § 1064; Stout *v.* Duncan, 87 Ind. 383; The Physico-Medical College *v.* Wilkinson, 89 Ind. 23; Crews *v.* Ross, 44 Ind. 481, overruled. Motion as of right made at subsequent term, need not show specifically the rendition of judgment, the time of the same, nor that the undertaking had been filed, the record otherwise showing such filing: Heberd *v.* Wines, 105 Ind. 237.

[2] Whitaker *v.* McClung, 14 Minn. 170.

[3] Somerville *v.* Donaldson, 26 Minn. 75.

[4] Washburton *v.* Crouch, 108 Ind. 83; Voss *v.* Eller, 109 Ind. 260.

[5] *Ibid.*

[6] Williams *v.* Thames &c. Co., 105 Ind. 420; Jenkins *v.* Corwin, 55 Ind. 21; Butler University *v.* Conrad, 94 Ind. 353.

[7] Gillett *v.* Miller, 106 Ind. 75.

[8] Kreitline *v.* Franz, 106 Ind. 359. See Campbell *v.* Hunt, 104 Ind. 210

TITLE X.

BILLS OF EXCEPTIONS.

CHAPTER LXXXI.—FORM AND SUBSTANCE OF THE BILL.
CHAPTER LXXXII.—TAKING EXCEPTIONS: SIGNING, FILING AND AMENDING THE BILL.

CHAPTER LXXXI.

FORM AND SUBSTANCE OF THE BILL.

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§ **2770. What is a Bill of Exceptions.** — In a recent case it is said by Mr. Justice Matthews that, "whatever brings upon the record, properly verified by the attestation of the judge, the matters of fact occurring at the trial, on which the point of law arises, which enters into the ruling and decision of the court excepted to, answers sufficiently the description of a proper bill of exceptions."[1] A bill of exceptions becomes a record, "when the bill is allowed by the judge and filed by the clerk."[2]

§ **2771. Of the Use of Bills of Exceptions.** — In a court of error or appeal the proceedings of the trial court can be known only by its record. In cases at law this record ordinarily consists of two parts, the record proper and the bill of exceptions. The record proper ordinarily embraces the original writ, the pleadings and the entry of verdict and judgment. If error is exhibited on the face of the record proper, it may be corrected in a court of error (unless there are statutes changing the common-law rule), by removing it to such court by a writ of error and then assigning error upon it, without the necessity of a bill of exceptions;[3] and if there is manifest error upon the face of it, the judgment will be reversed. This will happen where the judgment is one which could not have been lawfully rendered in the state of the pleadings, or in the state of the law under any state of the pleadings. Whenever it is desired to present for review in an appellate court a ruling of the trial court which does not appear upon the face of the record proper, an exception must be taken to the

[1] Kleinschmidt *v.* McAndrews, 117 U. S 282, 286.

[2] Lesser *v.* Banks, 46 Ark. 482, 485.

[3] Freshour *v.* Logansport &c. Co., 104 Ind. 463.

ruling at the time when it was made,[1] and a bill of exceptions must be drawn up, embodying a statement of the ruling and showing that an exception thereto was reserved at the time when the ruling was made. This bill of exceptions must be signed by the judge and filed by the clerk before the lapse of the term, in ordinary cases, or within a time thereafter, prescribed by statute, granted by the court on application, or fixed by stipulation of the parties. When so signed and filed, it becomes a part of the record, and, together with the record proper, it is transcribed and certified by the clerk of the court and transmitted to the appellate tribunal.

§ 2772. **Under the Codes Required in Equity Proceedings.** — Under the codes of procedure of several of the States, legal and equitable remedies are so blended that there is but one form of a civil action. In some of those jurisdictions bills of exceptions are required in causes where equitable relief is sought, the same as in causes which were formerly denominated actions at law.[2] But in those jurisdictions which preserve, either in the form of a separate tribunal, or of a separate system administered in the courts of general jurisdiction, the ancient distinction between law and equity as a system of remedial procedure, bills of exceptions are not necessary in chancery cases, for the reason that, according to the chancery practice, the entire proceeding, including the testimony, is in writing and is deemed to be of record.[3] Accordingly, the report of a master in chancery, under a reference to him, is a part of the record in the case without being incorporated in a bill of exceptions.[4] Bills of exceptions have been mentioned as one of the modes of preserving testimony in chancery cases; but it has been said that, as a matter of

[1] Allusions have already been made to the necessity of taking and saving exceptions, in order to present for review errors committed during the progress of a trial. *Ante*, §§ 690, 700. See also Phillips *v.* Soule, 6 Allen (Mass.), 150; People *v.* Thompson, 28 Cal. 214 (necessary to save for review instructions in criminal cases); *post*, § 2802.

[2] Blatchley *v.* Coles, 6 Colo. 82.

[3] Ferris *v.* McClure, 40 Ill. 99; Smith *v.* Newland, 40 Ill. 100; Mason *v.* Bair, 33 Ill. 194.

[4] Ferris *v.* McClure, *supra*.

form, a certificate of the evidence signed by the judge is preferable.[1] And it has ruled that, although oral testimony may be introduced in chancery cases, it must still be preserved in the record, which may be done by its being reduced to writing by the master, or by any one else under the direction of the court, or by its being embodied in the decree; and it is ruled that it is not essential that it should be reduced to writing and preserved in the record when it is first taken, but that the trial court must be left to the exercise of a discretion as to the time when and the mode in which it shall be placed in the record, so that it is done by the time the decree is rendered and filed. If, from accident, the evidence thus taken should be lost or forgotten before the decree is rendered and filed, it would be the duty of the court, on application of the parties, or, if a decision has not been made, on its own motion, to have it retaken, in order that it may be understood by the trial court and preserved in the record.[2]

§ 2773. Distinction between Matter of Record and Matter of Exception. — In Arkansas it has been said: "Whatever proceedings or facts the law or the practice of the courts requires to be enrolled, constitute and form part of the record. Such, for instance, are all judicial writs and process, the finding of the jury, the judgment of the court, and the like. Whatever else that is not necessarily enrolled, such for example as oral and written testimony, and exceptions taken to the opinion and judgment of the court, constitutes no part of the record, unless they are expressly made so by order of the court, by the agreement of the parties, by demurrer to evidence, by oyer, by bill of exceptions, or by special verdict. These are the usual and only legitimate modes by which matters of fact may be spread upon the record."[3] In a case in Missouri it was said: "The record proper, by law, is the petition, summons, and all subsequent pleadings, including

[1] Smith *v.* Newland, *supra.*

[2] Mason *v.* Barr, *supra.*

[3] Lenox *v.* Pike, 2 Ark. 14, 20, opinion by Lacy, J. To the same effect is Cole *v.* Driskell, 1 Blackf. (Ind.) 16. Compare Gist *v.* Higgins, 1 Bibb (Ky.), 303

the verdict and judgment; and these the law has made it our duty to examine and revise; and if any error is apparent on the face of these pleadings which constitute the record, we will reverse the cause, whether any exceptions were taken or not. Exception is matter which arises wholly from the action of the court in the progress of the trial, as the admission or rejection of evidence, the sustaining or overruling of some motion, the giving or refusing of instructions, etc. This is strictly no part of the record, unless made so by being incorporated in a bill of exceptions; and to entitle it to any notice, or to be made available here, the action of the court must have been excepted to at the time the alleged error was committed."[1]

§ 2774. Matters which can only be Shown by a Bill of Exceptions: Affidavits. — Affidavits which have been used in any proceeding connected with the cause in the trial court, can only be made a part of the record by being incorporated into the bill of exceptions.[2] Such affidavits, copied at length in the bill of exceptions, as a part of the evidence, heard by the judge in a proceeding at chambers, are authenticated by a general certificate to the bill of exceptions, and need not be otherwise identified.[3]

2775. Rulings upon Motions. — Rulings upon motions are not deemed to be saved for review in an appellate court, unless

[1] Bateson *v.* Clark, 37 Mo. 31, 34, opinion by Wagner, J. See also reporter's notes 34 Mo. 108. As to what the clerk should keep as a part of the record proper under the Indiana statute, and as to what the clerk should and should not copy (Ind. Practice Act, § 559; 2 Gav. & Hord Ind. Stat. 273; Rev. Stat. Ind. 1888, § 650), see Kesler *v.* Myers, 41 Ind. 543; Miles *v.* Buchanan, 36 Ind. 490; Ewing *v.* Ewing, 4 Ind. 468; Cochnower *v.* Cochnower, 27 Ind. 253; Shields *v.* Cunningham, 1 Blackf. (Ind.) 86; Hays *v.* M'Kee, 2 Blackf. (Ind.) 11.

[2] Colee *v.* State, 75 Ind. 511: Miles *v.* Buchanan, 36 Ind. 490; Stewart *v.* Rankin, 39 Ind. 161; Douglass *v.* State 72 Ind. 385; Blizzard *v.* Phebus, 35 Ind. 284; Round *v.* State, 14 Ind. 493; Leyner *v.* State, 8 Ind. 491; Taylor *v.* Fletcher, 15 Ind. 80; Cochran *v.* Dodd, 16 Ind. 476; Murphy *v.* Tilly, 11 Ind. 511; Wilson *v.* Truelock, 19 Ind. 389; Merritt *v.* Cobb, 17 Ind. 314; Horton *v.* Wilson, 25 Ind. 316; Whiteside *v.* Adams, 26 Ind. 250; Bell *v.* Rinker, 29 Ind. 267; Fisher *v.* Ewing, 30 Ind. 130; Potter *v.* Stiles, 32 Ind. 318.

[3] Yoemans *v.* Yoemans (Ga.), 3 S. E. Rep. 354.

the motion and ruling are exhibited in a bill of exceptions.[1] It is not sufficient that the clerk of the trial court has inserted in the transcript what purports to be a copy of the motion.[2] The rule applies to motions which are dispositive of the proceedings, such as a motion to dismiss the appeal by which the cause has been brought from an inferior jurisdiction;[3] or a motion in the court to which the cause has been taken by change of venue, to dismiss the cause;[4] and the rule applies in criminal as well as civil cases.[5]

§ 2776. **Facts Recited in Written Motion.** — It is scarcely necessary to say that facts recited in a written motion will not be taken as true on appeal unless they are established by evidence which is set out in a bill of exceptions, or unless there should be a bill of exceptions, authenticated by the signature of the judge, stating that such facts are true.[6] Thus, the recital in a motion for a new trial that, by the action of the court in compelling the remonstrator to assume the burden of proof, she was greatly surprised, etc., accompanied by an affidavit which states that the reason assigned therein is true, — goes for naught in the reviewing court, unless the facts therein stated are shown

[1] Board of Com. &c. *v.* Montgomery, 109 Ind. 69; Washington Ice Co. *v.* Lay, 103 Ind. 48; Crumley *v.* Hickman, 92 Ind. 388; Miles *v.* Buchanan, 36 Ind. 491; Carr *v.* Thomas, 34 Ind. 292; Dritt *v.* Dodds, 35 Ind. 63; Kohn *v.* Lucas, 17 Mo. App. 29; Robinson *v.* Suter, 15 Mo. App. 599; Holt *v.* Simmons, 14 Mo. App. 450.

[2] Washington Ice Co. *v.* Lay, *supra;* Berkley *v.* Kobes, 13 Mo. App. 502; Shaughnessy *v.* Railway Co., 7 Mo. App. 591.

[3] Washington Ice Co. *v.* Lay, *supra;* Burntrager *v.* McDonald, 34 Ind. 277; Mecker *v.* Fountain Co., 53 Ind. 31; Scotten *v.* Divilbiss, 60 Ind. 37; Crumley *v.* Hickman, 92 Ind. 388. See also Orr *v.* Worden, 10 Ind. 553; Alspaugh *v.* The Ben Franklin &c. Assn., 51 Ind. 271; Hasselback *v.* Sinton, 17 Ind. 545; Aurora Fire Ins. Co. *v.* Johnson, 46 Ind. 315; Taylor *v.* Fletcher, 15 Ind. 80; Indianapolis &c. R. Co. *v.* Wyatt, 16 Ind. 204; Round *v.* State, 14 Ind. 493; Thompson *v.* White, 18 Ind. 373; Whiteside *v.* Adams, 26 Ind. 250.

[4] Board of Com. &c. *v.* Montgomery, *supra.*

[5] State *v.* McKee, 109 Ind. 498; State *v.* Sweeney, 68 Mo. 96.

[6] Brown *v.* Muncie National Bank, 110 Ind. 323; Powers *v.* State, 87 Ind. 144, 152; Choen *v.* State, 85 Ind. 209; Indianapolis &c. Co. *v.* Christian, 93 Ind. 360.

by a bill of exceptions.[1] So, an assignment, made as a ground for a new trial in the court below, of an irregularity in permitting an assistant prosecuting counsel to state, in his argument to the jury, facts not in evidence, as set forth in certain described affidavits, presents nothing for review, the facts not being shown by a bill of exceptions.[2]

§ 2777. **Evidence Adduced at the Trial.** — Evidence, written or oral, adduced at the trial of an action at law, can only be made a part of the record and brought to the attention of a reviewing court, by being set out in a bill of exceptions. In many cases where it is sought to bring to the attention of the appellate court the ruling of the trial court upon a single question of law, it will be sufficient to recite in the bill of exceptions that there was *evidence tending to show* the proposition of fact upon which the question of law arose;[3] but in three cases it is necessary that the bill of exceptions should set out all the evidence: 1. Where the verdict is challenged as being unsupported by the evidence.[4] 2. Where error is assigned upon the ruling of the trial court in giving or refusing instructions, the same not being intrinsically bad in point of law.[5] 3. In chancery cases, where the facts are reviewed in the appellate court.[6] In the first case, if the bill of exceptions does not set out all the evidence the appellate court will presume, in support of the action of the trial court, that there was sufficient evidence to support the verdict; in the second case, if the bill of exceptions is deficient in like manner, the appellate court will presume that there was evidence to which the instructions which were given were applicable;[7] and if those instructions

[1] Indianapolis &c. Co. *v.* Christian, *supra.*

[2] Choen *v.* State, *supra.*

[3] Walls *v.* Gates, 4 Mo. App. 1.

[4] Lamb *v.* Old Colony R. Co., 140 Mass. 79; Ballentine *v.* State, 48 Ark. 45, 50 (or at least all that part of it which relates to the supposed defect of proof). Downey *v.* Day, 4 Ind. 531; Cunningham *v.* Gallagher, 61 Wis. 170 (award of damages presumed correct).

[5] People *v.* Durfee (Mich.), 29 N. W. Rep. 109; People *v.* Bourke, 66 Cal. 455.

[6] Carter *v.* Holman, 60 Mo. 498.

[7] Worthington *v.* Mason, 101 U. S. 149, 151; Phœnix Mutual Life Insurance Co. *v.* Raddin, 120 U. S. 183; *s. c.* F. Sup. Ct. Rep. 500, 506.

would be right upon any supposable evidence, the judgment will not be reversed.[1] Enough evidence, at least, must be given to make the materiality of the instructions which were refused appear.[2]

§ 2778. **Statements Embodied in Motion for New Trial.** — Statements of facts embodied in a motion for a new trial will not, on appeal, be regarded as evidence of the facts so stated, although the motion itself is transcribed into the bill of exceptions.[3] So, it is not sufficient, in order to have the propriety of the instructions passed upon in the appellate court, that the appellant embodied them in his motion for a new trial in the court below.[4]

§ 2779. **Statements of Rulings and Exceptions Made by the Clerk.** — It is scarcely necessary to say that statements made by the clerk, in the transcript which is sent to the reviewing court, that a particular ruling was made and a particular exception taken, will constitute no part of the record; for otherwise the clerk, instead of the judge, might authenticate a bill of exceptions.[5]

§ 2780. **Explanatory Notes of the Clerk.** — For the same reason imperfections in bills of exceptions cannot be helped out by explanatory notes of the clerk. Thus, where it was assigned for

[1] Wilson *v.* Trafalgar &c. Co., 93 Ind. 287, 290; Dennerline *v.* Gable, 73 Ind. 210; Wright *v.* Gully, 28 Ind. 475; Ricketts *v.* Richardson, 85 Ind. 508; Schreiber *v.* Butler, 84 Ind. 576; Johns *v.* State, 104 Ind. 557, 562; Hunt *v.* Elliott, 80 Ind. 245; *s. c.* 41 Am. Rep. 794; Northwestern Mutual Life Ins. Co. *v.* Heimann, 93 Ind. 24; Elkhart Mutual Aid Assn. *v.* Houghton, 103 Ind. 286; Keating *v.* State, 44 Ind. 449; Stratton *v.* Kennard, 74 Ind. 302; Drinkout *v.* Eagle Machine Works, 90 Ind. 423; Wade *v.* Guppinger, 60 Ind. 376; Higbee *v.* Moore, 66 Ind. 263; Powers *v.* State, 87 Ind. 144.

[2] Phœnix Mutual Life Ins. Co. *v.* Raddin, 7 Sup. Ct. Rep. 500, 506; *s. c.* 120 U. S. 183; Ward *v.* Bateman, 34 Ind. 110; Morrow *v.* State, 48 Ind. 432; Hinkle *v.* Margerum, 50 Ind. 240; Hammon *v.* Sexton, 69 Ind. 37; Hendrix *v.* Reiman, 90 Ind. 119; Louisville &c. R. Co. *v.* Porter, 97 Ind. 267; Thatcher *v.* State, 48 Ark. 60, 65.

[3] O'Donald *v.* Constant, 82 Ind. 212; Zehner *v.* Aultman, 74 Ind. 24; Smith *v.* Kyler, 75 Ind. 575.

[4] Carroll *v.* Bowler, 40 Ark. 168, Eakin, J.

[5] Smith *v.* Smith, 15 Ind. 315; Dritt *v.* Dodds, 35 Ind. 63.

error that the judge had suppressed certain portions of depositions offered by the appellant, but there was no bill of exceptions showing what depositions were so suppressed or for what cause; but there was a bill of exceptions showing that the appellants read to the jury certain portions of the depositions of certain named witnesses, not theretofore suppressed; and, at the end of certain of the answers, the letter Q was placed, and at the end of the rest the letter O; and a note by the clerk of the trial court stated that Q denoted answers which had been suppressed, and O answers which had not been suppressed,—it was held that this note could not be regarded as any part of the record; nor did an additional statement made by the clerk that the bill of exceptions, which was taken at the time of the suppression of the depositions, had been lost, give any greater force to the said note. The record could not be supplied in that mode.[1]

§ 2781. Reasons for Judge's Rulings.—The reasons upon which the trial judge may have acted in making a particular ruling form no part of the record proper, and do not become such by reason of the fact that the clerk may enter them upon the minutes. Such rulings are properly presented for review by a bill of exceptions only. Where there is no bill of exceptions, but the clerk undertakes to supply the deficiency, by an entry giving the reasons for the court's ruling, the reviewing court will not notice them.[2]

§ 2782. Bill should not Embody the Pleadings.—The pleadings are a part of the record proper. The object of a bill of exceptions being to bring to the attention of the appellate court matters which are not shown by the record proper, it is not proper to embody the pleadings in the bill of exceptions.[3] This, however, is often done, and it would seem to have the effect of

[1] Black *v.* Daggy, 13 Ind. 383.

[2] Hasselback *v.* Sinton, 17 Ind. 545; Kesler *v.* Myers, 41 Ind. 543, 548; Conoway *v.* Weaver, 1 Ind. 263; Blaney *v.* Findley, 2 Blackf. (Ind.) 338; Wilson *v.* Coles, 2 Blackf. (Ind.) 402; Ross *v.* Misner, 3 Blackf. (Ind.) 362; Richardson *v.* St. Joseph's Iron Co., 5 Blackf. (Ind.) 146; Aspinwall *v.* Knox County, 18 Ind. 372.

[3] Kirksey *v.* Cole, 47 Ark. 504; Douglass *v.* Orr, 58 Mo. 573.

making the record less artificial merely; since the pleadings would be no less a part of the record proper, and would not be deprived of any of their authenticity by reason of being set out in the bill.

§ **2783. When Bill Shows that it Contains all the Evidence.** — Moreover, it is the rule in most jurisdictions that the bill itself must affirmatively show that it contains all the evidence given in the cause, and that, where this is not so stated, it will not be presumed.[1]

§ **2784. How this Statement must be Made.** — This statement that the bill contains all the evidence must be made in explicit terms. It will not be sufficient that it contains a recital that "this was all the testimony given in the cause," since the word "testimony" is not synonymous with evidence;[2] nor will it

[1] Central Union Tel. Co. *v.* State, 110 Ind. 203; Rader *v.* Barr, 7 Ind. 194; Jarvis *v.* Strong, 8 Ind. 284; McKinsey *v.* Bowman, 58 Ind. 88; Gale *v.* Parks, 58 Ind. 117; Johnson *v.* Wiley, 74 Ind. 233; Miles *v.* Buchanan, 36 Ind. 490, 503; May *v.* Pavey, 63 Ind. 4; Kimball *v.* Loomis, 62 Ind. 201; Montgomery *v.* Hamilton, 43 Ind. 451; Railsback *v.* Greve, 58 Ind. 72; Brownlee *v.* Hare, 64 Ind. 311; Hammon *v.* Sexton, 69 Ind. 38; Fouty *v.* Morrison, 73 Ind. 333; Morris *v.* Stern, 80 Ind. 227; Miller *v.* Green, 110 Ind. 569. In Indiana this has been governed by the following Supreme Court rule: "In every bill of exceptions purporting to set out the evidence upon motion for a new trial overruled, the words 'this was all the evidence given in the cause' are to be regarded as technical and indispensable to repel the presumption of other evidence." Rader *v.* Barr, 7 Ind. 194. A good deal of difficulty seems to have been experienced in Indiana in the application of a statute providing for the incorporation into bills of exceptions of the short-hand notes of the testimony taken by the official stenographer or reporter of the court, as to which see Hull *v.* Louth, 109 Ind. 315, 337; Galvin *v.* State, 56 Ind. 51, 56; Woollen *v.* Wishmier, 70 Ind. 108, 114; Lowery *v.* Carver, 104 Ind. 447; Weir Plow Co. *v.* Walmsley, 110 Ind. 243, 250; Marshall *v.* State, 107 Ind. 173; Indiana &c. R. Co. *v.* Quick, 109 Ind. 295. *Contra*, in Missouri it is presumed that the bill contains all the evidence on a point as to which an exception is saved (Cummings *v.* Denny, 6 Mo. App. 602); though this presumption may be negatived by other statements in the bill. Taussig *v.* Railroad Co., 8 Mo. App. 578. Compare Druiding *v.* Lyon, 7 Mo. App. 199.

[2] Central Union Tel. Co. *v.* State ex rel., 110 Ind. 203, 207; Downs *v.* Downs, 17 Ind. 95; Gazette Printing Co. *v.* Morss, 60 Ind. 154; McDonald

be sufficient for it to recite, "this was all the evidence *offered* on the trial of the cause," since it is not enough that it should have been offered; it should also have been admitted. It is necessary that it should state that this "was all the evidence *given* in the cause."[1] Nor is it sufficient, under the Indiana court rule, set out in a preceding note, for the bill to close with the recital, "the above were the rough minutes of the court, including the material points of the evidence."[2] Nor will the recital, "this was all the evidence given upon the trial of the cause," authorize the appellate court to pass upon the question of the sufficiency of the evidence, where the bill elsewhere affirmatively shows that it does not embody all the evidence so given.[3] A bill of exceptions which contains *blanks*, showing omissions of evidence, will be so treated; the reviewing court presuming that the omitted evidence is necessary to enable it to determine whether the evidence itself as a whole was sufficient to sustain the verdict.[4] It seems also that a recital in a bill of exceptions that it contains "a fair and impartial report of all the evidence heard on the trial of the cause," would be insufficient; for much evidence is *heard* which is not *given* to the jury or trying body.[5] Where it clearly appears that the bill of exceptions does not contain all the evidence which was heard at the trial, although it purports to do so, the court will not examine that which it does contain, in order to determine the sufficiency of the verdict.[6] Nor will the Supreme Court decide, on affidavits, a controversy between the parties as to the manner in which the omitted evi-

v. Elfes, 61 Ind. 279; Sessengut *v.* Posey, 67 Ind. 408; Brickley *v.* Weghorn, 71 Ind. 497; Rader *v.* Barr, 7 Ind. 194.

[1] Garrison *v.* State, 110 Ind. 145; Fellenzer *v.* Van Valzah, 95 Ind. 128, 132; Goodwine *v.* Crane, 41 Ind. 335; Baltimore &c. R. Co. *v.* Barnum, 79 Ind. 261.

[2] Jarvis *v.* Strong, 8 Ind. 284.

[3] Johnson *v.* Wiley, 74 Ind. 233; Powers *v.* Evans, 72 Ind. 23; Morrow *v.* State, 48 Ind. 432; Ward *v.* Bateman, 34 Ind. 110; State *v.* Swarts, 9 Ind. 221; Merrifield *v.* Weston, 68 Ind. 71; Railsback *v.* Greve, 58 Ind. 72; French *v.* State, 81 Ind. 151; Shimer *v.* Butler University, 87 Ind. 218.

[4] Shimer *v.* Butler University, 87 Ind. 218.

[5] Woollen *v.* Wishmier, 70 Ind. 109, 116.

[6] Thames &c. Co. *v.* Beville, 100 Ind. 310, 313.

dence came to be omitted, but will look alone to the bill of exceptions.[1] Nor can such deficiencies be supplied by affidavit.[2]

§ 2785. **Entire Charge should not be Embodied in the Bill.** — In some jurisdictions there is a rule, apparently established for the purpose of facilitating the labors of the appellate courts, that the entire charge is not to be embodied in the bill of exceptions, but only that portion which forms the subject of the exceptions.[3] In 1832 the Supreme Court of the United States adopted a rule which, with slight verbal changes, has ever since remained in force, by which it was ordered, not only that the judges of the Circuit and District courts should not allow any bill of exceptions containing the charge of the court at large to the jury, in trials at common law, upon any ground of exception to the whole of such charge, but also "that the party excepting be required to state distinctly the several matters of law in such charge to which he excepts; and that such matters of law, and those only, be inserted in the bill of exceptions and allowed by the court."[4] The rule was thus expressed by Mr. Justice Story: "If, indeed, in the summing up, the court should mistake the law, that would furnish a ground for an exception. But the exception should be strictly confined to that mis-statement; and, by being made known at the moment, would often enable the court to correct an erroneous expression, or to explain or qualify it in such a manner as to make it wholly unexceptionable or perfectly distinct."[5]

[1] Thames &c. Co. *v.* Beville, *supra*. See also Bartel *v.* Tieman, 55 Ind. 438.

[2] Thames &c. Co. *v.* Beville, *supra*; Blizzard *v.* Blizzard, 48 Ind. 540.

[3] Ex parte Crane, 5 Pet. (U. S.) 190, 198; Carver *v.* Jackson, 4 Pet. (U. S.) 1, 81; Burt *v.* Merchants' Ins. Co., 115 Mass. 1, 16; Com. *v.* Costley, 118 Mass. 1, 23; Phœnix Mutual Life Ins. Co. *v.* Raddin, 7 Sup. Ct. Rep. 500, 504, *s. c.* 120 U. S. 183; Evans *v.* Eaton, 7 Wheat. (U. S.) 356, 426, 427; Conard *v.* Pacific Ins. Co., 6 Pet. (U. S.) 262, 280; Magniac *v.* Thompson, 7 Pet. (U. S.) 348, 390; Gregg *v.* Sayre, 8 Pet. (U. S.) 244, 251; Stimpson *v.* West Chester R. Co., 3 How. (U. S.) 553; Zeller *v.* Eckert, 4 How. (U. S.) 289, 297; United States *v.* Rindskopf, 105 U. S. 418.

[4] Rule 38 of 1832, 6 Pet. IV., and 1 How. XXXIV.; Rule 4 of 1858 and 1884, 21 How. VI., 108 U. S. 574, and 3 Sup. Ct. Rep. 5.

[5] Carver *v.* Jackson, 4 Pet. (U. S.) 1, 81; approved and adopted by Marshall, C. J., in Ex parte Crane,

§ 2786. Bill must Show that Objections were duly Presented to the Trial Court.—Objections made in the course of the trial must be stated to the trial court and must be incorporated in the bill of exceptions. An appellate court can consider only such objections as were presented to the trial court and thus brought to its notice for review.[1] The reason of the rule was well stated by Mr. Justice Daniel thus: "On the offer of testimony, oral or written, extended and complicated as it may often prove, it could not be expected, upon the mere suggestion of an exception which did not obviously cover the competency of the evidence, nor point to some definite or specific defect in its character, that the court should explore the entire mass for the ascertainment of defects which the objector himself either would not or could not point to their view. It would be more extraordinary still, if, under the mass of such an objection, or mere hint at objection, a party should be permitted, in an appellate court, to spring upon his adversary defects which it did not appear he ever relied upon, and which, if they had been openly and specifically alleged, might have been easily cured. 'Tis impossible that this court can determine, or do more than conjecture, as the objection is stated in this record, whether it applied to form or substance, or how far, in the view of it presented to the court below, if any particular view was so presented, the court may have been warranted in overruling it. We must consider objections of this character as vague and nugatory, and as, if entitled to weight anywhere, certainly as without weight before an appellate court."[2] Thus, where the bill of exceptions contained the statement that, "at the proper time, the said defendant, before the trial began, moved the court to suppress certain questions in the depositions of witnesses," who were named and the questions and answers designated, and then proceeded, "and the defendant then and there pointed out the reasons to the court for said motion," — it

5 Pet. (U. S.) 190, 198, and by Gray, C. J., in Com. *v.* Costley, 118 Mass. 1, 23. See also Burt *v.* Merchants' Ins. Co., 115 Mass. 1, 16.

[1] McClellan *v.* Bond, 92 Ind. 424; Delphi *v.* Lowery, 74 Ind. 520; *s. c.* 39 Am. Rep. 98; Russell *v.* Branham, 8 Blackf. (Ind.) 277; Camden *v.* Doremus, 3 How. (U. S.) 515, 530.

[2] Camden *v.* Doremus, *supra*.

was held that this was not a sufficient statement of the grounds of objection.[1]

§ 2787. **Skeleton Bills of Exceptions.** — The practice has grown up in several jurisdictions, in some cases sanctioned by statute, of drawing up what are termed "skeleton bills of exceptions," that is, bills of exceptions embodying the history of what took place at the trial, except such matters as exist and are on file in the office of the clerk in writing and may be distinctly identified. These are not transcribed in the bill before it is allowed and signed by the judge, but the clerk is directed to transcribe them, by the use of the words "here insert." This practice, it should be observed, is a very dangerous one; since the judge cannot know what mistakes or misprisions will be committed by the clerk, in the insertion of the matters of writing which are called for. It is like signing a promissory note in blank, and allowing some one else to fill in the amount. Owing to these and other errors and misprisions in bills of exceptions, cases have frequently occurred where judgments have been reversed and the trial judge put in the wrong, — in some instances almost in disgrace, — for supposed rulings which he never in fact made. Nevertheless, in the haste of a trial term, especially where the allotted time is short and where the trial judge must immediately proceed to another circuit, it frequently occurs that there is no time, before the close of the term, to draw up bills of exceptions, embodying, as they should before the judge examines and signs them, all matters of writing which properly form a part of them; and hence the practice above spoken of has grown up as a rule of convenience, perhaps of necessity.

§ 2788. **Not Allowed under Old Practice.** — Under the English practice, it seems that what we call "skeleton bills of exceptions," were not allowed; the judge had no right to sign a bill of exceptions, the purpose of which was to put into the record a written instrument or documentary evidence, until such written instrument or documentary evidence had been written

[1] Delphi *v.* Lowery, 74 Ind. 521.

out in full in such bill of exceptions.[1] This, it is said, was the practice in Indiana prior to the adoption of the code of 1852.[2] The rule of practice thus followed was changed by the code of 1852, which enacted as follows: "The party objecting to the decision must except at the time the decision is made; but time may be given to reduce the exception to writing, but not beyond the term, unless by special leave of the court. It shall not be necessary to copy a written instrument, or any documentary evidence into a bill of exceptions; but it shall be sufficient to refer to such evidence, if its appropriate place be designated by the words 'here insert.'"[3] "The only change," says Buskirk, J., "made by the above section, is that a judge may not sign a bill of exceptions in blank as to the instrument to be inserted, where the purpose is to embody a written instrument or any documentary evidence, where such evidence is referred to and its appropriate place designated by the words 'here insert.' The object and effect of the section was to authorize the clerk, after the bill had been signed, and when he was making out a transcript, to insert in the place designated such written instrument or documentary evidence. Before the adoption of the code, the instrument had to be inserted in the bill of exceptions before it was signed by the judge; but since, it may be inserted by the clerk in making out the transcript. But the insertion must be made in the bill of exceptions, or it will constitute no part of the record. The instrument to be inserted should be so referred to and described by the names of the parties thereto, by letters or numbers, or some specific designation, so that the clerk can with certainty know what instrument is intended to be inserted."[4]

§ 2789. General Observations as to What Necessary in Framing Skeleton Bill. — In Kansas, contrary to what was re-

[1] So stated by Buskirk, J., in Kesler *v.* Myers, 41 Ind. 543, 550.

[2] *Ibid.* See Huff *v.* Gilbert, 4 Blackf. (Ind.) 19; Livingood *v.* Livingood, 6 Blackf. (Ind.) 268; Spears *v.* Clark, 6 Blackf. (Ind.) 167; Vincennes University *v.* Embree, 7 Blackf. (Ind.) 461; Doe *v.* Makepeace, 8 Blackf. (Ind.) 575; Mills *v.* Simmonds, 10 Ind. 464.

[3] Ind. Practice Act, § 343. See R. S. Ind. 1888; § 626.

[4] Kesler *v.* Myers, 41 Ind. 543, 551.

garded as the spirit of earlier decisions, it was finally decided that it would be an unnecessary stringency, imposing needless clerical labor, to require every piece of writing to be incorporated into the bill of exceptions before its signature by the judge. The court said: "Where a deposition or other writing is to be made a part of a bill, it can be referred to with such marks of identification as to exclude all doubt. That surely ought to be sufficient, and so we think the better authorities hold. But these things must exist to exclude all doubt: 1. The bill, in referring to such extrinsic document, must purport to incorporate it into and make it a part of the bill. A mere reference to the document, although such as to identify it beyond doubt, or a statement that it was in evidence, is not sufficient; for such reference and statement do not make it certain that judge or counsel intended that it should be copied into and made a part of the bill. 2. The document itself must be in existence, written out and complete at the time of the signature of the bill; otherwise the door is open for dispute as to its language, and the bill must in fact be allowed by the judge within the statutory time. A reference to the testimony of some witnesses, to be thereafter written out by him, and as written out to be inserted, is improper; and such testimony, though written out and inserted, must be disregarded; for that in effect places in the bill the witness' statement of the testimony, and not the judge's. So also, if a document has been totally or partially destroyed, it must be restored before the signature, and the paper, as restored, clearly identified. And again: Suppose a paper in a foreign language is received in evidence and translated to the jury by some witness on the stand; it will not do to refer to that paper in the original, leaving the translation to be thereafter written out by any one, not even the witness who translated it to the jury; but the translation must be written out and properly referred to, so that the judge may approve it as the one given on the trial. The same principle renders it proper that short-hand notes be written out before the signature; for the notes of the stenographer are not a record; they are not conclusive as to what in fact was the testimony; they are not good against the cer-

tificate of the judge, and are no substitute for it. Whatever reliance the judge may place upon such notes, he after all must determine what was and what was not the testimony; and, until those notes are written out, neither he nor counsel can determine what they will show as the testimony. 3. * * * 'If a paper which is to constitute a part of a bill of exceptions is not incorporated into the body of the bill, it must be annexed to it, or so marked by letter, number, or other means of identification mentioned in the bill, as to leave no doubt, when found in the record, that it is the one referred to in the bill of exceptions.'[1] And these means of identification must be obvious to all. No mere memorandum, intelligible it may be to a single person, even the clerk, but indicating nothing to any one else, will be sufficient. They must be such that any one going to the record can determine what document is to be inserted, or, after insertion, that the clerk has made no mistake. The record must prove itself, and not the record *and* the testimony of the clerk. The clerk changes; the record endures. And long after judge and clerk are both gone, the record, if good, must carry on itself the evidence of its own integrity.''[2]

§ 2790. **Calls for Writings must be Definite and Certain.** — In the framing of skeleton bills of exceptions, where depositions, exhibits, contracts, written motions or other matters of writing are called for by means of the words "here insert," such writings must be identified with sufficient definiteness that no one can mistake what was intended;[3] and where it appears that this is not done, the appellate tribunal may reject the whole bill of exceptions. In one case the return to a writ of *certiorari* brought up a copy of the skeleton bill, as it was at the time it was allowed by the judge. In holding that it was insufficient, the appellate court said: "It is a skeleton bill, which not only casts upon the

[1] The Kansas court quotes this language from the Supreme Court of the United States in Leftwich *v.* Lecann, 4 Wall. 187.

[2] Atchison &c. R. Co. *v.* Wagner, 19 Kan. 335, 339, opinion by Brewer, J.

[3] Hill *v.* Holloway, 52 Iowa, 676; Wells *v.* Railroad Co., 56 Iowa, 520; Looney *v.* Bush, Minor (Ala.), 413; Branch Bank *v.* Moseley, 19 Ala. 222; Bradley *v.* Andress, 30 Ala. 80; Tuskaloosa Co. *v.* Logan, 50 Ala. 503.

clerk the duty of filling the numerous blanks found in it, but gives him no reference, brand, mark or *indicia* of any sort, by means of which he may be safely guided in the discharge of his duty in some of its most material features. Depositions were referred to by the names of the witnesses testifying; but, as these were on file in the case, any proper reference to them was a sufficient identification to guide the clerk to a certain conclusion. But the testimony of a number of witnesses was heard *ore tenus*. As to that feature, we will allow the bill of exceptions to speak for itself, viz.: 'Defendant thereupon introduced C. H. Banks, who testified (clerk insert here his testimony), J. M. Daggett, who testified (clerk insert here his testimony), Thomas Day, who testified (clerk will insert here his testimony);' and the testimony of many other witnesses for each party was called for in the same way. The clerk is also directed to insert the prayers for instruction that were given and those refused, without receiving any indication by which he should be guided in determining what had been asked, what given or refused. It is also disclosed that the court gave to the jury a charge independent of that asked by the parties, but the only evidence of it found in the bill is a request that the clerk insert it. From what source the clerk was to derive his information as to these matters is not pointed out. And yet it is certain that nothing that is not reduced to writing can be embodied in a bill of exceptions by reference to it alone. Even where a writing is referred to, it must be so identified, by the reference in the bill, that when the paper and the reference to it are compared, the identification can be made with certainty. Any other rule would make the final record of a case as vacillating and uncertain as the memory or the will of the clerk, to whom its final making up might be referred, and would place the rights of parties, who have judgments of record, entirely in the power of the person who eventually makes up the bill of exceptions for this court."[1]

§ 2791. General Direction to Insert Evidence Insufficient. — A bill of exceptions ran as follows: "The defendant,

[1] Lesser *v.* Banks, 46 Ark. 482, 483, 484, opinion by Cockrill, C. J.

to sustain the issues on his part, offered evidence as follows (insert evidence). The plaintiff, to sustain the issues on his part, offered evidence as follows (insert).'' It was held that these entries did not identify the evidence with sufficient certainty to authorize the clerk to insert any evidence in the transcript and thus make it a part of the record.[1]

§ 2792. **Instructions How Identified.** — If, instead of writing the instructions in the bill of exceptions, the bill contains a direction to the clerk to copy them, the direction must so identify them, by letters or numbers marked upon them, or by other means of identification mentioned therein, as to leave no doubt that the instructions found in the record are those referred to in the bill. A direction in a bill, "the clerk will here insert instructions, numbering them," — does not identify any instruction, nor authorize the insertion of any in the transcript of the bill; and it was held that, where the bill had been so made up, the instructions which were found therein would be disregarded.[2]

§ 2793. **What Designations Sufficient.** — The following designations of the documents intended to be inserted have been suggested by the Supreme Court of Indiana as sufficient: "The deposition of Robert Jones;" "the deed from John Doe to Richard Roe;" "the agreement between John Smith and James North;" "the affidavits of William Sikes, John Brown and James Black;" "exhibits A., B., and C., filed with the complaint;" "exhibits 1, 2, and 3, filed with the answer."[3] A skeleton bill of exceptions contained the following: "The plaintiff * * * read in evidence the depositions of H. Herschberg and A. Herschberg, taken in St. Louis on the 24th day of February, 1885, by Enrique Parmer, notary public, which were in words and figures as follows: (Clerk, here copy dep-

[1] Morrison *v.* Lehew, 17 Mo. App. 633. The court cited: United States *v.* Gamble, 10 Mo. 459; Christy *v.* Myers, 21 Mo. 114; Blount *v.* Zink, 55 Mo. 455; Jefferson City *v.* Opel, 67 Mo. 394; Ober *v.* Railroad Co., 13 Mo. App. 84.

[2] St. Louis &c. R. Co. *v.* Godby, 45 Ark. 485.

[3] Kesler *v.* Myers, 41 Ind. 543, 551

ositions of witnesses). The defendant read the agreed statement of F. Moore, which is in words and figures as follows: (Clerk, copy Moore's statement)." It was held, for obvious reasons, that these directions sufficiently identified the depositions and statement on file, to authorize the clerk to insert them in the bill.[1] "The bill," said Beck, J., "should identify the different papers intended to be made a part of the record, in something like the following manner: 'here clerk will copy evidence certified by the court, filed in this case and marked A.' 'Here clerk will copy instructions given upon request of plaintiff, filed in this case and marked B,' etc., etc"[2] Where evidence was thus sent up with the bill of exceptions, but without any effort at identification, the Supreme Court refused to consider it.[3] But it was early held that a paper found among the files of the clerk, which purported to detail the evidence in the cause, and which was signed by the judge and countersigned by the clerk, did not constitute any part of the record, and could not be considered; but it was regarded as a mere loose paper on the files of the clerk, or a memorandum of the judge of his notes on trial. The reason for so holding was, that the law does not require such matters to be enrolled, and therefore it constitutes no part of the record proper; that it was not incorporated into the bill of exceptions which was signed and sealed by the judge and made a part of the record, and therefore it did not become a part of the record by the act of the judge.[4]

§2794. Attaching Documentary Evidence to the Bill. — The Supreme Court of Arkansas have frequently held that it is not absolutely necessary to insert documentary evidence in a bill of exceptions, but that it may be attached to the bill, and referred to as exhibits, identifying the separate documents as Exhibits A. B, C, etc., or as Exhibits 1, 2, 3, etc.[5]

[1] Keith *v.* Herschberg Optical Co. 48 Ark. 138.

[2] Wells *v.* Railroad Co., 56 Iowa, 520.

[3] Woolfolk *v.* Wright, *supra;* Dillard *v.* Parker, *supra.*

[4] Lenox *v.* Pike, 2 Ark. 14, 19.

[5] Woolfolk *v.* Wright, 28 Ark. 1, 5; Dillard *v.* Parker, 25 Ark. 503; Sexton *v.* Brock, 15 Ark. 345, 348 (qualifying Berry *v.* Singer, 10 Ark. 484, and Clay *v.* Notrebe, 11 Ark. 634).

§ 2795. Written Instrument Set Out in Transcript and Referred to in Bill. — A statute of Indiana provides: "It shall not be necessary to copy a written instrument or any documentary evidence into a bill of exceptions, but it shall be sufficient to refer to such evidence if its appropriate place be designated by the words, 'here insert.'"[1] Under this statute it has been held that, where a written instrument properly and legally constitutes a part of the record, without being made such by bill of exceptions or an order of court, and where it has already been copied into the transcript, the clerk is not required again to copy such instrument into the bill of exceptions, but may make the same a part thereof by inserting in the designated place a reference to the page and line of the transcript where the same can be found. But if such instrument does not properly constitute a part of the record, without a bill of exceptions or an order of court, it is the duty of the clerk, in making a transcript, to insert it at its proper place in the bill of exceptions; otherwise it is no part of the record.[2] Under this rule, where the clerk copies into the transcript what purports to be the evidence that was given at the trial,[3] or an affidavit in support of a petition or motion,[4] or affidavits read upon the hearing of an application for a temporary injunction,[5] or affidavits in support of a motion for a change of venue,[6] — these constitute no part of the record and will not be considered on appeal or error. On the other hand, where the bill of exceptions recited, "the plaintiff, to sustain the issue on his part, introduced in evidence the writing and judgment mentioned in the complaint," and no other writing than the bond or undertaking on which the action was founded was mentioned in the complaint, and a copy of this undertaking was set out in the record with the complaint, — it was held that the reference to it in the bill of exceptions was sufficient, and dispensed with the necessity of again copying it into the record.[7]

[1] R. S. Ind. 1888, § 626; 2 R. S. Ind. 1876, § 343.

[2] Crumley *v.* Hickman, 92 Ind. 388.

[3] Stewart *v.* Rankin, 39 Ind. 161.

[4] Kesler *v.* Myers, 41 Ind. 543; Aurora Fire Ins. Co. *v.* Johnson, 46 Ind. 315; Kimball *v.* Loomis, 62 Ind. 201; Colee *v.* State, 75 Ind. 511.

[5] Carver *v.* Carver, 44 Ind. 265.

[6] Douglass *v.* State, 72 Ind. 386.

[7] Smith *v.* Lisher, 23 Ind. 500, 504.

§ **2796. Duty of Judge in Signing Skeleton Bills.** — The judge should not sign a skeleton bill of exceptions, until the testimony which was given orally at the trial has been written out and submitted to him, and he has convinced himself that it was the testimony, as given at the trial.[1]

[1] Stewart *v.* Rankin, 39 Ind. 161.

CHAPTER LXXXII.

TAKING EXCEPTIONS, SIGNING, FILING AND AMENDING THE BILL.

SECTION

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§ 2801. Manner of Taking and Noting Exceptions. — An exception will not be nullity, because noted out of its proper place in the record, if it appears that the exception was taken when the ruling was made, and if the ruling to which it refers be clearly stated. It was so held concerning an exception, in a case

where the court, sitting as a jury, had made special findings of fact and had then stated certain conclusions of law thereon, at the request of the parties, under the statute. The entry of the exception, instead of following the statement of the conclusions of law, followed the entry of the judgment; but, as it contained the words, "to all of which findings of fact and conclusions of law thereon, the defendant objects and excepts at the time," the court could see in it nothing beyond an informality. It was sufficiently certain as to the subject of the exception, and, as it purported to have been reserved "at the time," the court assumed that it was reserved in time to be effectual as an exception to the conclusions of law.[1] In the absence of a statute authorizing exceptions to be noted at the end of the entries upon the minutes which recite the court's rulings, an exception so noted will be regarded as no part of the record upon error or appeal.[2]

§ 2802. Exceptions Must be Taken at the Time of the Ruling. — The courts hold with great uniformity that, in order to have the benefit of an exception, it is necessary for the bill of exceptions to show that the exception was taken at the time of the ruling complained of,[3] or, as some cases relax the rule, at least before the rendition of the verdict. The reason of the rule is, that justice to his adversary requires that the exceptor should not be allowed to take his chances before the jury, and, in the event of defeat, then to deprive his adversary of the benefits of the verdict by an exception which, if insisted upon during the trial, might have been met and counteracted by the latter.[4] "It has been repeatedly decided," said Mr. Chief Justice Taney, "by this court, that it must appear by the transcript, not only that the instructions were given or refused at the trial, but also that the party who complains of them excepted to them while

[1] Western Union Tel. Co. *v.* Trissal, 98 Ind. 566, 571. Compare Dickson *v.* Rose, 87 Ind. 103.

[2] Engard *v.* Frazier, 7 Ind. 154.

[3] Phelps *v.* Mayer, 15 How. (U. S.) 160; Turner *v.* Yates, 16 How. (U. S.) 14, 29.

[4] Washington &c. Tel. Co. *v.* Hobson, 15 Gratt. (Va.) 122, 138.

the jury were at the bar. The statute of Westminster 2d, which provides for the proceeding by exception, requires, in explicit terms, that this should be done; and if it is not done, the charge of the court, or its refusal to charge as requested, forms no part of the record, and cannot be carried before the appellate court by writ of error. It need not be drawn out in form and signed before the jury retire; but it must be taken in open court, and must appear, by the certificate of the judge who authenticates it, to have been so taken. Nor is this a mere formal or technical provision. It was introduced and is adhered to for purposes of justice. For if it is brought to the attention of the court that one of the parties excepts to his opinion, he has an opportunity of reconsidering or explaining it more fully to the jury. And if the exception is to the evidence, the opposite party might be able to remove it by further testimony, if apprised of it in time." [1] After an elaborate opinion, referring to many cases in other American jurisdictions, the Supreme Court of Appeals of West Virginia have reached the following conclusion, stated by them in italics: "If errors or supposed errors of any sort are committed by a court, in its rulings during the trial of a case by a jury, the appellate court cannot review these rulings of the court, unless two conditions concur: first, these rulings must have been objected to when made and a bill of exceptions taken, or the point then saved, and the bill of exceptions taken during the term; and secondly, a new trial must also have been asked and overruled and objected to, and this noted on the record." [2]

§ 2803. And be Renewed in a Motion for New Trial. — In several jurisdictions it is necessary for the exceptor, in order to save for review the matters embodied in his bill of exceptions,

[1] Phelps *v.* Mayer, 15 How. (U. S.) 160, 161.

[2] Danks *v.* Rodeheaver, 26 W. Va. 274, 276, opinion by Green, J. In one case a singular judicial aberration rendered it necessary for a reviewing court to decide under a statute (Mont. Code Civ. Proc. 1888, § 289), that an exception to the ruling cannot be taken until the ruling is made. Kleinschmidt *v.* McAndrews, 117 U. S. 282, 286.

to renew his objections to the ruling therein stated, in the form of a motion for new trial, presented to the court below within the time prescribed by statute, by rule or decision.[1]

§ 2804. And an Exception to an Order Overruling the Motion Preserved by Bill of Exceptions.— In several jurisdictions, the overruling of a motion for new trial, or of a motion in arrest of judgment, is not noticed on appeal or error, unless an exception is saved thereto, which is shown by a bill of exceptions. Where such motions are not exhibited by the bill of exceptions, the appellate court will review only such errors as appear on the face of the record proper, which record proper is understood to consist ordinarily of the process, the pleadings, the verdict, and the entry of judgment.[2]

[1] Danks *v.* Rodeheaver, 26 W. Va. 274; State *v.* Phares, 24 W. Va. 657; Johnson *v.* State, 43 Ark. 391; *ante*, § 2712.

[2] McKee *v.* Calvert, 80 Mo. 348; Collins *v.* Barding, 65 Mo. 496; Jefferson City *v.* Opel, 67 Mo. 394; Robinson *v.* Hood, 67 Mo. 660; State ex rel. *v.* Gaither, 77 Mo. 304; Powell *v.* Bevin, 11 Mo. App. 216. The mere recital in the entries of the clerk, that such a motion was filed and overruled, will not be sufficient. This was the early rule in Arkansas, first applied in a case where there was no bill of exceptions at all (White *v.* Prigmore, 28 Ark. 450), and followed in a case where there was a bill of exceptions which made no reference at all to the motion for a new trial. Nesbett *v.* Brown, 30 Ark. 585. In a later case (Farquharson *v.* Johnson, 35 Ark. 536; approved in Carroll *v.* Sanders, 38 Ark. 216, and followed in Gaines *v.* Summers, 39 Ark. 482), the court went a step further. There, the record entries showed the filing and denial of a motion for a new trial, which was copied into the transcript. The bill of exceptions also stated that the losing party had filed such a motion, that it was denied, and that he excepted; but it did not set out the grounds of the motion, nor identify the one to which it referred as the one which appeared in the transcript. This extremely strict rule was overruled in a subsequent case, the court saying: "We will consider the merits whenever it appears from the record proper, that a motion for new trial was made and denied, and from the bill of exceptions that the appellant excepted to the action of the court in that respect, provided such a motion is contained in the transcript. In other words, we will presume that the motion sent up by the clerk in his certified transcript is the same motion that was filed, overruled and excepted to in the court below." Johnson *v.* State, 43 Ark. 391, 394; overruling in express terms Farquharson *v.* Johnson, *supra;* Gaines *v.* Summers, *supra;* "and all others decided upon the same considerations."

§ 2805. Exceptions Must be Specific. — In order to enable the reviewing court to determine whether the excepting party was aggrieved by a refusal to give a specific ruling, it must appear by his exceptions that all the essential facts or evidence bearing upon the question are therein stated, or so much thereof as may enable the court to determine that the ruling ought to have been in his favor.[1] In conformity with this principle, it is a general rule of procedure that an exception to the admission or rejection of evidence must be so framed as to *disclose the nature of the evidence admitted or rejected;* otherwise, the reviewing court cannot intelligently pass judgment upon it.[2] It is, therefore, a general rule that error cannot be assigned in *the ruling out of evidence*, unless it is distinctly shown "*what the evidence was*, in order that its relevancy may appear, and that a prejudice has arisen from its rejection."[3] Where the exception is to the exclusion of evidence, it must be so framed as to inform the reviewing court *what answer the witness was expected to give.* Where the exception arises upon cross-examination, the question itself will often disclose the answer expected; but where it arises upon direct examination, counsel, it is ruled, must inform the court *what they propose to prove.*[4] Another way of stating this principle is, that error cannot be predicated upon the refusal of the trial court to allow a question to be answered, unless it affirmatively appears that the answer would be legal evidence; if the question is general in its terms, calling for evidence which may be legal or illegal, it may be disallowed without error.[5] On the other hand, an objection and an exception to the ruling of the trial court in permitting a question to be answered, will not be available on error or appeal, unless the bill of exceptions shows *what the answer was;* since this is necessary in order to make it appear that the excepting party was prejudiced by the ruling.[6]

[1] Pullen *v.* Glidden, 68 Me. 559, 566.

[2] *Ante*, § 693.

[3] Sumner *v.* Chandler, 92 N. C. 634; Knight *v.* Killebrew, 86 N. C. 400; Bland *v.* O'Hagan, 64 N. C. 471; Bedwell *v.* Bedwell, 77 Ala. 587.

[4] Allen *v.* State, 73 Ala. 23; *ante*, § 678.

[5] Stewart *v.* State, 63 Ala. 199.

[6] Brookbank *v.* State, 55 Ind. 169. See also *ante*, §§ 703, 704.

§ **2806. And not Taken to Rulings in Gross.** — The futility of excepting to a number of rulings in gross has already been pointed out.[1] A single exception reserved, to two or more rulings of the trial court in gross, presents no question which can be considered on appeal.[2] An exception like the following, "to all of which findings of fact, and conclusions of law thereon, the defendant objects and excepts at the time," so far as it relates to the *special findings of fact*, is held to be a nullity.[3] It is valid only as to the conclusions of law based upon the facts as found, and is considered as addressed to those conclusions alone, and treated accordingly. It does not come within the rule that a single exception to two rulings is a nullity.[4] A point of law cannot be reserved for decision "upon all the evidence." A reserved point must be based upon facts admitted in the cause or found by the jury.[5]

§ **2807. Necessity of Signing and Sealing the Bill.** — Unless a bill of exceptions is authenticated as required by the statute, by the signature, or the signature and seal of the judge, it forms no part of the record and cannot be considered by the appellate tribunal.[6] Nor can the parties, by a *stipulation*, dispense with the signature and seal.[7] Therefore, the fact that the respond-

[1] *Ante*, §§ 696, 2397.

[2] Johnson *v.* McCulloch, 89 Ind. 270; Western Union Tel. Co. *v.* Trissal, 98 Ind. 566, 570.

[3] Western Union Tel. Co. *v.* Trissal, 98 Ind. 566 (the court citing, Cruzan *v.* Smith, 41 Ind. 288; Smith *v.* Davidson, 45 Ind. 396; Buskirk Pr. 205).

[4] Western Union Tel. Co. *v.* Trissal, *supra*.

[5] Smith *v.* Arsenal Bank, 104 Pa. St. 519.

[6] Jones *v.* Sprague, 3 Ill. 55; Reeves *v.* Reeves, 54 Ill. 332; Eastes *v.* Daubenspeck, 4 Ind. 617; Law *v.* Jackson, 8 Cow. (N. Y.) 746; Darrah *v.* Steamboat Lightfoot, 17 Mo. 276; Denver *v.* Capelli, 3 Colo. 235; De LaMar *v.* Hurd, 4 Colo. 442; Marshall &c. Co. *v.* Kirtley, 8 Colo. 108; People *v.* Ferguson, 34 Cal. 309; State *v.* Keatley, 21 Mo. App. 484. The same rule applies in respect of a "*case made.*" This must be authenticated by the judge, or it will not be considered in the appellate court; nor will the consent of counsel cure the want of the proper authentication. Hodgden *v.* Commissioners, 10 Kan. 637.

[7] Coburn *v.* Murray, 2 Me. 336; Hodgden *v.* Commissioners, 10 Kan. 638; Leonard *v.* Warriner, 20 Wis. 41. Compare Cohen *v.* Trowbridge, 6 Kan. 385.

ent or appellee *joins in error* upon an unsigned bill of exceptions, will not cure the defect;[1] and accordingly a bill of exceptions in a criminal case, settled and signed by the district attorney, is unauthorized and void.[2] As the bill of exceptions relates to matters within the personal knowledge of the judge, it must be signed *by the judge who presided at the trial;* and where one judge presided at the trial and another judge settled the bill of exceptions, the appellate court refused to consider the same.[3]

§ 2808. **Certification on "Belief" Insufficient.** — Nor will a bill of exceptions be considered, where the judge has done no more than certify that he *believes* that it is conformable to the truth of the case, but does not certify that it *actually* is so.[4]

§ 2809. **Bill Need not be Signed Instanter.** — Although exceptions must be taken to the rulings of the court at the time when such rulings are made, in order that a minute of the same may be made by the judge and that he may have an opportunity to review and correct his own rulings if erroneous,[5] yet it is not believed to be the rule in any jurisdiction that the bill of exceptions must be written out and tendered to the judge at the time when the exception is taken. On the contrary, in many jurisdictions the practice is to embody in one bill all the exceptions which are taken at a single term. In Virginia it is not necessary that a bill of exceptions should be tendered immediately upon the transpiring of the action of the court to which the party excepts. "It is true," says Mr. Justice Daniel, "that when the character of the exceptions is such that little delay is occasioned by the preparation of the bill of exceptions, it is sometimes immediately prepared and disposed of; and, in such a case, a memorandum of the transactions is usually made in the minutes of the proceedings of the day. But as, in a great number, perhaps a majority of cases, serious delay and inconvenience would result from stopping the progress of the trial to prepare bills of

[1] Denver *v.* Capelli, 3 Colo. 225.
[2] People *v.* Ferguson, 34 Cal. 309.
[3] Law *v.* Jackson, 8 Cow. (N. Y.) 746.
[4] Coburn *v.* Murray, 2 Me. 336.
[5] *Ante*, §§ 690, 700, 2802.

exceptions to the rulings of the court, a practice, sanctioned by long usage, has prevailed, for the counsel desiring to except to any opinion of the court given against them on the trial, simply to state to the court that they intend to save the point, and ask the court to note the exception, and afterwards, during the term, to prepare the bill of exceptions and tender it to the court for its signature."[1] "The law," says Chief Justice Marshall, "requires that a bill of exceptions should be tendered at the trial. But the usual practice is to request the judge to note down in writing the exceptions, and afterwards, during the session of the court, to hand him the bill of exceptions, and submit it to his correction from his notes. If he is to resort to his memory, it should be handed to him immediately, or in a reasonable time after the trial. It would be dangerous to allow a bill of exceptions of matters dependent on memory at a distant period, when he may not accurately recollect them; and the judge ought not to allow it. If the party intends to take a bill of exceptions, he should give notice to the judge at the trial; and if he does not file it at the trial, he should move the judge to assign a reasonable time within which he may file it. A practice to sign it after the term must be understood to be a matter of consent between the parties, unless the judge has made an express order in the term, allowing such a period to prepare it."[2]

§ 2810. [Continued.] **In the Courts of the United States.** — In the courts of the United States, the matter seems to be regarded as one which yields to the discretion of the judge of the Circuit Court, and the mere fact that the bill of exceptions has been signed by the judge after the lapse of the term, is not regarded by the Supreme Court of the United States as a sufficient reason for refusing to consider it. In an earlier case the court regarded the signing of the bill of exceptions during the trial as of such importance that it was said that it was necessary for it to appear that it was so signed. Mr. Justice Duvall said: "It is a settled principle, that no bill of exceptions is valid, which is not for

[1] Washington &c. Tel. Co. v. Hobson, 15 Gratt. (Va.) 122, 138.

[2] Ex parte Bradstreet, 4 Pet. (U. S.) 102, 107.

matter excepted to at the trial. We do not mean to say that it is necessary (and in point of practice we know it to be otherwise), that the bill of exceptions should be formally drawn and signed before the trial is at an end. It will be sufficient if the exception be taken at the trial and noted by the court with the requisite certainty; and it may afterwards, during the term, according to the rules of the court, be reduced to form and signed by the judge; and so in fact is the general practice. But in all such cases the bill of exceptions is signed *nunc pro tunc;* and it purports on its face to be the same as if actually reduced to form and signed pending the trial. And it would be a fatal error if it were otherwise; for the original authority under which bills of exceptions are allowed has always been considered to be restricted to matters of exception taken pending the trial and ascertained before the verdict."[1] In a later case Mr. Justice Story, in giving the opinion of the same court, said: "In the ordinary course of things at the trial, if an objection is made and overruled as to the admission of evidence, and the party does not take any exception at the trial, he is understood to waive it. The exception need not, indeed, then be put into form or written out at large and signed; but it is sufficient that it is taken, and the right reserved to put it into form, within the time prescribed by the practice or rules of the court."[2] In a still later case Mr. Justice Curtis said: "The record must show that the exception was taken at that stage of the trial when its cause arose. The time and manner of placing the evidence of the exception formally on the record are matters belonging to the practice of the court in which the trial is held. The convenient dispatch of business in most cases does not allow the preparation and signature of bills of exceptions during the progress of a trial. The requisite certainty and accuracy can hardly be secured, if any considerable delay afterwards be permitted; and it is for each court in which cases are tried to secure, by its rules, that prompt attention to the subject necessary for the preservation of the actual occurrences on which the

[1] Walton *v.* United States, 9 Wheat. (U. S.) 651, 657. See also Sheppard *v.* Wilson, 6 How. (U. S.) 260, 275.

[2] Poole *v.* Fleeger, 11 Pet. (U. S.) 185, 211. See also Brown *v.* Clarke, 4 How. (U. S.) 4, 15.

validity of the exception depends, and so to administer those rules that no artificial or imperfect case shall be presented here for adjudication." And it was held that the following rule of the Circuit Court of the United States for the District of Maryland was unobjectionable, and that the court committed no error in refusing, in pursuance thereof, to sign and seal a bill of exceptions before the rendition of the verdict: "Ordered, that whenever either party shall except to any opinion given by the court, the exception shall be stated to the court before the bailiff to the jury is sworn, and the bill of exceptions afterwards drawn out in writing, and presented to the court during the term at which it is reserved; otherwise it will not be sealed by the court." [1]

§ **2811. Must be Filed before Lapse of Term.** — The general rule is that bills of exceptions must be filed before the lapse of the term, unless leave is granted to file them at a later date, or unless a statute otherwise provides; otherwise they will form no part of the record.[2] But, as already observed, a distinction is taken between the taking of exceptions and the formal writing out and signing of the bill of exceptions, which is the evidence of them for the appellate court. In the *courts of the United States*, this *rule* has been so far *relaxed* that it has been held that it is competent for the trial judge, in the exercise of a sound discretion, to sign a bill of exceptions, even after the adjournment of the court and without the consent of counsel; and this, although a statute of the State within which the court sat prescribed otherwise, which statute had been adopted by a rule of the court. It was reasoned that this statute could derive no force, in a court of the United States, except by virtue of its being adopted as a rule; that it could hence, in that court, have no higher dignity than that of a court rule, and that it was competent for the court to suspend it, like any other rule which it may

[1] Turner *v.* Yates, 16 How. (U. S.) 14, 29. See also Phelps *v.* Mayer, 15 How. (U. S.) 160.

[2] Vandoren *v.* Kimes, 29 Ind. 582; St. Louis &c. R. Co. *v.* Holman, 45 Ark. 102; Freeman *v.* Brenham; 17 B. Mon. 603; Biggs *v.* M'Ilvain's Executrix, 3 A. K. Marsh. (Ky.) 360; Sheppard *v.* Wilson, 6 How. (U. S.) 269.

have adopted for its own convenience. Mr. Chief Justice Taney, in giving the opinion of the court so holding, reiterated the statement that, "the exception must show that it was taken and reserved by the party at the trial, but it may be drawn out in form and sealed by the judge afterwards; * * * and the time within which it may be drawn out and presented to the court, must depend on its rules and practice, and on its own judicial discretion." [1]

§ 2812. Unless Time Extended beyond Term by Statute. — Statutes exist in some jurisdictions which provide for extending the time to a day beyond the term at which the trial was had. A statute of Arkansas, borrowed from Kentucky, provides that "the party objecting to the decision must except at the time the decision is made, and time may be given to reduce the exception to writing, but not beyond the succeeding term." [2] This statute does not authorize the signing of bills of exceptions, after the lapse of the term, except where the time has been extended, on application to the court in term time, and then not after the expiration of the time which was so extended.[3] Notwithstanding the language of this statute, it is held that, where the time for signing a bill of exceptions is extended generally, without being limited to a particular day, the extension will be held to terminate with the term, so that, if the bill is signed thereafter, it will be a nullity.[4] "A judgment," reasons the Arkansas court, "becomes final and passes beyond the control of the court, upon the expiration of the term at which it is rendered, unless suspended by the order of the court; and it cannot be conceived, with any reason, that giving time to a party for the mere purpose of reducing an exception to writing can have the effect, if no day is named, of suspending the judgment until the end of the next term." [5] Moreover, the statute, as construed in Kentucky, does not admit of the signing of a bill *in vacation*, even where the time

[1] United States *v.* Breitling, 20 How. (U. S.) 252, 254.

[2] Dig. Ark. Stat. 1884, § 5157.

[3] Adler *v.* Conway Co., 42 Ark. 488; St. Louis &c. R. Co. *v.* Rapp, 39 Ark. 558.

[4] Garibaldi *v.* Carroll, 33 Ark. 568.

[5] *Ibid.* 570.

is extended, on application to the judge before the lapse of the term. The reason for this conclusion is thus stated by Mr. Justice Crenshaw: "If the practice were allowed of preparing and filing bills of exceptions in vacation, they might be prepared and signed at any place within, and perhaps out of the circuit. Such a practice would be attended with great inconvenience to litigants, and might result in much mischief and injustice, especially to the successful party in the court below. When bills of exceptions are allowed to be filed in term time only, the parties will have an opportunity of having their attorneys present, who attended to the trial of the cause, and perhaps their witnesses also, who testified at the trial, as they generally reside within the vicinity of the court-house. A practice which would require a litigant, careful of his interests, to have the same attorney and perhaps his witnesses, attend at any place, and in vacation, would be unreasonable, inconvenient, expensive and mischievous." [1]

§ 2813. Or by Stipulation. — It is competent for the parties to stipulate that the bill of exceptions may be filed on or before a given date after the expiration of the term.[2]

§ 2814. Void when Filed after Expiration of Statutory Time. — Where the time for filing bills of exceptions is limited by statute, they are void if filed beyond the expiration of the statutory time, — at least, unless the right to have them filed within the prescribed time is waived by the adverse party.[3] It is so held under a Massachusetts statute,[4] which requires exceptions allowed to rulings at the trial to be reduced to writing and filed with the clerk, and notice thereof given to the adverse party, and presented to the court, before the adjournment, without day, of the term, and within three days after the verdict in the case; and which provides that, "for good cause shown, a further time,

[1] Freeman *v.* Brenham, 17 B. Mon. (Ky.) 603, 608.

[2] Swank *v.* Swank, 85 Mo. 198.

[3] Doherty *v.* Lincoln, 114 Mass. 362; Com. *v.* Greenlaw, 119 Mass. 208; Barstow *v.* Marsh, 4 Gray (Mass.), 165; Phillps *v.* Soule, 6 Allen (Mass.), 150; Conway *v.* Callahan, 121 Mass. 165; Tufts *v.* Newton, 119 Mass. 476.

[4] Pub. Stat. Mass. 1882, ch. 153, § 8.

not exceeding five days, unless by consent of the adverse party, may be allowed by the court; " and that, " in all cases the adverse party shall have an opportunity to be heard concerning the allowance of such exceptions." [1] But it is ruled that the object of the statute is to protect the adverse party and the presiding judge from being compelled to examine the truth of exceptions of which they have no notice, until after the time named in the statute has expired; but not to prevent the judge from afterwards allowing the exceptions, if he is satisfied of their conformity with the truth and sees fit so to do, and the adverse party consents to such allowance.[2]

§ **2815. Or after Expiration of Time Granted.** — Cases are numerous in various jurisdictions which hold that, where an extension of time for the filing of a bill of exceptions has been granted by the court to a particular day, if the bill of exceptions is filed after that time, it will be disregarded by the appellate court.[3] In such a case the circuit judge has no discretion to sign a bill of exceptions after the expiration of time granted, even for cause shown.[4]

§ 2816. RULE UNDER INDIANA STATUTE. — It was formerly the rule in Indiana that a bill of exceptions must be signed during the term; [5] but it was changed by a recent statute, providing as follows: " When the record does not otherwise show the decision or grounds of objection thereto, the party objecting must, within such time as may be allowed, present to the judge a proper bill of exceptions, which, if true, he shall promptly sign and cause to be filed in the cause; if not true, the judge shall correct, sign, and cause it to be filed without delay. When so filed it shall be a part of the record; and delay of the judge in signing

[1] Doherty *v.* Lincoln, 114 Mass. 362; distinguishing Whitcomb *v.* Williams, 4 Pick. (Mass.) 228, as having been decided under a different statute.

[2] Walker *v.* Moores, 122 Mass. 501.

[3] St. Louis &c. R. Co. *v.* Rapp, 39 Ark. 558; Adler *v.* Conway Co., 42 Ark. 488; Freeman *v.* Brenham, 17 B. Mon. (Ky.) 603, 609; Nye *v.* Old Col. R. Co., 124 Mass. 241; Cooney *v.* Burt, 123 Mass. 579.

[4] St. Louis &c. R. Co. *v.* Holman, 45 Ark. 102.

[5] Hamm *v.* Romine, 98 Ind. 77; Gaff *v.* Hutchinson, 38 Ind. 341; Everhart *v.* Hollingsworth, 19 Ind. 138; Scanlan *v.* Ayres, 73 Ind. 211; Dunn *v.* Hubble, 81 Ind. 489.

and filing the same shall not deprive the party objecting of the benefit thereof. The date of the presentation shall be stated in the bill of exceptions, and the entry shall show the time granted, if beyond the term, for presenting the same."[1] The rule which obtained prior to this statute resulted, in many instances, in inconvenience and embarrassment; and, in some instances, it deprived parties of the benefits of their exceptions through the mere delay and neglect of the judge. Under the statute, if the bill is presented to the judge for examination within the time fixed by him, it will not be ground for disregarding it in the appellate court that it was signed by the judge after the date so fixed.[2] But the rule under the statute remains as before, that the failure to present the bill of exceptions for his examination and signature within the time allowed by his order, will prevent it from becoming a part of the record, although he may sign it.[3] Where, however, the bill does not state the date at which it was presented to the judge for his signature, and the record elsewhere shows that it was signed by the judge and filed after the time allowed for its preparation and filing, it will be presumed that it was not presented to the judge until the date of his signature, and that it is not properly in the record, notwithstanding a statement in the bill that "now, within the time fixed, the defendants present their bill of exceptions,"[4] etc. It is no compliance with the provisions of the statute above quoted to recite that, within the time allowed, the defendants presented their bill of exceptions; but the exact date of the presentation must be stated, not in the margin or on the back of the bill, but in the bill itself, so that it may be seen by the appellate court whether or not the date of presentation was within the time allowed by the court.[5] If the bill of exceptions is not presented to the judge within the time allowed, the Supreme Court will not hear affidavits for the purpose of determining whether the failure so to present it was excusable.[6]

[1] Rev. Stat. Ind. 1888, § 629.

[2] Creamer *v.* Sirp, 91 Ind. 366; Hamm *v.* Romine, 98 Ind. 77; Robinson *v.* Anderson, 106 Ind. 152; Terre Haute &c. R. Co. *v.* Bissell, 108 Ind. 113, 119 (overruling La Rose *v.* Logansport National Bank, 102 Ind. 332).

[3] Joseph *v.* Mather, 110 Ind. 114.

[4] Orton *v.* Tilden, 110 Ind. 131.

[5] *Ibid.*

[6] Wishmier *v.* State, 110 Ind. 523. The statute, as it stands in the Revised Statutes of 1881, contains also the following proviso: "That when, in any case, an appeal is prosecuted upon the question of the correctness of instructions given or refused, or the modifications thereof, it shall not be necessary to set out in the record all the evidence given in the cause, but it shall be sufficient in the bill of ex-

§ 2817. Sufficient if Filed at the Term at which the Motion for New Trial is Overruled. — It is now settled in Missouri, after a considerable divergence of opinion, that a bill of exceptions is properly made up at the term of the court at which the motion for a new trial is overruled; although the motion for a new trial is not overruled until the third term after it is filed. The court proceeds upon the idea that the judge, by continuing the motion for new trial, prolongs, so to speak, the trial term, and that the unsuccessful party ought not to lose his bill of exceptions by reason of the fact that the judge may pocket the motion for new trial and hold it up from term to term — a circumstance which the party cannot prevent or remedy.[1]

§ 2818. Whether Continuance of Motion for New Trial Carries with it Bill of Exceptions. — There is a provision in the present code of Indiana,[2] as follows: "If a motion for a new trial shall be filed in a cause in which such decision, so excepted to, is assigned as a reason for a new trial, such motion shall carry such decision and exception forward to the time of ruling on such motion, and time may then be given by the court within which to reduce such exception to writing."[3] Under the prior decisions of that court, a filing and continuing of a motion for a new trial did not have the effect of carrying forward the time for filing the bill of exceptions;[4] and the objecting party was required to go to the trouble and expense of preparing a formal bill of exceptions, and having it signed and filed, although the judge might afterwards conclude to grant him a new trial. "The fact," said Woods, J., "that the motion for a new trial may not be passed on until a subsequent term does not affect the rule. It is not the policy of the law that the right

ceptions to set out the instructions or modifications excepted to, with a recital of the fact that the same were applicable to the evidence in the cause."

[1] Givins *v.* Van Studdiford, 86 Mo. 149.

[2] 1 R. S. Ind. 1888, § 626.

[3] Backus *v.* Gallentine, 76 Ind. 367, 368.

[4] Sohn *v.* Marion &c. R. Co., 73 Ind. 77; Backus *v.* Gallentine, 76 Ind. 367; Supreme Lodge *v.* Johnson, 78 Ind. 110; Nye *v.* Lewis, 65 Ind. 326; Rinehart *v.* Bowen, 44 Ind. 353.

to file bills of exceptions shall remain open indefinitely, but that the facts on which disputed rulings of the courts have been made shall be stated, together with the exception and grounds therefor, while fresh in the memory." [1] But where a cause had been submitted for trial, and the evidence heard, and the court took the matter under advisement until the next term, the party against whom the finding was then rendered might at such term make a motion for a new trial, on the ground that the finding was contrary to the law or not supported by sufficient evidence, and file his exceptions, embodying the evidence and setting out his exceptions to the overruling of his motion for a new trial.[2] This is obvious; for the taking of the matter under advisement has the effect, in legal contemplation, of prolonging the trial, in accordance with a rule elsewhere stated.[3] But where a cause was tried at one term, and a general verdict, together with answers to interrogatories, was returned, but no judgment was rendered thereon, no legal motion for a new trial made, and no order made giving time beyond the term within which to file a bill of exceptions, it was held, though on doubtful grounds, that a bill filed at the next term, at which the judgment was rendered, was no part of the record.[4]

§ 2819. Evidence of the Extension of Time Granted by the Court. — It has been ruled that where, under a statute, special leave is granted by the court to present a bill of exceptions at a day subsequent to the adjournment of the term, this special leave must be shown by the record outside of the bill of exceptions; and where it is not so shown it will not be presumed in any case to have been granted, but the contrary will be presumed. "It is manifest to our minds," says Perkins, J., "that the legislature never contemplated that the court or judge should assume to insert in the bill of exceptions, where it is signed after the term, that leave was given at the term to file the same after the term; because the statute does not require that the party pre-

[1] Sohn *v.* Marion &c. Co., *supra.*
[2] Kendel *v.* Judah, 63 Ind. 291.
[3] See preceding section.
[4] Greenup *v.* Crooks, 50 Ind. 410, 416.

paring the bill of exceptions shall submit it, before it is signed by the judge, to the opposite party. It would open a door to enormous abuse, therefore, if the judge should be allowed to insert in bills of exceptions statements that are not legitimate and proper parts of such bills, and thereby bind parties by such arbitrary and extrajudicial statements."[1] It is a rule in Massachusetts that where an order is granted extending the time for signing the bill, as prescribed by the statute, the *order should appear on the court "docket."*[2]

§ 2820. Nunc Pro Tunc Entry Showing such Leave Granted. — Nor is parol evidence alone sufficient to authorize a *nunc pro tunc* entry, after the expiration of the term, showing that time was granted during the term for the filing of a bill of exceptions. In order to authorize such an entry, there must have been a minute on some docket or order book, made at the term, showing that time was duly granted.[3]

§ 2821. Extending the Time already Granted. — Where the court has once fixed a date beyond the expiration of the term, within which the unsuccessful party may file his bill of exceptions, the power of the court is exhausted. It can thereafter grant an extension of the time only by the consent of both parties, and any *ex parte* grant of such an extension is void.[4] The judge cannot, after the expiration of the time granted, allow a bill to be filed *nunc pro tunc* without the consent of the adverse party.[5]

[1] Nye *v.* Lewis, 65 Ind. 326, 328. So held in Schoonover *v.* Reed, 65 Ind. 313, and Roloson *v.* Herr, 14 Ind. 539.

[2] Barstow *v.* Marsh, 4 Gray (Mass.), 165; Doherty *v.* Lincoln, 114 Mass. 362.

[3] Schoonover *v.* Reed, 65 Ind. 313. That the doctrine of the text conforms to the common-law rule in regard to *nunc pro tunc* entries, is shown by the following cases, and many others: Boyd *v.* Blaisdell, 15 Ind. 73; Makepeace *v.* Lukens, 27 Ind. 435; Hamilton *v.* Burch, 28 Ind. 233; Uland *v.* Carter, 34 Ind. 344; Long *v.* State, 56 Ind. 133.

[4] Robinson *v.* Johnson, 61 Ind. 535; Whitworth *v.* Sour, 57 Ind. 107; New Albany &c. R. Co. *v.* Wilson, 16 Ind. 402; Vanness *v.* Bradley, 29 Ind. 388; McElfatrick *v.* Cofforth, 29 Ind. 37; Roloson *v.* Herr, 14 Ind 539; Harrison *v.* Price, 22 Ind. 165; Earl *v.* Dresser, 30 Ind. 11; Thompson *v.* Eagleton, 33 Ind. 300.

[5] New Albany &c. R Co., *supra.*

This should, however, be stated with the qualification that, under a recent statute of Indiana, elsewhere shown,[1] the mere retention by the judge of the bill after the time granted will not deprive the party of his exceptions, provided it was submitted to him before the expiration of the time. Earlier decisions in that jurisdiction,[2] holding the contrary, are no longer the law.

§ 2822. In Criminal Cases [Indiana]. — A statute of Indiana provides: "All bills of exceptions, in a criminal prosecution, must be made out and presented to the judge at the time of the trial, or within such time thereafter as the judge may allow, not exceeding sixty days from the time judgment is rendered; and they must be signed by the judge and filed by the clerk. The exceptions must be taken at the time of the trial."[3] The meaning of this statute is that "errors of law occurring at the trial, in a criminal prosecution, must be excepted to at the time the decision is made, upon the trial of the cause by the court or jury, and that the exceptions thus taken will constitute a part of the record, if they are shown by a bill or bills of exceptions, signed by the judge and filed by the clerk at or before the time the judgment is rendered, or within such time thereafter as the court may allow, not exceeding sixty days."[4] The word "trial," as used in the above statute, includes all the steps taken in the cause, from the submission of the cause to the jury to the rendition of the judgment; it is not interpreted in a narrow and restricted sense.[5] The trial, therefore, terminates with the final judgment; and accordingly it is held that leave to file a bill of exceptions must be obtained before the judgment, or, at least, concurrently with its entry; and where such leave was obtained ten days after final judgment, it was held no bill.[6] When, therefore, a verdict of guilty was rendered in a criminal case, and thereafter, during the term, the defendant entered a motion for a new trial, and the cause was then continued until the next term, at which term the motion for a new trial was overruled, and sixty day's time given within which to prepare a bill of exceptions, and the cause again continued; and no bill of exceptions

[1] *Ante*, § 2818.

[2] Board &c. *v.* Eperson, 50 Ind. 275.

[3] Rev. Stat. Ind. 1888, § 1847.

[4] Bruce *v.* State, 87 Ind. 450, 455; Calvert *v.* State, 91 Ind. 473; Hunter *v.* State, 101 Ind. 406; Hunter *v.* State, 102 Ind. 428; Barnaby *v.* State, 106 Ind. 539; Pence *v.* State, 110 Ind. 95.

[5] Jenks *v.* State, 39 Ind. 1; Bruce *v.* State, 87 Ind. 450; Sturgeon *v.* Gray, 96 Ind. 166; Hunter *v.* State, 101 Ind. 406.

[6] Hunter *v.* State, 101 Ind. 406.

was filed within sixty days, but *afterwards* the court rendered judgment against the defendant on the verdict, and again granted him thirty days within which to prepare and file a bill of exceptions, and his bill was filed within this time; — it was held a good bill. The power of the court to extend the time for presenting the bill was not exhausted until judgment on the verdict was rendered, and until the parties had, in legal contemplation, passed out of court.[1]

§ 2823. What Deemed to Constitute a Filing. — Where the record contained a bill of exceptions and showed that such bill was presented to the judge within the proper time, certified by him as correct and ordered to be made a part of the record; and the record bore the certificate of the clerk that it was a full and complete transcript of the proceedings, papers filed, etc., it was held that it sufficiently showed a filing of the bill of exceptions within the proper time, whether it was indorsed as having been so filed or not.[2] The court say: "It is not necessary to the filing of a paper that it shall be indorsed as having been so filed. Such an indorsement is the evidence of, but not the filing. A paper is filed when it is delivered to the proper officer, and by him received to be kept on file.[3]

§ 2824. Fact and Day of Filing, how Shown. — In Missouri, "there must be an entry of record to make a bill of exceptions a part of the record. This is indispensable in term time. When leave is granted, with consent of parties, to file a bill in vacation, there must be some certificate on the bill itself, signed by the clerk, indicating the fact and date of filing, or some entry made by the clerk in the records of the court to that effect."[4] And it was held that a memorandum, written by the attorneys at the foot of the bill, to the effect that the parties had "agreed upon the foregoing bill of exceptions," did not help out the matter; since that must be understood as having been addressed to the

[1] Barnaby *v.* State, 106 Ind. 539.

[2] Hull *v.* Louth, 109 Ind. 315.

[3] *Ib.* 336; *S. P.*, Powers *v.* State, 87 Ind. 144.

[4] Lafollete *v.* Thompson, 83 Mo. 199, opinion by Martin, C.

judge to inform him that he might sign the bill, as settled and agreed upon between the parties.[1]

§ 2825. **Minute Order making Bill a Record.**— In Arkansas, it is usual to make an order of court constituting the bill of exceptions, when filed, a record; but if properly signed and filed it becomes such, *ex proprio vigore*, to the same extent as pleadings are, which require no such order.[2] On the other hand, if the bill of exceptions be not file-marked, it seems that an order on the minutes of the court making it a record will suffice to show the filing.[3]

§ 2826. **Nunc pro tunc Entry of Allowance.** — In Missouri it is necessary that there should be an entry of record, forming a part of what is known as the "record proper," showing that the bill of exceptions was allowed. Where this entry has been omitted it cannot be made *nunc pro tunc*, at a subsequent term, merely upon the recollection of the judge,[4] — the rule being that a judicial record cannot be amended at a subsequent term unless there be some memorandum to amend by.[5] Even though the bill itself shows the date at which it was signed, this will not be sufficient. An entry by the clerk upon the record showing the fact that it has been allowed is necessary; for this is held to be what the statute of that State means in requiring the bill of exceptions to be "filed."[6]

§ 2827. Construction of Order Extending Time to "Present" Bill. — Construing the statute relating to bills of exceptions remedially, the Supreme Court of Nebraska has lately held that an order of the trial court which extended the time for forty days from the adjournment of the court in which to present a bill of exceptions, must be taken to mean the time within which to prepare the bill and present the same to the adverse party or his attorney.[7]

[1] *Ibid.*

[2] Bullock *v.* Neal, 42 Ark. 278.

[3] Walker *v.* State, 35 Ark. 386.

[4] Cunningham *v.* Wells, 16 Mo. App. 78.

[5] Belkin *v.* Rhodes, 76 Mo. 643, 650.

[6] Cunningham *v.* Wells, *supra;* Fulkerson *v.* Houts, 55 Mo. 301; Johnson *v.* Hodges, 65 Mo. 589; McGrew *v.* Foster, 66 Mo. 30; Pope *v.* Thomson, 66 Mo. 661.

[7] Morehead *v.* Adams, 18 Neb. 569.

§ 2828. Amendment of Bills of Exceptions.— A bill of exception being a judicial record, the power to amend it stands upon the same footing as the power to amend other judicial records. Being a record, it must carry with it its own verity, and, if defective, *cannot be amended by affidavits* or other extraneous evidence.[1] If *improper entries* are made in the bill by a misprision of the clerk or of counsel, great difficulty will attend the correction of them. In a case in Arkansas the clerk inserted instructions in the bill which were not intended to be therein inserted. The Supreme Court said: "The efforts to correct this by *certiorari* are futile. If not brought into the record by the bill of exceptions, the instructions cannot be noticed. This court, on appeal, can act upon the record alone, and must act on what appears there. Although entirely satisfied, as men, that his honor, the circuit judge, did not give the instructions contained in the transcript, in the connection shown, and that he did give other instructions, which, whether erroneous or not, were certainly pertinent to the issue, we cannot know it judicially. It was error to give the instructions as they appear." And the court accordingly reversed the judgment, for the giving of instructions which the judges, *as men*, knew had never been given.[2] This seems to be carrying what is termed "technicality" to an extreme. There surely ought to be some way by which such a misprision can be corrected. There is a very simple way. The rule which obtains in Missouri that, even after an appeal or writ of error, the court below retains jurisdiction over its own record for the purpose of amending it, should be applied in such a case; and the appellate court should, on application, postpone the hearing of the case until the trial court can have the opportunity of amending its bill of exceptions, which, as thus amended, can be brought to the appellate court by a *certiorari*. The record is in the breast of the judge during the term, and the court may then freely amend it, so as to make it conform to the facts; but, after the lapse of the term, it has so far passed beyond his authority

[1] St. Louis &c. R. Co. *v.* Godby, 45 Ark. 485, 491; Lesser *v.* Banks, 46 Ark. 482, 484.

[2] Johnson *v.* Terry, 35 Ark. 220, 224.

that he cannot amend it unless some written memorial remains to amend by. This principle has been frequently applied to the subject of the amendment of bills of exception.[1] "It cannot be supposed," said Owsley, J., "that the power of the court over bills of exceptions absolutely ceases upon their signing them; and if it does not, the only limitation in point of time for the exercise of that power, must be at the end of the term at which exceptions may be filed." [2]

[1] Hamilton *v.* Burch, 28 Ind. 234.

[2] Givins *v.* Bradley, 3 Bibb (Ky.), 195.

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